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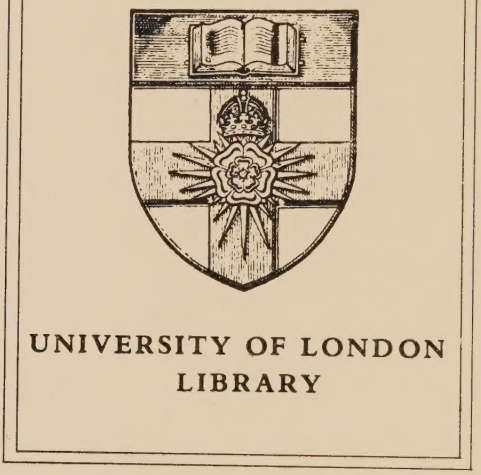

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THE

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1923

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CASES REPORTED IN THIS VOLUME

	PAGE
Abram Steamship Co., Ltd. *v.* Westville Steamship Co., Ltd. [H.L.]	645
Adams *v.* Morgan & Co., Ltd. [C.A.]	189
Alliance Economic Investment Co. *v.* Berton [C.A.]	539
Ambatielos, The. The Cephalonia [Adm.]	303
Anstruther-Gough-Calthorpe *v.* McOscar and Another [C.A.]	198
Attorney-General *v.* Adelaide Steamship Co., Ltd. [H.L.]	31
Attorney-General *v.* National Provincial and Union Bank of England and others [H.L.]	123
Baker *v.* Inland Revenue Commissioners [H.L.]	566
Ballantine & Co. *v.* Cramp and Bosman [K.B.D.]	579
Beck & Co. *v.* Szymanowski & Co. [H.L.]	244
Best, *Re.* Parker *v.* Best (Ch.D.]	696
Boston Corporation *v.* Fenwick & Co., Ltd. [K.B.D.]	583
Bourgeois *v.* Weddell & Co. [K.B.D. Divl. Ct.]	587
Bradbury *v.* English Sewing Cotton Co., Ltd. [H.L.]	427
Brandt & Co. and Others *v.* Liverpool, Brazil and River Plate Steam Navigation Co., Ltd. [C.A.]	656
Brighton and Hove General Gas Co. *v.* Hove Bungalows, Ltd. [Ch.D.]	369
Brimelow *v.* Casson and Others [Ch.D.]	40
British American Continental Bank Ltd., *Re.* Lisser and Rosenkranz's Claim [C.A.]	52
Bygraves *v.* Dicker [K.B.D. Divl. Ct.]	473
Caldwell *v.* Jones [K.B.D. Divl. Ct.]	310
Carton, Ltd., *Re* (Ch.D.]	622
Champsey Bhara & Co. *v.* Jivraj Balloo Spinning and Weaving Co., Ltd. [P.C.]	235
Chellew *v.* Brown [C.A.]	506
Chester Corporation *v.* Briggs and Others [K.B.D. Divl. Ct.]	222
Chesterman's Trusts, *Re.* Mott *v.* Browning and Others [C.A.]	705
Chillingworth and Another *v.* Esche [C.A.]	97
Civil Service Co-operative Society, Ltd. *v.* McGrigor's Trustee [Ch.D.]	595
Clarke (Deceased), *Re.* Bracey *v.* Royal National Lifeboat Institution [Ch.D.]	607
Collins *v.* Hopkins [K.B.D.]	225
Colorado, The [C.A.]	531
Courcier and Harrold's Contract, *Re* [Ch.D.]	497
Craddock Bros., Ltd. *v.* Hunt [C.A.]	394
Crook's Settlement, *Re.* *Re* Glasier's Settlement. Crook *v.* Preston [Ch.D.]	697
Cross *v.* Imperial Continental Gas Association [Ch.D.]	628
Darrell *v.* Whitaker and Another [K.B.D. Divl. Ct.]	492
Dey *v.* Rubber and Mercantile Corporation, Ltd. [Ch.D.]	526
Dodd *v.* Amalgamated Marine Workers' Union [C.A.]	194
Elliott *v.* Boynton [C.A.]	174
Engelbach's Estate, *Re.* Tibbetts *v.* Engelbach [Ch.D.]	93
Eustace *v.* Eustace [C.A.]	281
Falkiner, *Re.* Mead *v.* Smith [Ch.D.]	681
Food Controller and Another *v.* Cork [H.L.]	463
Glasgow Corporation *v.* Barclay, Curle & Co., Ltd. [H.L.]	480
Giusti Patents and Engineering Works, Ltd. *v.* Maggs and Others [C.D.]	718
Hackney Pavilion, Ltd., *Re* [Ch.D.]	524
Hardy & Co. *v.* Hillerns and Fowler [C.A.]	275
Harrods, Ltd. *v.* Stanton [K.B.D. Divl. Ct.]	592
Home Secretary *v.* O'Brien [H.L.]	442
Hummeltenberg, *Re.* Beatty *v.* London Spiritualistic Alliance [Ch.D.]	49
Hyams, *Re. Ex parte* Lindsay *v.* Hyams [C.A.]	510
Jenkins *v.* Feit [K.B.D. Divl. Ct.]	295
Johnson *v.* Stephens and Carter, Ltd., and Another [C.A.]	701
Keeling *v.* Pearl Assurance Co., Ltd. [K.B.D.]	307
Keeves *v.* Dean [C.A.]	12
Kelantan Government *v.* Duff Development Co., Ltd. [H.L.]	349
Kent *v.* Atkinson [Div.]	28
King, *Re.* Kerr *v.* Bradley [Ch.D.]	688
Larringa & Co., Ltd. *v.* Société Franco-Américaine des Phosphates de Médulla, Paris [H.L.]	1
London County Council *v.* Gainsborough [K.B.D. Divl. Ct.]	300
Long *v.* Gowlett [Ch.D.]	335
Manton *v.* Brocklebank [C.A.]	416
Mellows *v.* Low [K.B.D. Divl. Ct.]	537
Mersey Docks and Harbour Board *v.* Proctor [H.L.]	134
Mitford *v.* Mitford and von Kuhlmann [Div.]	214
Morant, *Re. Ex parte* the Trustees [Ch.D.]	690
Motor Union Insurance Co., Ltd. *v.* Boggan [H.L.]	331
Nunan *v.* Southern Rail. Co. [C.A.]	21
Nunn *v.* Pellegrini [C.A.]	12
Oram *v.* Oram [Div.]	635
Ord *v.* Ord [K.B.D. Divl. Ct.]	206
Palmer *v.* Palmer [C.A.]	604
Peyrae *v.* Wilkinson and Another [K.B.D.]	180
Phillips *v.* Britannia Hygienic Laundry Co., Ltd., and Others [C.A.]	127
Pitchers *v.* Surrey County Council [C.A.]	517
Portreath, The [Adm.]	601
Pratchett *v.* Drew [Ch.D.]	685
Pratt *v.* Patrick and Others [K.B.D.]	512
Price *v.* Rhondda Urban District Council [Ch.D.]	679
Queen's Club Gardens Estates, Ltd. *v.* Bignell [K.B.D. Divl. Ct.]	165
R. *v.* Devon Justices. *Ex parte* Director of Public Prosecutions [K.B.D. Divl. Ct.]	185
R. *v.* Duke of Leinster [C.C.A.]	187
R. *v.* Electricity Commissioners. *Ex parte* London Electricity Joint Committee Co. [C.A.]	150
R. *v.* Forde [C.C.A.]	477
R. *v.* Governor of Brixton Prison. *Ex parte* Perry [K.B.D. Divl. Ct.]	182
R. *v.* Kakelo [C.C.A.]	191
R. *v.* Sussex Justices. *Ex parte* McCarthy [K.B.D. Divl. Ct.]	233
Reynolds *v.* Shipping Federation, Ltd. [Ch.D.]	383
Richards *v.* Duffryn Aberdare Colliery Co., Ltd. and Others [Ch.D.]	614
Rider *v.* Ford [Ch.D.]	562

PAGE

ROSSE (COUNTESS), *Re.* PARSONS *v.* EARL OF ROSSE [C.A.] 634
ROWLAND *v.* DIVALL [C.A.] 270
RUDD *v.* RUDD [DIV.] 637
RUSSELL *v.* BEECHAM AND ANOTHER [C.A.] .. 318
RYALL *v.* HOARE [K.B.D.] 528
RYALL *v.* HONEYWILL [K.B.D.] 528
ST. HELENS COLLIERY CO., LTD. *v.* HEWITSON [H.L.] 249
SALFORD CATTLE MARKET SALEROOMS, LTD. *v.* OSBORNE [K.B.D. DIVL. CT.] 312
SALTER *v.* LASK [C.A.] 89
SECRETARY OF STATE FOR HOME AFFAIRS *v.* O'BRIEN [H.L.] 442
SHAKESPEARE MEMORIAL TRUST, *Re*, EARL OF LYTTON *v.* ATTORNEY-GENERAL [CH.D.] 106
SHAPIRO *v.* LA MORTA [C.A.] 378
SHREWSBURY ESTATE ACTS, *Re.* COUNTESS OF SHREWSBURY *v.* EARL OF SHREWSBURY AND OTHERS [C.A.] 666
SHUFFLEBOTHAM *v.* SHUFFLEBOTHAM [C.A.] 509
SMITH *v.* PRIME [K.B.D.] 495
SMITH, *Re.* ROYAL EXCHANGE ASSURANCE CO. *v.* LEE [CH.D.] 694

PAG

SMITH *v.* SMITH [C.A.] 36
SMITH *v.* SMITH [DIV.] 60
SOUTH EASTERN RAIL. CO. *v.* COOPER [C.A.] 11
SPEIR, *Re.* HOLT *v.* SPEIR [C.A.] 64
STANDARD OIL CO. OF NEW YORK *v.* CLAN LINE STEAMERS, LTD. [H.L.] 7
STANFORD, *Re.* CAMBRIDGE UNIVERSITY *v.* ATTORNEY-GENERAL [CH.D.] 58
STEINBERG *v.* SCALA (LEEDS), LTD. [C.A.] .. 23
STOCKHAM *v.* EASTON [K.B.D. DIVL. CT.] 61
SUTTON *v.* BEGLEY AND ANOTHER [C.A.] .. 38
THOMPSON *v.* THOMPSON [CH.D.] 32
TOURNIER *v.* NATIONAL PROVINCIAL AND UNION BANK OF ENGLAND, LTD. [C.A.] .. 55
UPTON *v.* GREAT CENTRAL RAIL. CO. [H.L.] 28
WHEAL REMFRY CHINA CLAY, BRICK, AND TILE CO., LTD. *v.* TRURO CORPORATION [K.B.D. DIVL. CT.] 31
WHITBURN, *Re.* WHITBURN *v.* CHRISTIE [CH.D.] 57
WILKES AND ANOTHER *v.* GOODWIN [C.A.] .. 6
WILLS *v.* MAY [CH.D.] 50
WILLS (GEORGE) & SONS, LTD. *v.* R. S. CUNNINGHAM, SON & CO., LTD. [K.B.D.] .. 29
WOOD *v.* CARWARDINE [K.B.D.] 5

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LARRINAGA & CO., LTD. *v.* SOCIÉTÉ FRANCO-AMÉRICAINE DES PHOSPHATES DE MÉDULLA, PARIS

[HOUSE OF LORDS (Viscount Finlay, Lord Atkinson, Lord Sumner, Lord Wrenbury and Lord Carson), December 4, 5, 1922, March 16, 1923]

[Reported 92 L.J.K.B. 455; 129 L.T. 65; 39 T.L.R. 316; 16 Asp.M.L.C. 133; 29 Com. Cas. 1]

Shipping—Charterparty—Frustration—Speculative contract—Adventures five to seven years in futuro—Severability.

The doctrine of frustration excuses the performance of a contract where it appears on the construction of the contract that the parties contracted on the basis of the continued existence of a certain state of facts, and, there being no express provision in the contract relating to the cessation of that state of facts, an implication necessarily arises that, if the parties had applied their minds to the possibility of that cessation, they would have agreed that in such circumstances the contract must be determined. The doctrine can rarely, if ever, apply to a speculative contract, for the basis of a speculative contract is to distribute all risks on one side or the other and to eliminate any chance of the contract falling to the ground. Where, therefore, a charterparty provided for the charter of six ships to be named to convey six cargoes in March–May and September–November, 1918, 1919, and 1920, and, owing to the war conditions then prevailing, the parties agreed that the first three shipments should be dispensed with,

Held: this was clearly a speculative contract, it dealt with six distinct and severable adventures between which there was no interdependence, and its performance was not frustrated so far as the last three shipments were concerned.

Notes. The Law Reform (Frustrated Contracts) Act, 1943 (4 HALSBURY'S STATUTES (2nd Edn.) 662), does not apply to charterparties, except a time charter or a charterparty by way of demise, or to any other contract for the carriage of goods by sea: see s. 2 (5) (a).

Considered: *Maritime National Fish, Ltd.* v. *Ocean Trawlers, Ltd.*, [1935] All E.R.Rep. 86. Referred to: *Hirji Mulji* v. *Cheong Yue Steamship Co., Ltd.*, [1926] All E.R.Rep. 51; *Tatem, Ltd.* v. *Gamboa*, [1938] 3 All E.R. 135; *Duke of Westminster* v. *Howard* (1940), 85 Sol. Jo. 106; *Davies Contractors, Ltd.* v. *Fareham U.D.C.*, [1956] 2 All E.R. 145; *Carapanayoti & Co., Ltd.* v. *E. T. Green, Ltd.*, [1958] 3 All E.R. 115.

As to frustration of a contract generally, see 8 HALSBURY'S LAWS (3rd Edn.) 185 et seq; and as to charterparties, see ibid., 2nd Edn., vol. 30, pp. 289–299, 450. For cases see 12 DIGEST (Repl.) 436 et seq.

Cases referred to:

(1) *Taylor* v. *Caldwell* (1863), 3 B. & S. 826; 2 New Rep. 198; 32 L.J.Q.B. 164; 8 L.T. 356; 27 J.P. 710; 11 W.R. 726; 122 E.R. 309; 12 Digest (Repl.) 696, *5333*.

(2) *Appleby* v. *Myers* (1867), L.R. 2 C.P. 651; 36 L.J.C.P. 331; 16 L.T. 669, Ex. Ch.; 12 Digest (Repl.) 696, *5334*.

(3) *Krell* v. *Henry*, [1903] 2 K.B. 740; 72 L.J.K.B. 794; 89 L.T. 328; 52 W.R. 246; 19 T.L.R. 711, C.A.; 12 Digest (Repl.) 435, *3327*.

(4) *Metropolitan Water Board* v. *Dick, Kerr & Co.*, [1918] A.C. 119; 87 L.J.K.B. 370; 117 L.T. 766; 82 J.P. 61; 34 T.L.R. 113; 62 Sol. Jo. 102; 16 L.G.R. 1, H.L.; 12 Digest (Repl.) 456, *3410*.

(5) *Distington Hematite Iron Co., Ltd.* v. *Possehl & Co.*, [1916] 1 K.B. 811; 85 L.J.K.B. 919; 115 L.T. 412; 32 T.L.R. 349; 2 Digest (Repl.) 271, *621*.

(6) *F. A. Tamplin Steamship Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.*, [1916] 2 A.C. 397; 85 L.J.K.B. 1389; 32 T.L.R. 677; 21 Com. Cas. 299; 115 L.T. 315; 13 Asp.M.L.C. 467, H.L.; 12 Digest (Repl.) 442, *3361*.

(7) *Hamlyn & Co.* v. *Wood & Co.*, [1891] 2 Q.B. 488; 60 L.J.Q.B. 734; 65 L.T. 286; 40 W.R. 24; 7 T.L.R. 731, C.A.; 12 Digest (Repl.) 684, *5266*.

(8) *The Moorcock* (1889), 14 P.D. 64; 58 L.J.P. 73; 60 L.T. 654; 37 W.R. 439; 5 T.L.R. 316; 6 Asp.M.L.C. 373, C.A.; 12 Digest (Repl.) 686, *5274*.

(9) *Jackson* v. *Union Marine Insurance Co., Ltd.* (1874), L.R. 10 C.P. 125; 44 L.J.C.P. 27; 31 L.T. 789; 23 W.R. 169; 2 Asp.M.L.C. 435, Ex. Ch.; 12 Digest (Repl.) 438, *3339*.

(10) *Bank Line, Ltd.* v. *A. Capel & Co.*, [1919] A.C. 435; 88 L.J.K.B. 211; 120 L.T. 129; 35 T.L.R. 150; 63 Sol. Jo. 177; 14 Asp.M.L.C. 370, H.L.; 12 Digest (Repl.) 443, *3365*.

(11) *Ertel Bieber & Co.* v. *Rio Tinto Co.*, *Dynamit Act* v. *Rio Tinto Co.*, *Vereinigte Koenigs and Laurahuette Act* v. *Rio Tinto Co.*, [1918] A.C. 260; 87 L.J.K.B. 531; 118 L.T. 181; 34 T.L.R. 208, H.L.; 12 Digest (Repl.) 447, *3380*.

(12) *Honck* v. *Muller* (1881), 7 Q.B.D. 92; 50 L.J.Q.B. 529; 45 L.T. 202; 29 W.R. 830, C.A.; 12 Digest (Repl.) 342, *2647*.

Appeal from an order of the Court of Appeal (BANKES and SCRUTTON, L.JJ., ATKIN, L.J., dissenting) affirming an order of MCCARDIE, J., on an award in the form of a Special Case stated by an arbitrator.

The appellants were shipowners who before the war of 1914–18 had a line of cargo steamers running from the southern ports of the United States of America to Europe. The respondents owned mines in the United States of America from which they shipped phosphates to buyers in Europe. On April 5 (or 15), 1913, a charterparty was made between the appellants, as disponents of six steamships to be named fourteen days before readiness to load, and the respondents, as charterers. The charter provided for the carriage of six parcels of phosphates from Port Tampa or Tampa in charterers' option to Dunkirk at the rate of 15s. 3d. per ton. Each of the six parcels was to be 3,000–3,300 tons, margin in owners' option. The loading dates were Mar. 15/May 15, and Sept. 15/Nov. 15 respectively in each of the years 1918, 1919, and 1920. Clause 15 provided that, should the steamer not arrive at her loading port and be in all respects ready to load under the charter on or before the stated dates, the charterers should have the option of cancelling the charter. Clause 20 provided that all disputes which might arise relating to the charterparty should be submitted to arbitration in the usual manner. At the time when the charterparty was entered into two similar contracts dated respectively July 26, 1912, and Sept. 10, 1912, were in course of fulfilment, and at the outbreak

A of war in August, 1914, there were respectively three and ten voyages unperformed under the said two contracts. In consequence of the change of circumstances caused by the war the charterers waived their right to the first three shipments. By letters dated Oct. 25, 1918, and Nov. 21, 1918, the respondents reminded the appellants that they were under contract to carry parcels in 1919 and 1920, and intimating that if peace was signed before the date fixed for the first 1919 voyage B they would demand fulfilment of the charterparty, as the Dunkirk buyers had notified that they were expecting delivery. The Treaty of Peace between Great Britain and Germany was signed on June 28, 1919. On Aug. 27, 1919, the respondents again wrote to the appellants asking them to name a steamer for the second 1919 voyage. On Sept. 4, 1919, the appellants replied that they were advised that the war and its incidents had put an end to the contract. The dispute having C been referred to arbitration, the arbitrator made an award, holding that there was no frustration, and assessing the damages at £29,137 10s. McCARDIE, J., affirmed the award. On appeal to the Court of Appeal (BANKES and SCRUTTON, L.JJ., ATKIN, L.J., dissenting), held that, having regard to the course of business between the parties, the contract should be treated as a series of separate contracts embodied in one document, and that, although frustrated as to part, it might have to D be performed as to the remainder, and, therefore, there was no frustration of contract. The shipowners appealed.

R. A. Wright, K.C., A. T. Miller, K.C., and *Valentine Holmes* for the appellant shipowners.

Jowitt, K.C., and *James Dickinson* for the respondent charterers.

The House took time for consideration.

E Mar. 16. The following opinions were read.

VISCOUNT FINLAY.—The appellants are a Liverpool shipping company owning steamers running between Europe and the southern ports of the United States of America. The respondents are the owners of phosphate mines in Florida. A dispute arose between them with reference to a contract made in April, 1913, for the F chartering of vessels to bring phosphates from Port Tampa in Florida to Dunkirk. On Dec. 19, 1919, the dispute was referred to arbitration and an arbitrator was appointed, and the matter comes before your Lordships' House upon an award in the form of a Special Case. The claim of the phosphate company was in respect of the failure by the appellants to provide vessels for the carriage of phosphates to Dunkirk from Port Tampa, and the main case set up on behalf of the appellants G was "frustration" by reason of the war. The arbitrator by his award, subject to the opinion of the court on points of law on the Case stated by him, found that the appellants were liable to the phosphate company in damages for their failure to provide steamers for the last three voyages, and assessed the damage at £29,137 10s. The case in the first instance came before McCARDIE, J., who confirmed the arbitrator and gave judgment for the amount assessed. His decision was confirmed in H the Court of Appeal by BANKES and SCRUTTON, L.JJ. (ATKIN, L.J., dissenting).

The material facts lie in small compass. Three contracts for chartering vessels were entered into between the appellants and the respondents. The first (a), dated July 26, 1912, was for the carriage of four consignments of phosphates, each of 3,000 tons, 10 per cent. more or less, from Port Tampa to Dunkirk at dates ranging from July 1, 1913, to Sept. 30, 1915. The second (b), dated I Sept. 10, 1912, was for eleven consignments, some of 3,000 tons, 10 per cent. more or less, and some of 4,500 tons, 10 per cent. more or less, of phosphates, also from Port Tampa to Dunkirk, at dates ranging from Mar. 15, 1914, to Feb. 28, 1918. Neither of these two contracts is in question in the present proceedings. The third contract (c) is that to which the present proceedings relate. Its date is described sometimes as April 5 and sometimes as April 15, 1913. It provides for the carriage of six consignments of 3,000–3,300 tons each of phosphates from Port Tampa to Dunkirk at dates ranging from Mar. 15, 1918, to Nov. 15, 1920. It is an ordinary form of charterparty for carriage from Port Tampa to Dunkirk,

and on the back there is a note that it applies to the six parcels with their several dates. By cl. 15 in the body of the charter it is provided that should the steamer not arrive at her loading port and be in all respects ready to load under the charter on or before the day stated in the note on the back, the charterers have the option of cancelling, the same to be declared when the vessel is ready to load. It seems clear that this option applies only to a cancellation so far as the particular voyage is concerned. It is stated in the Special Case that in consequence of the confusion caused by the war the charterparties for shipments during the early period of the war were declared by both sides to be null and void. This has no reference to the charterparty now in question—(c). In February, 1916, the phosphate company desired to re-commence shipments, and inquired whether the Larrinaga company were willing to execute their contracts. The Larrinaga company replied that after the war started they had agreed to cancel all charters dates of which came within the period of the war (this referred, it was admitted, to charters so far as they related to voyages, the dates of which fell within the period of the war), and went on to say that a large amount of their tonnage had been commandeered by the government, and that it did not seem reasonable to ask them to send boats to Dunkirk, having regard to the risk of damage. On the 24th of the same month (February, 1916) the charterers replied:

"Naturally we do not insist upon Messrs. Larrinaga & Co. sending their steamers to Dunkirk during the period of hostilities."

The arbitrator, after setting out this letter, proceeds:

"This reply was transmitted to the owners, and thereafter both parties acted with regard to all the charterparties for parcels of phosphate to Dunkirk on the basis that the owners were not to be compelled to nominate tonnage nor charterers to be compelled to ship during the period of the war."

The Case goes on to state that in consequence of this arrangement no further correspondence took place between the parties until Oct. 25, 1918, when, the Germans being in full retreat, the charterers wrote to the Larrinaga company the following letter:

"As the war through which we are passing may now very shortly terminate, we take the liberty to remind you that in pursuance of the charterparty of April 15, 1913, you are to carry during the course of the years 1919 and 1920 cargoes of phosphates land pebble with consignment to Dunkirk. The first cargo is arranged for Mar. 15 to May 15, 1919, and we at once notify you that, if the peace is signed at that date, we shall demand the execution of your engagements, our buyers having notified to us that they expect to receive at Dunkirk the phosphate which we have sold to them. Awaiting the favour of your acknowledgment hereof."

No reply having been received, this letter was repeated and confirmed by the charterers on Nov. 21, 1918, and on Dec. 2 the Larrinaga company replied as follows:

"We have your favours of Oct. 25 and Nov. 21 informing us that your buyers are now prepared to receive phosphate at Dunkirk and asking us to fulfil charterparty for cargo Mar. 15 to May 15, 1919. We take note of your advice, but all shipping is still under government control and may remain so a long time, but, even if the government commenced releasing ships in the near future, it appears to us the war and government control have interfered to such an extent with a charter such as ours that the question may well arise whether the charter is still binding. It is, however, not necessary to go into this at present."

On receipt of this letter the charterers wrote on Dec. 7 the following:

"We note your remarks, with regard to which we make our reservations."

The Special Case finds specially that phosphate was so valuable as a fertiliser that its import into Europe was encouraged by the Allies, and quotes a passage from

the report for 1919/1920 of the Chamber of Shipping of the United Kingdom, in which it is remarked that the government have directed that tonnage should be provided for the carriage of phosphates. The Special Case also points out that from the shipping point of view phosphate is a most desirable consignment, having regard to its small bulk relatively to its weight. Summing up the effect of the correspondence, the Special Case states as one of the findings of fact the following:

> "That a mutual agreement was established by the correspondence referred to above in which it was agreed between the parties that the owners were not to be compelled to furnish steamers nor charterers to ship the cargoes of phosphate during the period of hostilities or the period of the war, and that the period of this agreement was extended by the charterers' letter of Aug. 27, 1919 [semble Oct. 25, 1918], to the date upon which peace should be signed, and the charterers accordingly made no claim for tonnage to be provided for the 1918 voyages, and I also find that charterers have no claim against the owners for their failure to provide a steamer for the first voyage of 1919."

This first voyage of 1919 would have been for the carriage of consignment No. 3 in the contract (c), loading date March 15 to May 15, 1919. On Aug. 27, 1919, the charterers repeated their demand for a steamer to carry lot No. 4, Sept. 15 to Nov. 15, 1919, and the Larrinaga company replied on Sept. 4 that there was no change in the situation since their letter of Dec. 2 was written. They added, and it is this which brought matters to a head: "We have, however, been taking legal advice as to the position, and we are advised that the war and its incidents have put an end to the contract." On Dec. 19, 1919, the arbitrator was appointed.

The thirteenth finding of fact by the arbitrator is most important. It is as follows:

> "So far as it is a question of fact I find that there was nothing in the nature of the contract or in the conditions prevailing at the time it fell to be performed making it impossible for the contract to be performed and that the charterparty of April 15, 1913, was never frustrated nor abrogated and that in refusing to nominate steamers to load the three parcels arranged for Sept. 15 to Nov. 15, 1919, and for 1920, owners committed a breach of the charterparty."

In dealing specifically with the submissions of fact made by the owners, the arbitrator finds that the charterparty was a speculative charterparty and both parties took the risk that different conditions might prevail when the charterparty came to be performed; that there was no frustration of the contract, and the alteration in trade conditions in consequence of the war was not fundamental as regards the charterparty obligations, such alteration being one of the risks taken by the parties on entering into a contract which was not to be performed until a lapse of five years; that the government would have permitted the shipment of these cargoes, there was nothing to prevent the owners from chartering neutral tonnage for the voyages in question, and after Feb. 15, 1919, there was no requisition or direction imposed by the British government upon the owners' tonnage preventing the carriage of the phosphates contracted for during the years 1919 and 1920; that the conditions prevailing in 1918, 1919, and 1920 were not in contemplation of either party, but that each party, having regard to the speculative nature of the contract, took the risk of such conditions prevailing; and that the contract sought to be enforced was in substance and effect the same contract as that entered into in 1913. The arbitrator's award was that, subject to the opinion of the court on any point of law, the owners were liable to the charterers in damages in respect of the last three voyages.

The Larrinaga company have submitted in argument at the Bar of your Lordships' House that in point of law the award ought to have been in their favour. The doctrine of "frustration" as a defence to an action for breach of contract has been very much discussed in recent years. If a man contracts absolutely to do a certain thing he is liable on his contract, even if the performance of it has since

the contract become impossible. When certain risks are foreseen the contract may contain conditions providing that in certain events the obligations shall cease to exist. But even when there is no express condition in the contract, it may be clear that the parties contracted on the basis of the continued existence of a certain state of facts, and it is with reference to cases alleged to be of this kind that the doctrine of "frustration" is most frequently invoked. If the contract be one which for its performance depends on the continued existence of certain buildings or other premises, it is an implied condition that the premises should continue to be in existence, and their total destruction by fire without fault on the part of those who have entered into the contract will be a good defence. Such a contract does not as a matter of law imply a warranty that the buildings or other property shall continue to exist: *Taylor* v. *Caldwell* (1); *Appleby* v. *Myers* (2). I share the doubts which have been expressed (see POLLOCK ON CONTRACTS (8th Edn.) p. 439 et seq.) as to the extension of this doctrine to such cases as *Krell* v. *Henry* (3) and the other cases known as the Coronation cases. In each case the question must be, What was the basis on which the contract proceeded? It may be that the parties contracted in the expectation that a particular event would happen, each taking his chance, but that the actual happening of the event was not made the basis of the contract. If, in consequence of war, there is a compulsory cessation of the execution of a contract for construction of works of such a character and duration that it fundamentally changes the conditions of the contract and could not have been in the contemplation of the parties when it was made, to hold that the contract still subsists would be "not to maintain the original contract but to substitute a different contract for it." *Metropolitan Water Board* v. *Dick Kerr & Co.* (4) and the judgment of ROWLATT, J., in *Distington Hematite Iron Co. Ltd.* v. *Possehl & Co.* (5). It is quite clear from the findings of the arbitrator that performance of this contract was not made impossible by the war. The conduct of the parties, as stated in the Special Case, shows that they did not regard the outbreak of war as effecting any fundamental change in the incidents of the charterparties. Inconvenience and danger there was, no doubt, but the parties, taking a business view of the matter, were content to agree that the shipments should not be required while the war continued. They obviously contemplated resuming them when peace should have been concluded.

We are asked to review the findings of the arbitrator as being on a mixed question of fact and law, and, therefore, subject to review by the court. Upon the facts of the Special Case, the view to which these facts lead me is, that the conclusions of the arbitrator were right, both in fact and in law. This is the view which was taken by BANKES, L.J., and by SCRUTTON, L.J. It is true that ATKIN, L.J., dissented. With the greatest respect for any opinion of his, I am unable to agree with him in this case. His judgment rests upon two propositions: the first is that the contract was dissolved under the doctrine of frustration. I have already given my reasons at length for thinking that there was no frustration in the present case, and that the parties themselves recognised this. The second ground on which the lord justice proceeds is that which was taken at the Bar as a second point completely separate from "frustration." It was this, that apart from frustration altogether the defendants are entitled to say, we contracted for six shipments—we did not get them, and we did not contract for three. This ground appears to me untenable on the facts of the present case. It was by the consent of both parties that the first three shipments under this contract were not made. How can this be said to affect the right of the charterers to have the remaining shipments carried out? The case presents a totally different aspect from that which it would have borne if the shipments Nos. 1, 2, and 3 under this contract had not been made in consequence of a wrongful repudiation by the charterers of these shipments, and an assertion of a right to convert the contract for six shipments into a contract for three. They did nothing of the kind. As a matter of business convenience the first three shipments, which would have been during the continuance of the war, were dispensed with by common consent. The right under

A the remaining contract was intact so far as this point is concerned, and, as I have already stated, I think that the main contention on the ground of frustration fails. I wish to add that I entirely agree with the observations made by McCARDIE, J., as to the dangers attending any undue extension of the doctrine of frustration as a defence to actions of contract. The doctrine is perfectly sound and thoroughly established, but care is very necessary in its application to particular cases. In B my opinion, the appeal should be dismissed with costs.

LORD ATKINSON.—The facts have already been fully stated. But for the division of opinion in the Court of Appeal, I should have been of opinion that this was a plain case. Any difficulty one may feel in deciding it is due to the unscientific and careless way in which the parties have framed the instrument in C which they designed to embody the agreement at which they had arrived. On April 5 or 15, 1913, they, through their agents, executed a charterparty in a printed form, upon the proper construction of which, coupled with the endorsement on its back, the question for decision mainly, if not entirely, depends. It begins with a provision that the appellants are disponents of six good steamships not named. No flag is named, no measurements given. Then it proceeds as if it dealt with D one ship, a steamer, and only one, and provides that she shall repair to Tampa in Florida and there load and carry from thence to Dunkirk phosphate in bulk from the mines of the respondents, in no case "exceeding" " as stated hereafter tons," and not less than "as stated hereafter tons." No number of tons are stated in the body of the charterparty, but it must, I think, be taken that the words "as stated hereafter" refer to the endorsement on the back of the charterparty in which E latter the tons are stated. By cl. 15 of the charterparty it is provided that

> "should the steamer not arrive at her loading port and be in all respects ready to load under this charter on or before the day of 'as stated hereafter' the charterers have the option of cancelling the same [i.e., the charterparty], to be declared when the vessel is ready to load."

On the back of the charterparty one finds the following endorsement:

F

> "The within charter applies to six (6) parcels, the three last of which were as follows, the first three having been abandoned by consent: No. 4—3000/3300 tons, margin in owners' option, loading dates Sept. 15 to Nov. 15, 1919. No. 5. —3000/3300 tons, margin in owners' option, loading dates Mar. 15 to May 15, 1920. No. 6.—3000/3300 tons, margin in owners' option, loading dates G Sept. 15 to Nov. 15, 1920. The cargo to be discharged by charterers' stevedore at steamer's expense and at lowest current rate, including the cost of tubs if same required by charterers. Should steamers load at Tampa, captain to report to charterer's agents who will be named three months before lay days commence on each parcel. (Signed) H. G. T. & Co.—Société Franco-Américaine des Phosphates de Médulla, Un Administr. (Signed) L. Menage."

H It is not disputed that the charterparty plus the endorsement on its back together contain the contract of the parties. It is an advance contract. The first service under it is not to be rendered till about five years after its date and the last till about seven-and-a-half years after its date. It is difficult to see upon what principle the charterers must not be held to have taken the risk of what might happen in these periods of years. It will also be observed that the endorsement deals not I at all with ships but with the cargoes which are to be carried by them, so that the appellants could perform their part of their contract by providing ships to carry these cargoes no matter to whom the ships belonged. The fact that the appellants' own ships were requisitioned by the government would not by itself relieve them from the obligation to supply ships to implement their contract, unless they proved in addition that it was commercially impossible for them to procure other suitable ships by charter or otherwise to do so. I concur with the Court of Appeal in thinking that by executing this charterparty and the endorsement on its back, the appellants and respondents entered into one contract, not six contracts, but this

one contract dealt with six wholly distinct, separate, and severable adventures between which there was no interdependence in the sense that the carrying out of any one of them was made to depend in any way upon the carrying out or abandonment of any of the others. The six adventures were not united into one composite adventure by any condition of that kind. The appellants' counsel admitted that though cl. 15 of the charterparty purports to give to the respondents the right to cancel the charterparty itself, this must mean only the right to cancel it quoad the particular ship which arrived late. As I understood counsel, he contended that this fact had no significance because it was a provision of the contract. It is, to my mind, just because it is part of the contract that is has significance. It shows that the six adventures do not form such a composite whole that they may not be separately dealt with, the one abandoned or dispensed with without affecting the others.

Since *F. A. Tamplin Steamship Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.* (6) was decided, it has, I think, been generally accepted that the principle upon which the courts of law act in absolving persons from the further performance of their contract by reason of the frustration of its objects, is correctly stated by LORD LOREBURN in his judgment in that case. After dealing with the authorities he says ([1916] 2 A.C. at pp. 403–4):

> "In most of the cases it is said that there was an implied condition in the contract which operated to release the parties from performing it, and in all of them I think that was at bottom the principle upon which the court proceeded."

It is, in my opinion, the true principle, for no court has an absolving power; but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation upon which the parties "contracted." It is not enough, however, that this inference should be merely a reasonable inference to draw and nothing more. It must be an inference which it is necessary to draw in order to effectuate the intention of the parties as revealed by the language they have used. In *Hamlyn & Co.* v. *Wood & Co.* (7) and *The Moorcock* (8) the law upon the point was laid down thus.

> "A stipulation must not by implication be introduced into a written contract unless, on consideration of the contract in a reasonable and business-like manner, an implication necessarily arises that the parties must have intended that such a stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be an implication which is necessary in order to effectuate the intention of the parties."

Again it is impossible to imply in a contract any term or condition inconsistent with its express provisions, or with the intention of the parties as revealed by those provisions. In *F. A. Tamplin Steamship Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.* (6), LORD PARKER, dealing with this question, said ([1916] 2 A.C. at p. 422):

> "It is, of course, impossible to imply in a contract any term of condition inconsistent with its express provisions, or with the intention of the parties as gathered from those provisions. The first thing, therefore, in every case is to compare the term or condition which it is sought to imply with the express provisions of the contract and with the intention of the parties as gathered from those provisions, and ascertain whether there is any such inconsistency."

The phrase "frustration of a contract" is an incorrect phrase. It is the performance of the contract which must be frustrated, with the result that the contract itself is thereby dissolved. In the case of a charterparty, it is the maritime adventure with which the charterparty deals that must be "frustrated." This is obvious from the judgment of BRAMWELL, B., in *Jackson* v. *Union Marine Insurance Co., Ltd.* (9). LORD SUMNER, in his judgment in *Bank Line, Ltd.* v. *Arthur Capel & Co.* (10), points out what was the origin of the phrase "frustrate the commercial

A object of the contract," and what would be the effect of such a frustration upon the contract of the parties.

During the argument addressed to your Lordships on behalf of the appellants, though I listened to it most attentively, I failed to apprehend precisely what was the unexpressed condition which, to use LORD LOREBURN'S language, formed the foundation of the contract entered into by the appellants and the respondents on B April 5 (or 15), 1913. It certainly was not, it would appear to me, to be that England should not be at war with any power, European or other, during this period of seven-and-a-half years from its date. Nor was it a condition that the appellants should be relieved from the obligation to provide ships to implement their contract if their own ships should be requisitioned by the Crown. In my view, there is nothing in the contract or in the surrounding circumstances to induce any C court to infer that these conditions or either of them formed the foundation of the contract of the parties. If the appellants had contracted that they would employ in the stipulated adventure none but ships belonging to themselves, it might possibly be contended that there was an implied condition upon which this written contract was based, to the effect that if they should be deprived of the use of these ships by force majeure, such as a requisition by the Crown, they D should be relieved from the further performance of their contract. But the parties never entered into a contract of that kind. The arbitrator, a commercial man and not a lawyer, has found as a fact that there was nothing to prevent the appellants from chartering neutral tonnage for the three voyages in respect of which the respondents claim relief, namely, those in November, 1919, and May and November, 1920. Had they done this, they would have had a complete E answer to the respondents' claim. The correspondence which passed between the parties clearly supports, in my view, the finding of the arbitrator, that it was agreed between the parties that the appellants should not furnish steamers nor the respondents ship cargoes of phosphate during the period of the war, and that this agreement was, by the respondents' letter of Aug. 27, 1919, extended to the date at which peace should be signed. It may well be that these mutual agreements F could not be enforced at law, but they show clearly that the parties regarded the agreement of April 5, 1913, not as dissolved, but as existing and being valid and binding, but that owing to the condition of things prevailing, they were willing to abstain from enforcing each against the other the rights which this contract conferred respectively upon them. For these reasons I think that the appeal fails, that the decision appealed from was right, and should be upheld and the appeal G be dismissed with costs.

LORD SUMNER.—The rights of the parties in this case must depend upon the original charter of April 15, 1913, for no agreement was afterwards entered into which would vary them. Neither the communications which actually passed, nor the suspension of communications, shows more than that both acquiesced in drop- H ping the first three voyages. The charterparty provides for six separate voyages, each being a distinct commercial adventure. There is no reason why a single contract should not provide for many adventures, nor why those adventures should not be entirely independent of one another. That the voyages are to be made at fixed and regular intervals; that the cargo is to be always of the same material; that the ports of loading and discharge and the rate of freight and the contractual I terms are to be the same throughout, only show that the adventures are severally as like one another as possible, not that they are not several adventures. For anything that appears the suppression of one or more voyages would not affect the others, though it might affect the shipowners' profits one way or the other. If there was a lump sum freight for the six voyages, different considerations would arise.

It is said that, when the time for the first voyage arrived, the first adventure was frustrated, war having caused a supersession of active relations between the parties, and that the whole of the contract adventures were thereupon frustrated

also, being all bound up together, because the consideration for performing any one voyage was the promise to perform it and five others, and that a six-voyage charter cannot be turned into a three-voyage charter, for this would be a different contract. I think this argument begs the question. I see no difficulty in the considerations being as separate as the voyages. The rate of freight is the same, it is true, though the commercial results of the voyages may differ widely, but the advantage of securing a dead-weight cargo in advance at a port of initial loading so adjacent to United States loading ports as Port Tampa is, deliverable at a port of final discharge so close to British and Continental discharging ports as Dunkirk is, may well compensate for a rate of freight which is not always profitable per se. Indeed, in a contract made in 1913 and possibly only to be completed in 1921, a rate of freight fixed in 1913 could hardly be anything but a speculation, and might as well be a flat rate as not. It is of some importance to observe that, among the many cases of frustration decided in the last few years, this case can find no comparable precedent. Neither party to the contract here is an alien enemy. Nothing to be done under the contract became illegal at any time. Nothing was prohibited by legal authority. Neither the port of loading nor the port of discharge was under blockade and, if the appellants' own ships were under requisition, they could have fulfilled their contract with other ships, of which they might be able to obtain the disposition. Clearly, they took the risk of being able to get the stipulated vessels when wanted. Your Lordships are not concerned in this case with the uncertain duration of a war still continuing, for the question arises only after the cessation of hostilities, and there is no question of any "postponement of the voyages now in dispute for an inordinate time" or at all. Here is no charter "dependent for the possibility of its performance on the continued availability of a specific thing," for nothing more specific than the ports of Tampa and Dunkirk is involved, and they remain in being. So far as the ships are concerned, this is not a contract de certo corpore at all. Nor can it be said that "the foundation of what the parties are deemed to have had in contemplation has disappeared and the contract itself has vanished with the foundation." As regards the last three voyages, every "subject-matter which is essential to the performance of the contract" is available. The ports are there and so is the phosphate, and it is not even shown that no ships conformable to the charter could have been obtained. The contract, if the last three voyages had been made, would, in my opinion, have been the same contract as that originally contemplated, for the first three might, within its terms, have been prevented and excused by excepted perils, and a contract for six voyages which results in only the second three being made is the same contract, whether the first three fail by reason of matters expressly excepted in the contract or excepted by the parties impliedly under the doctrine of frustration in its modern form. The argument always gets back to the same question, namely, whether this is a contract for six separate adventures or for one composite adventure carried out in six stages.

The most favourable way in which the appellants' case was put was this. Ultimately frustration is a question of fact, and that question must be answered as at the time when the frustrating facts arise, for if the adventure is frustrated the contract is dissolved then and there without any further election or notice on either side, and it is important that the parties should be able to know forthwith how they stand. Accordingly, if, in the circumstances as they appeared to be, when the time for commencing the first voyage arrived, the true conclusion is that, in the supposed intention of the parties when they entered into the charter, such circumstances, so viewed, would defeat the whole contract, then the contract was forthwith discharged, no matter what happened afterwards when the dates of the later voyages were reached. Even on this footing the same difficulty still arises that, if the voyages were really intended to be separate and independent voyages, the parties cannot have intended the failure of one to involve the failure of all. They may have been entitled to say that the circumstances which led to the failure of the first seemed likely to continue in existence when the time came

for the second and so on, but, to my mind, that of itself leads only to the conclusion that the time for deciding whether each separate adventure is frustrated arises in this case when the time for performing it has substantially arrived and not before. To hold otherwise would be to convert a contract for separate adventures into a contract for one composite adventure to the prejudice of one party or the other.

It was argued on the strength of what was said in *Ertel Bieber & Co.* v. *Rio Tinto Co.* (11) by my noble and learned friend, LORD DUNEDIN ([1918] A.C. at p. 270), and by LORD PARKER OF WADDINGTON (ibid. at p. 283), that if a given construction, quoting LORD DUNEDIN'S words, "would be to turn a contract for two million tons into a contract for far less," the construction so described must be rejected outright, and so, in this case, a construction which results in the shipowners being bound to three voyages, having contracted for six, must be bad also. It is plain that in that case both noble Lords were dealing with the question in hand, viz., whether a suspensory clause applying, among other things, to the event of war, could, as between subjects and enemies of his Majesty be an answer to the dissolution of the whole contract on the outbreak of war, which would naturally be the result in law of that relation, and could leave standing such part of the contract as would not eventually become performable till after the conclusion of peace. It is, indeed, a cogent reply to such a contention to say that it makes a new contract between the parties, but no such argument applies where the question is whether the intention of the parties themselves, neither being an enemy of the King, is not to drop such voyages as cannot be performed and to retain such as can. It may be thought unlikely that they would have intended three voyages to be obligatory when three others had been abandoned, but from the nature of this contract I am assured that it is not. These are distinct voyages, not an out-and-home voyage as in the case put by BRAMWELL, L.J., in *Honck* v. *Muller* (12) (7 Q.B.D. at p. 99), nor a single voyage as in *Jackson* v. *Union Marine Insurance Co., Ltd.* (9).

ATKIN, L.J., observes in his dissentient judgment that

> "this is a typical case of frustration. Substantially the whole of the existing circumstances which formed the basis of the contract had disappeared during the war . . . the possibility of regular service, and regular shipment, which alone gave the mutual obligations of fixed shipments at a fixed price a commercial basis, had by common consent disappeared. . . . At the root of the doctrine of frustration lies the necessity for relieving commercial men of suspense."

With great respect I venture to question this. In the case of a contract like this, which is an extreme case of commercial providence, everything was so obviously liable to be upset, more or less, by changing of circumstances of all sorts as to make it very difficult to say that in 1913 the parties intended even the war of 1914–18 to involve the dissolution of the contract five years afterwards, though till 1918, at any rate I suppose, it would remain in force. In effect most forward contracts can be regarded as a form of commercial insurance, in which every event is intended to be at the risk of one party or another. Each party is likely most to need the maintenance of such a contract exactly when the other would most wish to be rid of it. If, as here, neither party wished the first three voyages to be performed, the remedy was to let them drop one by one, as they did, and to see how things went on. To relieve the shipowners of suspense by dissolving the entire contract would, after all, only plunge them into a new suspense, namely, how to get deadweight cargo, and at a pre-war rate of freight, too, if ships should be once more at their disposal. The charterers again, unless this charter stood, would not be able to sell their product c.f. and i, when the prospect of re-starting the Dunkirk mills improved, except at the cost of speculating on the freight element in the price, so that they, too, would necessarily be exposed to some suspense one way or the other. If the suspense is unilateral the result of putting an end to it

by dissolving the contract may only be to deprive the other party of the chance of administering a not unprofitable squeeze. All the uncertainties of a commercial contract can ultimately be expressed, though not very accurately, in terms of money, and rarely, if ever, is it a ground for inferring frustration of an adventure that the contract has turned out to be a loss or even a commercial disaster for somebody. If a contract is really a speculative contract, as this plainly is, the doctrine of frustration can rarely, if ever, apply to it, for the basis of a speculative contract is to distribute all the risks on one side or on the other and to eliminate any chance of the contract falling to the ground, unless, indeed, the law has put an end to it. Even the outbreak of war does not necessarily result in the frustration of commercial adventures. It may dissolve a contract as involving a trading with the enemy, which is a totally different ground, but, apart from this and in spite of the uncertain duration of war, it must depend on the facts whether there is a frustration of the contemplated adventure in reality. No one can tell how long a spell of commercial depression may last, no suspense can be more harassing than the vagaries of foreign exchanges, but contracts are made for the purpose of fixing the incidence of such risks in advance, and their occurrence only makes it the more necessary to uphold a contract and not to make them the ground for discharging it. I would dismiss this appeal.

LORD WRENBURY and **LORD CARSON** concurred.

Appeal dismissed.

Solicitors: *Charles Lightbound & Co.*; *William A. Crump & Son.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

KEEVES *v.* DEAN
NUNN *v.* PELLEGRINI

[COURT OF APPEAL (Bankes and Scrutton, L.JJ., and Lush, J.), December 19, 1923]

[Reported [1924] 1 K.B. 685; 93 L.J.K.B. 203; 130 L.T. 593; 40 T.L.R. 211; 68 Sol. Jo. 321; 22 L.G.R. 127]

Rent Restriction—Assignment—Right of statutory tenant to assign interest in premises—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 15.

The right of a tenant who remains in possession of premises under the Rent Restrictions Acts is a purely personal right and he cannot assign his interest in the premises.

Per BANKES, L.J., and LUSH, J.: The right to assign a tenancy cannot properly be described as a "term or condition of the original contract of tenancy" within s. 15 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and so a statutory tenant is not entitled to that right, unless that right is expressly mentioned in the original tenancy; per LUSH, J.: If it is an express term of the original tenancy that the tenant should have a right to assign, that right is limited to the duration of the tenancy; per SCRUTTON, L.J.: A right in the tenant to assign could be a term or condition of the original tenancy, but it would not be a term or condition "consistent with the provisions of" the Rent Restriction Acts within s. 15 (1).

Notes. Questions were reserved in the judgments as to the rights of statutory tenants to sublet. As to this, see 23 HALSBURY'S LAWS (3rd Edn.) 821, 824, 826 et seq.

Distinguished: *Campbell* v. *Lill* (1926), 135 L.T. 26. Considered: *Roe* v. *Russell*, [1928] All E.R.Rep. 262. Applied: *John Loribond & Sons, Ltd.* v. *Vincent*, [1929] All E.R.Rep. 59. Considered; *Price* v. *Gould*, [1930] All E.R. Rep. 389; *Sutton* v. *Dorf*, [1932] All E.R.Rep. 70; *Brown* v. *Ministry of Housing and Local Government, Ford* v. *Same*, [1953] 2 All E.R. 1385. Referred to: *Aston* v. *Smith*, [1924] 2 K.B. 143; *Hicks* v. *Scarsdale Brewery Co.*, [1924] W.N. 189; *Prout* v. *Hunter*, [1924] 2 K.B. 365; *Salter* v. *Lask, Lask* v. *Cohen*, [1925] 1 K.B. 584; *Ebner* v. *Lascelles*, [1928] 2 K.B. 486; *Haskins* v. *Lewis*, [1930] All E.R.Rep. 227; *Skinner* v. *Geary*, [1931] All E.R.Rep. 302; *Hiller* v. *United Dairies (London), Ltd.*, [1933] All E.R.Rep. 667; *Strood Estates Co.* v. *Gregory*, [1936] 2 All E.R. 355; *Re Swanson's Agreement, Hill* v. *Swanson*, [1946] 2 All E.R. 628; *Oak Property Co.* v. *Chapman*, [1947] 2 All E.R. 1; *Brown* v. *Brash*, [1948] 1 All E.R. 922; *Thynne* v. *Salmon*, [1948] 1 All E.R. 49; *Baker* v. *Turner*, [1950] 1 All E.R. 834; *American Economic Laundry, Ltd.* v. *Little*, [1950] 2 All E.R. 1186; *Moodie* v. *Hosegood*, [1951] 2 All E.R. 582; *Mills* v. *Allen*, [1953] 2 All E.R. 534; *Thompson* v. *Ward*, [1953] 1 All E.R. 1169; *Barclays Bank, Ltd.* v. *Bird*, [1954] 1 All E.R. 449.

As to the rights of a statutory tenant, see 23 Halsbury's Laws (3rd Edn.) 805 et seq.; and for cases 31 Digest (Repl.) 692–695. For Increase of Rent &c. Act, 1920, see 13 Halsbury's Statutes (2nd Edn.) 981.

Cases referred to:

(1) *Collis* v. *Flower*, [1921] 1 K.B. 409; 90 L.J.K.B. 282; 124 L.T. 510; 19 L.G.R. 193, D.C.; 31 Digest (Repl.) 662, *7627*.

(2) *Mellows* v. *Low*, post p. 537; [1923] 1 K.B. 522; 92 L.J.K.B. 363; 128 L.T. 667; 39 T.L.R. 190; 67 Sol. Jo. 261; 21 L.G.R. 180, D.C.; 31 Digest (Repl.) 658, *7600*.

(3) *Remon* v. *City of London Real Property Co.*, [1921] 1 K.B. 49; 89 L.J.K.B. 1105; 123 L.T. 617; 36 T.L.R. 869; 18 L.G.R. 691; 84 J.P.Jo. 349, C.A.; 31 Digest (Repl.) 638, *7455*.

(4) *Cruise* v. *Terrell*, [1922] 1 K.B. 664; 91 L.J.K.B. 499; 126 L.T. 750; 38 T.L.R. 379; 66 Sol. Jo. 365; 20 L.G.R. 418, C.A.; 31 Digest (Repl.) 698, *7891*.

(5) *Doe d. Mitchinson* v. *Carter* (1798), 8 Term Rep. 57; 101 E.R. 1264; 31 Digest (Repl.) 408, *5380*.

(6) *Denn d. Lord Stanhope* v. *Skeggs* (1781), cited in 8 Term Rep. at 59; 101 E.R. 1266; 31 Digest (Repl.) 434, *5606*.

(7) *Church* v. *Brown* (1808), 15 Ves. 258; 33 E.R. 752, L.C.; 31 Digest (Repl.) 409, *5384*.

KEEVES *v.* DEAN

Appeal from an order of the Divisional Court (Sankey and Salter, JJ.) reversing a decision of the Croydon County Court.

The plaintiff, the landlord, claimed possession of premises in London Road, Thornton Heath, alleging that the defendant had wrongly taken possession of the premises and still wrongfully retained possession of them against the will of the plaintiff. The premises had been assigned to the defendant by the statutory tenant, and the defendant claimed that he was entitled to remain in possession. The county court judge held that the statutory tenant could not assign his interest in the premises, and the tenant appealed.

NUNN *v.* PELLEGRINI

Appeal from a decision of the Divisional Court (Sankey and Salter, JJ.) affirming a decision of the Ipswich County Court. This was also a claim by the landlord for the recovery of possession of premises which the statutory tenant had purported to assign to the defendant. The county court judge decided in favour of the tenant and confirmed him in possession of the premises. The landlord appealed.

In both cases the Divisional Court held, on the construction of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as a whole, and, in particular,

in consequence of the terms of s. 15 (1) and (2), that the tenant had a right to assign his interest in the premises. The landlords in both cases appealed.

Merriman, K.C., and *A. H. King* for the landlord, Keeves.
Lord Halsbury, K.C., and *J. Oddy* for the tenant, Dean.
C. E. Jones and *Vaisey* for the landlord, Nunn.
Rowley Elliston for the tenant, Pellegrini.

BANKES, L.J.—These two appeals from decisions of the Divisional Court raise a very important question under the Rent Restriction Acts. The question is whether a person who had been tenant of premises, and whose tenancy had been determined by a notice to quit, but who had remained on against the will of the landlord, claiming the protection afforded by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, can assign his statutory position to an assignee. The person I have been referring to has come to be known as the "statutory tenant," and I think it is a pity that that expression was ever introduced. It is really a misnomer, because the person who cannot be turned out because of the provisions of the statute has in a sense no estate or interest such as a tenant has. His real position is that no one has any right to turn him out so long as the provisions of the statute are complied with, and when one arrives at the conclusion that that is the legal position of the person who has been called the "statutory tenant," it follows that it is a purely personal right, which, unless the statute expressly confers upon the person the right to pass it on, must cease the moment the person leaves the premises voluntarily, or ceases to occupy them, or dies.

I desire to reserve the question as to the right of a person who succeeds upon the death of a tenant. *Collis* v. *Flower* (1) and *Mellows* v. *Low* (2) were both cases in which the original tenancy had not been determined, and in which, therefore, the position of the person who has been called the statutory tenant, or the person who succeeded from the death of a statutory tenant, was not directly in question It is quite true that in *Mellow's Case* (2) McCardie, J., expressed the view that there was no difference between the case of a death of a person whose tenancy had not been determined and the case where the tenancy had been determined and the person was remaining on under the statutory right created by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, but that was obiter, and I think that that question must receive separate consideration on some future occasion if ever the question arises, and I confine my judgment to-day strictly to the question whether the so-called statutory tenant has a right to assign his statutory position. I think that depends upon the construction of s. 15 (1) which provides as follows:

> "A tenant who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act, and shall be entitled to give up possession of the dwelling-house only on giving such notice as would have been required under the original contract of tenancy, or, if no notice would have been required, on giving not less than three months' notice."

The first observation I wish to make about that subsection is that it refers to the tenant's statutory position as a right to retain possession, and then it proceeds in terms to define the conditions upon which the person shall exercise that right, and provides that he must exercise the right subject to the benefit of all the terms and conditions of the original contract of tenancy. Primâ facie one would say that those were provisions dealing with the position of the individual and on what terms the individual shall be entitled to retain the right to possession which the Act has conferred upon him. But it is said the right to assign the tenancy is a term or condition of the original contract of tenancy in every case where the

A original contract of tenancy does not forbid such an assignment, and it is, therefore, argued that a person who is a tenant and whose tenancy does not include the term against the assignment is entitled to exercise, as one of the terms and conditions of his original contract of tenancy, the power of assignment. I think it is well established by the two decisions in this court—*Remon* v. *City of London Real Property Co.* (3) and *Cruise* v. *Terrell* (4)—that the person who is in possession by B virtue of the statute only is a tenant within the meaning of s. 15 (1). If, therefore, a right to assign that tenancy can be said to be a term or condition of his original contract of tenancy it would follow that he would have a right to assign. I do not myself think that the right to assign a tenancy can be properly described as a term or condition of the original contract of tenancy; it certainly is not an express term; if it is a term or a condition at all it must be implied; and, in my C opinion, it is neither a term nor a condition. If those words are to be used in their ordinary signification the right to assign is a right incident to the estate, just as a right to sell one's watch, or any other chattel which may belong to one, is a right incident to one's property in the chattel, and it is not a correct use of language to describe that right as a term or condition of the original contract of tenancy.

D There are two authorities I should like to refer to on that point. One is *Doe d. Mitchinson* v. *Carter* (5), where LORD KENYON says (8 Term Rep. at p. 60):

> "Generally speaking, the grant of an estate carries with it all legal incidents, and therefore the grantee has a right to sell and convey it, unless he be controlled by the terms of his grant. In the case of *Denn d. Lord Stanhope* v. E *Skeggs* (6), LORD MANSFIELD seems to have doubted on this ground, whether or not the covenant that the executors of the tenant should not assign were void as being inconsistent with the thing granted: but in so doubting, his Lordship probably overlooked the maxim modus et conventio vincunt legem; though indeed that maxim is to be taken with some qualification; for a grantor when he conveys an estate in fee, cannot annex a condition to his grant not F to alien, nor, when he conveys an estate tail, a condition not to bar the entail. Such restrictions are imposed to prevent perpetuities: but, short of that restriction, both parties to a contract may model it in what manner they please. Though therefore the grant of an estate primâ facie carries with it all legal incidents, that grant may be modified according to the wish of the parties; and when we are considering the rights of the grantee, it is necessary to see G what restraints have been imposed on him."

To the same effect is the language of LORD ELDON, L.C., in *Church* v. *Brown* (7), where he says with regard to leasehold interest (15 Ves. at p. 264):

> "I should lay no stress on the word 'assigns'; if the lease was to be made to the lessee, his executors or administrators: his assigns being included in himself; and the right to assign, unless restrained, being incident to his H estate."

In a later passage LORD ELDON says (ibid. at p. 263):

> "The safest rule for property is, that a person shall be taken to grant the interest in an estate, which he proposes to convey, or the lease he proposes to make; and that nothing, which flows out of that interest, as an incident, is to I be done away by loose expressions, to be construed by facts more loose."

If, therefore, one construed the words "terms and conditions of the original contract of tenancy" in s. 15 (1), according to their natural meaning they would not, in my opinion, include such a right as the right to assign, but in this Act one has to look at the Act as a whole to see whether it is necessary to put upon the language used something other than the ordinary meaning in order to give the statute, as far as possible, a "working whole," if I may use that expression. Here, as I have already said, this court has held that it was obliged to give the expression "tenant" in this section a meaning other than that ordinarily attached

to that expression, but in this case it seems to me that, looking at s. 15 (2), it is really manifest that the legislature were intending to use, and did use, the words "terms and conditions of the original contract of tenancy" in their strict legal meaning, and I arrive at that conclusion for this reason. Section 15 (2) is dealing with the parting with possession which is the description of the right which the person is given in sub-s. (1) of s. 15 when dealing with that right which provides that the tenant is not to part with that right to anyone except his landlord for valuable consideration; if he does, the assignor is subject to penalty, and the person who pays the consideration or premium may be entitled to recover it back, because he has paid money under a void agreement. When this legislation was introduced it was hardly conceivable that an assignment would be made except for valuable consideration. I think one may take it as reasonably certain that ninety-nine out of every hundred assignments would be for valuable consideration, and, if that is a correct view, it follows that the legislature were dealing with assignments or parting with possession, speaking generally, upon the assumption that such a transaction would be for valuable consideration. When one arrives at that conclusion one is driven to the conclusion that sub-s. (2) is, almost in terms, forbidding the very thing which the tenants here are asserting that they have a right to do. It may be that some ingenious individuals have discovered that sub-s. (2) is only dealing with parting with possession for valuable consideration, and that it may be possible lawfully to part with possession without any consideration at all, and in that way to evade the provisions of sub-s. (2). It is not necessary, in my opinion, to consider that question, and the conclusion which I have arrived at upon the construction of sub-s. (1) when read in connection with the provisions of sub-s. (2) is that the statute does not confer, and did not intend to confer, upon the so-called statutory tenant a right to pass on his legal position under the statute to anyone by way of assignment. I say nothing about sub-letting for this reason, that one sees that, where a statutory tenant has sublet part of the premises which he claims the right to retain, it may be that he is still entitled to rely on the statute. What the position may be if he sublet the whole of the premises, and whether in those circumstances any distinction can be drawn between sub-letting and assignment it is not necessary for the purpose of the present case to decide, and I do not propose to decide it. It must be reserved for further consideration when that is necessary after the passing of the last statute. It is true that it may be said, if the construction which McCardie, J., thought might be placed upon the provisions of s. 12 is correct, that that would operate against the argument which I have been putting forward in support of my view: it may be that the provisions of s. 12 only refer to dispositions by will or under an intestacy in the case where the original tenancy has not been put an end to. I say nothing about that; I leave it for further consideration.

I have dealt so far with the construction to be placed upon the Act generally, without reference to the facts of these two particular cases, but having regard to the construction which I place upon the statute, it is not really necessary to draw a distinction between the two cases. Their facts up to this point are the same, namely, that the tenancy of the original tenant in each case had been determined by notice to quit; that the person who claimed the right to pass on his statutory position was a person who was in possession of the premises solely by right of the statute. To that extent, therefore, their facts are the same. In the first case the assignment was not put in, and, therefore, the fact whether the assignment was for valuable consideration or not was not before the court; but, from my point of view, that is really immaterial having regard to the construction which I put upon sub-s. (1) of s. 15. In the second case the document which was said to be the assignment was put in and the county court judge expressed himself strongly with regard to the form of that document. Whether the form was due to a want of knowledge on the part of the person who was responsible for it, or to a complete knowledge of the statute and the rocks which he was endeavouring to avoid, it is immaterial to discuss. It certainly was not more, putting it at the highest, than

A an agreement to assign, and if it was an agreement to assign and was for valuable consideration it comes directly within sub-s. (2) of s. 15. If it was without consideration then, with submission to the Divisional Court, I fail to see how any appeal to equity can assist the person claiming under the document. It is not necessary, in my opinion, to draw any distinction between the facts of the two cases, and I arrive at my decision really upon the view I take of s. 15 (1). For B these reasons I think that the decision of the Divisional Court cannot be supported in either case, and that the appeals must be allowed with costs here and below, and in one case the judgment of the county court judge confirmed, and in the other set aside.

SCRUTTON, L.J.—This case is another stage in the unwelcome task which C Parliament has imposed on the courts of making bricks with very insufficient statutory straw—another stage in the task of defining monstrum horrendum informe ingens.

My Lord has rather objected to the expression "statutory tenant." I rather fancy I am the author of that phrase, but I am still impenitent. I do not know what else one could do; Parliament calls him a tenant. It is quite true that D before the passing of these Acts one would not have called a person who stayed in premises against the will of the landlord for as long as he liked, irrespective of the landlord's wishes, a tenant, but Parliament has called him a tenant and has created him such by statute, and he appears to me to have more than a personal right against the landlord. I take it that he has a right against all the world to stay in those premises until he is turned out by an order of the court, and that he E could bring proceedings for trespass against a person who came into the house. As I see the position, he could say: "I am by statute a person having an interest in these premises on which you are trespassing." However, it does not much matter what he is called so long as one knows what one is talking about, and, in speaking of a statutory tenant, my Lord was speaking of a person whose common law tenancy has expired, and who, by statute, is entitled to remain in those F premises against the wish of his landlord until an order is made by a county court judge. The question in this particular case is: Can this person who stayed on in that way, and who seems to me to have much more interest in the premises than a tenant at will or a tenant by sufferance, assign his right, whatever it is, to another person. One sees at once that that may raise the question which it is not necessary to decide, and which I do not propose to decide in this case: Can such G a person by will leave his interest in the premises to another? And it also may raise a question which I do not mean to decide in this case: Can such a person while he is a statutory tenant sublet either part, or the whole, of the premises, for less than the actual terms for which he holds those premises.

The answer, I think, to the question, whether he can assign, is to be found in the consideration of the meaning of s. 15 (1) of the Act of 1920. That appears to H me to raise two questions: First, was it a term and condition of the original contract of tenancy that the tenant could assign—that is to say, the common law tenancy which was determined by the expiration of its term or by notice to quit. Secondly, if it was a term of the original contract of tenancy, is its continuance consistent with the provisions of this Act? I am not able to agree with my Lord on the question whether it was a term or condition of the original contract of I tenancy in the sense in which those terms are used in this Act. First, I think it is clear that it was an incident of the original contract of tenancy. [His Lordship read the passage in *Doe d. Mitchinson* v. *Carter* (5) which is set out in the judgment of BANKES, L.J., ante p. 15, and proceeded:] I take it that unless one has an express term forbidding alienation, if one has a tenancy, one has a right to assign one's tenancy. Is that a term and condition as the phrase is used in this Act? In the sense of being a written term of any contract it is not; it clearly is an incident of the tenancy, and I am appalled at the idea that one can read "terms and conditions" here so strictly as to exclude incidents of tenancy. For

instance, it is not a term and condition of a tenancy that the landlord should have a right to distress, it is an incident. Is the landlord to have no right of distress in the case of a statutory tenant because it is not a term and condition of the tenancy, but is only an incident? It appears to me that would be giving much too narrow a meaning to the words "terms and conditions" as they are used here. I take it that these words include all the rights that the landlord would have, and that the tenant would have, in respect of the tenancy, and similarly all the duties whether they are derived from express terms in the contract or are incidents of the relation of landlord and tenant, and, therefore, the answer to the first question is, I should say, that it is a term and condition of the original contract of tenancy that the tenant should be able to assign, and then comes the question.

But is that term or condition, as I interpret it, consistent with the provisions of the Act? When I look at s. 15 (2) I find that the tenant retaining possession as aforesaid—that is, a statutory tenant—

> "shall not as a condition of giving up possession ask or receive the payment of any sum, or the giving of any other consideration by any person other than the landlord."

That is to say, if he is promising to give up possession, which I assume every person who assigns tenancies is, he must not take money or any valuable consideration for it. That appears to me absolutely inconsistent with a right to assign for good and valuable consideration. It is made illegal by s. 15 (2), in my view, to assign for valuable consideration, and, if so, power to ask for valuable consideration cannot be consistent with the provisions of this Act. Having got so far the assignee seems to be in this difficulty: either the tenant has assigned to him for valuable consideration, which is illegal, and he gets no title, or, if he has assigned to him without any consideration at all, he has an agreement which he cannot enforce, because one cannot enforce an agreement made without consideration, and, again, he gets no title. Therefore, I think there is a dilemma from which the assignee cannot escape. Either the tenant has assigned to him for valuable consideration, which is illegal, or he has not assigned to him for any consideration at all, and he gets no interest. Law will not help him because the assignment is not by deed; equity will not help him because there is no consideration for the agreement which is sought to be enforced, and, therefore, it seems to me, subject to one point that I desire to mention, that an assignment by a person who is now a statutory tenant is not consistent with the provisions of the Act.

The point that I desire to reserve is this. I do not discuss what will be the result in law or equity when, if ever, an assignee appears with a deed which shows no consideration on the face of it and as to which it is proved that there was no consideration. Nor am I proposing to decide whether the statutory tenant can sublet either in whole or in part. That question is obviously of the very greatest practical importance, because I should think that many statutory tenants at present in England have sublet in whole or in part their premises, and I am also reserving the question of the statutory tenant's power of disposition by will. The section to which we have been referred—s. 12 (1) (g)—shows that Parliament did contemplate that, if a statutory tenant died intestate his widow or a member of his family residing in his house might have a right to continue his statutory tenancy, and while one is not very much surprised at anything in or out of the Rent Restriction Act it would be very odd if Parliament, having said that, declined to allow relief to the statutory tenant by will, but as to that I reserve the question until it arises.

Both the cases that have been decided, as my Lord has pointed out, were cases of death while the original tenancy was still in force, and not while the tenant was a statutory tenant. If that is the general law, how do the facts stand in the two cases before us? In the first case, *Keeves* v. *Dean*, the county court judge held that there was no power to assign, and, therefore, did not inquire whether there was an effective assignment or not. The terms of the assignment were neither

before him, nor before the Divisional Court. The county court judge held there was no power to assign, and, therefore, did not trouble about that possible title. It did occur to me that it might be there was an assignment by deed with no consideration stated, and that there ought to be a new trial to ascertain that fact, but I have reason to believe that suggestion so highly improbable that I do not think it is necessary to order a new trial. In *Nunn* v. *Pellegrini* a document was produced which purported to be for a sum of money to transfer fixtures, fittings and stock-in-trade. No document was produced which transferred the interest in the premises, and, therefore, the alleged assignee was in the position that either he had got possession because he had promised to pay a sum for the stock-in-trade which would be an assignment for valuable consideration, or, if he was let into possession for no consideration, then he had nothing to which the courts would give any effect, and, therefore, in that case, it was impossible for the assignee to make any title to which the courts would give effect. I cannot help feeling it is an unfortunate result for two people who appear to have paid considerable sums of money to get into these premises to be turned out, but one must interpret the Act and leave them with such remedies as they have under the ordinary law of contract. For these reasons I decide that the statutory tenant is not entitled to assign for valuable consideration and cannot transfer any effective interest in the premises without consideration, except possibly in the case of a deed, and that case I reserve.

LUSH, J.—I also am of opinion that the judgment of the Divisional Court cannot be supported. When it is said that a person who, sometimes inconveniently, is called a statutory tenant, can assign, one necessarily asks oneself what it is that he has to assign. He has no estate in the land, as that estate has come to an end and the right to possession and to enjoy the land has reverted to the lessor, or, if the lessor has, as he was fully entitled to do, created a fresh tenancy, the right to possession and the right to occupy has passed to the new lessee. The person who was a tenant has no estate that I can see and no interest in the land of any sort or kind. I think that all this Act of Parliament has given him is a purely personal right, namely, to be free from disturbance by the landlord. It is a negative right; it is a very valuable right, but it is personal to him, and the right consists, not in having something, but in being free from having a landlord take action for possession.

The fact that he has a personal right apart from s. 15 is, I think, shown both by the whole scheme of the Act and also by a certain provision in the Act. I turn to s. 12 (1) (g), which makes provision for the case of a tenant who dies intestate, and allows the widow, provided she was residing with the tenant at the time of his death, to continue in possession of the house, and, if there was no widow, then a member of the family, to be decided by the county court judge in default of agreement. It seems to me that that provision shows that the statute regards the person selected as having the right to the protection that the Act gives to the statutory tenant, and it seems a little strange, if this right to assign exists, that the widow, the moment she becomes the statutory tenant, can herself assign and so force a tenant on the landlord who has no voice in the selection of the persons who may come into occupation. The widow would have a right herself to assign away that which was given to her personally and allow strangers to come into the house and give to them a right which she, but for the statute, never possessed. The difficulty which, to my mind, seems insuperable in the way of the view that the statutory tenant can assign is this. The right to possession has reverted to the landlord; the right of the statutory tenant, by the plain terms of s. 15, and, indeed, other sections in the Act, is limited to such time as he continues in possession; the moment he goes out he no longer has the right to insist upon entering. If he has not got the right of entering, how can he confer it upon another? It is vital to the validity of an assignment by a tenant that the assignee shall obtain the right to

enter, and if the statutory tenant has not got the right to enter I cannot for myself see how he can possibly assign it to someone else. A

Looking at the whole of the Act, it appears to me that the right is a purely personal one—a negative right—and one that is incapable of assignment. If one turns to s. 15 upon which SANKEY and SALTER, JJ., rested their judgments, one sees this. It was necessary that a section like that should be included because when the Act said that the tenant should not be turned out, it was necessary to B define the rights upon which he was allowed to stay, and, in my opinion, the whole scope of s. 15 is to provide for ascertaining the terms upon which the statutory tenant is to retain possession. The section was passed to define those terms, and the scope of the section is limited to the purpose for which it was passed. When one looks at the section one sees that so long as the statutory tenant retains possession he is to observe and be entitled to the benefit of all the terms and conditions C of the original contract of tenancy. Speaking for myself, I cannot come to the conclusion that a right to assign a tenancy is one of the terms or conditions of a tenancy. I do not see how it can any more be said to be a term and condition of the agreement of tenancy than the right to assign a contract can be said to be a term or condition of the contract. A person who has made a contract has got a right to assign it because, speaking generally, all property is alienable, but he D does not derive that right from the other party to the contract. It is a right that the law gives him, and, in my opinion, is entirely independent of the contract that he has made with the other contracting party. Just in the same way if a person buys a chattel, he does not obtain from his vendor his right to sell it; that right is not a term of his contract. In my view, if the right to assign is not a term and condition of the contract of tenancy, s. 15 gives no right to assign, and, therefore, E the case comes back to the question: Does the statute mean anything more than a personal right to the tenant, the person in occupation? I do not want to pursue the matter unduly, but I must say, speaking for myself, if it is a term and condition of the contract that the tenant should have a right to assign, it seems to me one must limit that right to the duration of the tenancy. I cannot see how it can be said that a person who has taken a lease for three years and who, ex hypothesi, F has stipulated that he should have a right to assign that lease can possibly be said to have a right to assign it after the lease has come to an end. The tenant's right to possession is a purely personal right, which a statutory tenant is incapable of assigning.

Appeals allowed. G

Solicitors: *Gibson & Weldon*, for *F. Gower*, Croydon; *Peard & Son*, Croydon; *Morris & Bristow*, for *Bernard Pretty*, Ipswich; *Foyer, White, Borrett & Black*, for *Westhorp, Cobbold & Ward*, Ipswich.

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

A

NUNAN *v.* SOUTHERN RAIL. CO.

[COURT OF APPEAL (Bankes, Scrutton and Atkin, L.JJ.) October 23, 1923]

[Reported [1924] 1 K.B. 223; 93 L.J.K.B. 140; 130 L.T. 131; 40 T.L.R. 21; 68 Sol. Jo. 139]

B *Fatal Accident—Damages—Measure—Limitation of damages for negligence agreed by deceased person—Condition on railway ticket—Death through negligence of company's servants—Fatal Accidents Act*, 1846 (9 & 10 *Vict.*, *c.* 93), *s.* 1.

By a condition on a workman's ticket issued to the plaintiff's husband by the defendant railway company it was provided that the amount which he would be able to recover from the defendants in respect of personal injuries or other damage suffered by him through their negligence should not exceed £100. Owing to the negligence of the defendants' servants the plaintiff's husband received injuries from which he died. In an action brought by the plaintiff, as his widow, under s. 2 of the Fatal Accidents Act, 1846,

Held: at the material time, i.e., at the moment of death, the deceased man was entitled to maintain an action and recover damages in respect of the defendants' negligence within s. 1 of the Act of 1846; the widow's cause of action was a new cause in which the damage was quite different from that in respect of which the deceased man would have been entitled to recover, and the quantum of damages to which she was entitled, which was compensation for the loss of a person on whom she was dependent, was quite different from the amount which her husband could have recovered in an action for personal injuries, including, as it did, sums in respect of matters for which he could not claim; and, therefore, the damages recoverable by the plaintiff were not limited to the £100 to which the damages would have been limited in an action by the husband.

Notes. Considered: *Grein* v. *Imperial Airways, Ltd.*, [1936] 2 All E.R. 1258. Referred to: *Fosbroke-Hobbes* v. *Airwork, Ltd. and British American Air Services, Ltd.*, [1937] 1 All E.R. 108; *Coe* v. *London and North Eastern Rail Co.*, [1943] 2 All E.R. 61.

As to damages in an action under the Fatal Accidents Acts, see 28 HALSBURY'S LAWS (3rd Edn.) 100 et seq., and for cases see 36 DIGEST 211 et seq. For the Fatal Accident Act, 1846, see 17 HALSBURY'S STATUTES (2nd Edn.) 4.

Cases referred to:

(1) *Griffiths* v. *Earl of Dudley* (1882), 9 Q.B.D. 357; 51 L.J.Q.B. 543; 47 L.T. 10; 46 J.P. 711; 30 W.R. 797, D.C.; 36 Digest (Repl.) 217, *1143*.

(2) *Haigh* v. *Royal Mail Steam Packet Co., Ltd.* (1883), 52 L.J.Q.B. 640; 49 L.T. 802; 48 J.P. 230; 5 Asp.M.L.C. 189, C.A.; 36 Digest (Repl.) 215, *1133*.

(3) *The Stella*, [1900] P. 161; 69 L.J.P. 70; 82 L.T. 390; 16 T.L.R. 306; 9 Asp.M.L.C. 66; 36 Digest (Repl.) 215, *1134*.

(4) *Williams* v. *Mersey Docks and Harbour Board*, [1905] 1 K.B. 804; 74 L.J.K.B. 481; 92 L.T. 444; 69 J.P. 196; 53 W.R. 488; 21 T.L.R. 397; 49 Sol. Jo. 417; 3 L.G.R. 529, C.A.; 36 Digest (Repl.) 210, *1108*.

(5) *British Columbia Electric Rail Co., Ltd.* v. *Gentile*, [1914] A.C. 1034; 111 L.T. 682, P.C.; 36 Digest (Repl.) 208, **1976*.

(6) *Seward* v. *The Vera Cruz* (1884), 10 App. Cas. 59; 54 L.J.P. 9; 52 L.T. 474; 49 J.P. 324; 33 W.R. 477; 1 T.L.R. 111; 5 Asp.M.L.C. 386, H.L.; 1 Digest 34, *265*.

Appeal from an order made by SWIFT, J., in an action tried by him without a jury.

The plaintiff, the widow of one John Nunan who was killed in consequence of the negligence of the defendants' servants, claimed to recover damages from the

defendants under the Fatal Accidents Acts, 1846 and 1864. The defendants admitted that the deceased man met his death owing to the negligence of the defendants' servants, but they relied on a condition applicable to the workman's ticket with which the deceased man was travelling as limiting their liability to the plaintiff to £100. This sum the defendants paid into court. A

In delivering a written judgment, SWIFT, J., said that the question was whether the claim of the plaintiff was limited by the agreement which her deceased husband made with the railway company that their liability should not exceed £100. By a number of decisions it had been established that the damages recoverable under the Fatal Accidents Act, 1946 and 1864, for the benefit of the widow or other person entitled was the pecuniary loss directly resulting to them from the death of the deceased. The measure of damages was a different measure of damages from that which an injured person was entitled to recover in respect of his personal injuries, and a jury, in assessing those damages, might have to consider matters which were quite immaterial when adjudicating upon a claim for personal injuries sustained by a plaintiff, and must disregard many matters the consideration of which would be very material to such a claim. HIS LORDSHIP continued: It seems to me that the right of action given to the executor or to the beneficiaries is clearly a different right of action from that which the deceased would have had if he had survived. There are certain factors which are common to both rights of action, and before the executor or beneficiaries can recover under the Fatal Accidents Act it is essential that they should show that certain rights would have existed in the deceased man had he lived, but once they have proved that those rights existed, and also satisfied the further conditions which the legislature has imposed upon them in giving them a right to sue, I think they have a different cause of action from that which the deceased would have had if he had survived, and when the decided cases come to be examined I am convinced that there is nothing in them which is inconsistent with this view. B C D E

In order that a person who has sustained injuries through the negligence of another may succeed in an action for damages he must prove (i) that he has been injured by the wrongful act, neglect, or default of the defendant; (ii) that he has thereby sustained damage; and (iii) that at the time the action is brought his cause of action still exists. If he proves injury, but cannot show any damage, or if he proves injury and damage, but it is established that the damage has been caused or contributed to by his own negligence [see now Law Reform (Contributory Negligence) Act, 1945], or if it be shown that he has barred or settled his claim, he has no right against the defendant. If he dies in consequence of the negligence of the defendant with his right to damages still existing, his executor or beneficiaries named in the statute have a right of action. They must prove (i) that the deceased person was injured by the wrongful act, neglect, or default of the defendant; (ii) that he died in consequence of such injury; (iii) that at the time he died he had a right to recover damages; and (iv) that the beneficiaries have suffered pecuniary loss from his death. If they prove these four things they have a cause of action, if they fail in any one of them they have no cause of action. It seems to be clear that there is something more given by the Fatal Accidents Act, 1846, to the beneficiary than a mere new principle of assessing damages. To succeed, they must not only show that the deceased has sustained injury through the neglect of the defendants which would have entitled him to damages had he lived, but they must also show that he has died, and that his death has occasioned them pecuniary loss. If during his life the deceased has so dealt with his cause of action that, at the moment of his death he has destroyed it, the executor or beneficiary cannot sue, for they are unable to prove the first essential condition imposed on them by the statute, namely, that the neglect is such as would, if death had not ensued, have entitled the party injured to maintain an action. In *Griffiths* v. *Earl Dudley* (1), a workman had contracted with his employer not to claim compensation for personal injuries under the Employers' Liability Act, 1880, and it was held that s. 1 of the Act did not render the workman's express contract not to claim compensation F G H I

A invalid. The contract made by the workman in that case was one which prevented him from suing his employer had he lived, and it seems to me clear that this was sufficient to bar any claim under the Fatal Accidents Acts. I do not think that case is any authority for the proposition that a person, whilst reserving a cause of action to himself in case he is injured, may bar the right of any one of the persons named in the Fatal Accidents Act, to bring an action if he is killed. B I do not find anything in the judgments to make me think that any such view was in the minds of the learned judges who decided that case. The decision seems to me to be completely supportable on the ground that at the time of the man's death he himself had no cause of action, and, therefore, the widow was not in a position to assert a claim, and I do not see in the judgments that any emphasis at all is laid upon the fact that the contract made between the workman and the C employer purported to bind his executor not to bring an action under Lord Campbell's Act.

In *Haigh* v. *Royal Mail Steam Packet Co., Ltd.* (2), a deceased man, a passenger by steamer, had contracted that the defendants should not be responsible for any act, neglect, or default whatsoever of the pilots, master, or mariners, and it was held that this provision exempted the defendants from liability in an action for the D loss of life of a passenger by negligence of the defendants' servants in collision with another ship. BRETT, M.R., said (49 L.T. at p. 804):

> "We think that if the passenger had not been killed but only injured he could not have recovered for the injury. If this is so, it follows that his executors cannot recover under Lord Campbell's Act."

E The reason, of course, was that the executors were unable to show the existence at the time of the death of a wrong for which the deceased could have maintained an action had he lived. In *The Stella* (3) the deceased man had agreed that "the company are relieved from all responsibility for any injury however caused that may be sustained by the person using this pass." GORELL BARNES, J., said ([1900] P. at p. 167):

F > "It is conceded that the widow and children can only claim for loss under Lord Campbell's Act where the passenger himself, if alive, could claim for injury done to himself."

He then considered the terms of the agreement, and, having come to the conclusion that the deceased man himself could not have claimed had he lived, disallowed the claim of the widow. In *Williams* v. *Mersey Docks and Harbour Board* G (4), the husband of the plaintiff sustained injuries in 1902, and died of those injuries in December, 1904. The action was one in which the defendants were acting within the protection of the Public Authorities Protection Act, 1893 [rep. by Law Reform (Limitation of Action) Act, 1954, s. 1], and they claimed that, as an action had not been commenced within six months after the neglect alleged against them, it could not be maintained. It was held by the Court of Appeal that their H view was correct. In the course of his judgment, MATHEW, L.J., said ([1905] 1 K.B. at p. 807):

> "It has been pointed out over and over again that the test of the right to sue under the Act is whether an action could have been maintained by the deceased in respect of his injuries. . . . It has been decided that, where an action by the deceased man was excluded by the terms of his employment, no I action could be maintained after his death by his representative; that, inasmuch as he could not, if alive have maintained an action, his representative could not do so. . . . Again, where the claim originally made by the deceased man was settled, it was held that the representative could not sue for damages for his death. . . . Again, where there was contributory negligence on the part of a deceased person it was held that his representative could not sue. The cases appear to establish a general principle that, where an action could not have been brought by the deceased person, it cannot be maintained in respect of the same accident by his representative."

In that case the deceased could not have maintained an action against the defendants at the time of his death or at any time more than six months after the neglect which was said to have caused the injury to him. A

From these authorities I think that it is clear that if the deceased man dies through an act of negligence on the part of another, that other is not liable to be sued under the Fatal Accidents Acts, 1846–1864, unless at the time of the death there was an existing cause of action, and such existing cause of action may B have been defeated by an antecedent agreement which prevents it ever arising, or by some act occurring at the moment of the default, such as contributory negligence, or by the deceased not pursuing his remedy within the proper time, or by the matter being settled. But if a cause of action exists at the time that the deceased died, and he was entitled at that moment to recover damages in respect of it then his executor or beneficiary named in the statute is given a new cause C of action, of which the original negligence and right to recover are essential factors, but it also requires the death of the deceased and pecuniary loss to the beneficiary to make the new cause of action complete. In the case which I am now considering, the deceased, at the time of his death, had a cause of action, and he had a right to recover damages. What his injuries were or would have been had he not been killed I do not know. It may be that they would have been slight, but D whatever they were he had a right to recover damages for the pain and suffering which they entailed, for any permanent injury which he might have suffered, and for any money which, in consequence of the neglect of the defendants, he should be out of pocket. By the bargain which he had made with the railway company, he could not recover for his personal injuries, however severe they may have been, more than £100, but a much smaller sum might have been adequate compensation E for him. It is impossible to say what his damages would have been had he lived; all that one can say is that at the time he died he had a cause of action for injuries and a right to recover damages in respect of them, though he was not entitled, owing to his agreement, to recover more than £100 for his personal injuries. In those circumstances, his widow proves that he had a right of action to recover damages, that he is dead, and that she has thereby suffered pecuniary loss. It is F contended on behalf of the defendants that her pecuniary loss cannot exceed £100. I do not agree with this contention. Once she has proved that she has a right to sue under the Fatal Accidents Acts, the statute fixes the measure of her damages, they are to be proportioned to the injury which a jury thinks she has sustained through the death of her husband. I do not think that in this case the deceased man ever attempted to bargain as to the rights of his executor or widow in case G he was killed. A man may clearly bargain as to his own personal claim for his injuries, but it does not follow that because he may bargain as to his own rights, he either does or may do so with regard to the rights of others, and if he had attempted to do so, I do not think he would have been acting within the scope of his powers. The statute has given the right to the beneficiaries provided that the condition upon which they are to have that right is fulfilled, and I do not think H that anybody is entitled to interfere with the statutory method of assessing the beneficiaries compensation except the executors or beneficiaries themselves. The widow's compensation is an entirely different matter from that which the compensation of the deceased would have been had he lived and recovered damages, and I can see no reason why a bargain made by the deceased as to the amount of compensation which he should receive for a broken leg or damaged ribs or any I other personal injuries should affect the claim of the widow to compensation for his death. Had the deceased contracted so as to prevent any right of action accruing to him, or had he destroyed it before he died, the widow clearly would have had no claim, but since he has not done that, she has a claim under the Fatal Accidents Acts, and I can see no reason for holding that there is anything in her husband's contract to interfere with the assessment of that claim in the ordinary way. Sitting here as a jury and assessing the damages in accordance with the directions of the Act of Parliament, and laying down for myself those

principles as to the assessment of damages in a case of this sort, which I should think it right to state to a jury for their guidance were they dealing with the matter, I have come to the conclusion that the amount proportioned to the injury resulting from the death of John Nunan to the plaintiff is £800, and I give judgment for the plaintiff for that amount with costs. The defendants appealed.

Sir John Simon, K.C., *Thorn Drury, K.C.*, and *Cecil Ince* for the defendants. *Schiller, K.C.*, and *H. D. Samuels*, for the plaintiff, were not called on to argue.

BANKES, L.J.—In this action the question was raised whether or not the plaintiff, who was suing under what is commonly called Lord Campbell's Act, has a right of action in the following circumstances. Her husband was, on Aug. 21, 1922, being conveyed as a passenger by the defendant railway company under a workman's ticket, and owing to the admitted negligence of the company he lost his life. It was not disputed, as I understand it, by the plaintiff's counsel in the court below that the deceased man was travelling under a contract which contained a provision that the liability of the company, so far as he was concerned, was limited to a sum not exceeding £100. I can foresee that a number of questions might be raised as to what the exact contract was between these parties, but it is not necessary to determine that, because the case has been brought upon the footing that the deceased man was travelling under a contract, one of the terms of which was that the liability of the company was limited to a sum not exceeding £100, in case of injury resulting to the deceased man in respect of which the company were liable.

In my opinion, having regard to the language of Lord Campbell's Act itself, and to the decisions upon the language of the Act to which we have been referred, SWIFT, J.'s view was the only possible one, and I entirely agree with his careful and clearly worded judgment. It is not really necessary to add to what he said, but having regard to the argument, I will state my views in reference to the matter. The statute provides, by s. 1:

> "Whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

The first material question is: At what point of time is it necessary to consider whether the deceased man would have had such a right of action as is indicated in the section? That point has been settled by the Privy Council. LORD DUNEDIN refers to it specifically in *British Columbia Electric Rail. Co., Ltd.* v. *Gentile* (5) where he says ([1914] A.C. at p. 1041):

> "Their Lordships are of opinion that the punctum temporis at which the test is to be taken is at the moment of death, with the idea, fictionally, that death has not taken place."

So one starts upon the authority of that decision, with the question: What was the deceased's position at that particular moment? Other authorities have been cited to us, under which it is plain that at that moment he might have been entitled to maintain an action and recover damages, or he might have disentitled himself to maintain such an action and recover damages, and that disentitling—if I may use that expression—may have been the result of his own act or the result of the operation of law. For instance, he might never have been entitled to maintain the action by reason of his own contributory negligence [see now Law Reform (Contributory Negligence) Act, 1945], or by reason of a contract made by him by which he agreed that in no circumstances would he claim any damages in respect

of the particular contract in question, or any breach thereof, or failure to perform the contract in question, or by reason of a settlement of his claim. Our attention has been called to a decision (*Williams* v. *Mersey Docks and Harbour Board* (4)) in which it was held that where a man had a right of action but failed to take advantage of it within the time limited by the Public Authorities Protection Act, 1893 [rep. by Law Reform (Limitation of Actions, &c.) Act, 1954, s. 1], he ceased, within the meaning of the statute of 1846, at the material time to have a right to maintain an action and to recover damages. None of those disentitling causes was present here, and the sole contention is that the case does not fall within the language of the statute because the deceased had, by his agreement with the company, disentitled himself to claim more damages than £100.

The statute, however, says nothing about the quantum of damages. It speaks about maintaining an action and recovering damages; it may be small or large damages; it may be special or general damages. The language of the statute is perfectly general and I cannot see any indication in the language of the statute why it should not be read in its fullest and most general sense. So reading it, the fact is that, on the admission of the railway company, the deceased was at the material date entitled to maintain and to recover damages, and in those circumstances it seems quite immaterial to consider what the amount of the damages would have been which he might have recovered if he had not been killed, and for this reason, that the quantum of damages to which the personal representative or the dependant is entitled under the statute is something quite different from the amount of damages which the man himself might recover. It is measured on an entirely different basis. The amount of the damages to which the dependant is entitled is compensation properly so called, in which all the circumstances are to be taken into account in arriving at the amount not only for the purpose of substantiating a large claim, but also to reduce the amount which the claimant may be putting forward. It has been held by Lord Selborne, and also by Lord Blackburn, in *Seward* v. *Vera Cruz* (6) (10 App. Cas. at pp. 67 and 70) that the cause of action of the dependants under s. 2 of the statute is a new cause of action in respect of which the damage is something quite different from that upon which the deceased man would himself have been entitled to recover, and estimated on an entirely different basis. On those grounds I think that the view taken by the learned judge was really the only possible one, and, therefore, that the appeal fails and must be dismissed with costs.

SCRUTTON, L.J.—This is an action brought by a dependant under Lord Campbell's Act, and the answer made is that the dependant is prevented from recovering more than the named amount by a contract which the dead man had made with the railway company. I deal with the case on the assumption that he had made a contract with the railway company by which, if he suffered damage by their negligence, he could not recover more than £100, because counsel for the widow has said that he does not propose to argue to the contrary. The Fatal Accidents Act has, I think, been interpreted by authorities binding upon us to mean that a dependant has a fresh cause of action, but he cannot recover on that cause of action unless the deceased man at the time of his death had, in the language of the statute, a right to maintain an action and recover damages for the act, neglect, or default of the defendants. He may have lost such a right by the fact that he was guilty of contributory negligence, or because he has made a contract by which he excluded himself from the right to claim damages, and in such a case as that the decision of the Court of Appeal in *Haigh* v. *Royal Mail Steam Packet Co., Ltd.* (2) and the decision in *The Stella* (3), show that such a contract would bar the right of his dependants. He may have lost his right because he has not claimed it within the period of limitation imposed by the statute [now three years: see s. 3 of the Act of 1846 as amended by the Law Reform (Limitation of Actions) Act, 1954, s. 3], and, therefore, can no longer himself sue, or by reason of having released the right by accord and satisfaction.

In all those cases, if he could not bring an action at the time of death, neither can his dependants.

It is argued that, if that is so, his dependants must be equally bound if he has made an agreement which, while leaving him a cause of action, limits the amount which he can recover. I agree that it looks odd that he should be able to bar his dependants entirely, but not in part, but one has to be guided by the words of the statute, and it appears to me that the question which I put to counsel for the railway company illustrates the extraordinary difficulties into which one would get if one tried to transfer the provisions as to the amount of liability (as distinguished from liability itself) from the contract of the passenger to the rights of his dependants. Supposing that the passenger has made a contract with the railway company that unless he gives notice within seven days after the accident he can only recover 50 per cent. of his proved damages. How is one to transfer that to the rights of the dependants? Their damages are not the same damages as the damages of the passenger; they are calculated on quite a different measure; they include matters which the dead man could not claim, and they exclude matters which he could claim; and how is one to apply the provision as to 50 per cent. of one set of proved damages to quite a different set of proved damages? The only way that occurred to me, when I was thinking about it during the argument, was to say that one has to treat the damages over £100 as being a separate cause of action, and one has to say that, while the dead man could bring an action for damages up to £100, he could not bring an action for sums over £100, and, therefore, he, not being able at the time of his death to bring an action for sums over £100, his dependants could not bring an action for sums over £100 either. That has the difficulty that it splits up a cause of action, a thing which is unknown in English law; one cannot have a cause of action for £1 of damages and another cause of action for the second £1 of damages, and so on. That suggestion being the only one that occurred to me, and getting no answer from counsel for the railway company as to how he would deal with the question that raised the difficulty, I regretfully come to the conclusion that, if neither he nor I can think of the answer, there is not one. In these circumstances I must follow the words of the statute, which compel me to say in this case that the dead man at the time of his death could have brought an action for damages, and, therefore, his dependants can bring an action for their own, and quite different, damages. For this reason it seems to me that the appeal must be dismissed.

ATKIN, L.J.—I agree. Assuming, as has been assumed in argument, that there was a contract which did limit the liability of the company to the deceased man to the sum of £100, I agree that that contract does not defeat the claim of the plaintiff in this case. It was put in the pleadings, and for some time it was argued before us in an alternative form. It was said either that the condition applied to the claim of the widow so that she could not recover more than £100 damages, or that the fact that there was a limitation on the deceased's right to recover damages, prevented the widow from recovering any damages of any kind. I think that, finally, the last alternative was the one that was put before the court. It seems to me that that contention is wrong. The position of a dependant under Lord Campbell's Act is one in which he has quite a different cause of action from that which the deceased man had. In the words of LORD BLACKBURN in *Seward* v. *Vera Cruz* (6) (10 App. Cas. at p. 70), the action is "new in its species, new in its quality, new in its principle, in every way new." One may say that it is an action for damages suffered by a different person under a different cause of action, and with a completely different measure of damages. In those circumstances, if the contract made by the deceased is only a contract that puts a limit to the amount of damages that he can recover, how has that any relation at all to the claim brought by the dependants on a different cause of action and in respect of a different measure of damages? It seems to me that it can have

none. The circumstances may be entirely different. The deceased person could, if he were alive, only, bring an action to recover the compensation for his own personal injuries, injuries which ex hypothesi must fall short of the consequences of death. The dependants bring their action substantially for the loss of the breadwinner and the real supporter of the family. The deceased person, under the contract in question, might have been entitled to recover, in the facts of any given case (possibly in the facts of this case, if he survived), damages amounting to the whole amount of the damages suffered by him; £100 might give him the full amount, and it might be even in excess of the amount that he was entitled to receive. For my part, I find myself quite unable to find any logical relation between the two facts, namely, that there should be a limit to the damages recoverable by the deceased, and an inability to sue on the part of the dependants. The words of s. 1 of the Act of 1846 are satisfied. The deceased man had a right, at his death, to maintain an action, and there was a person who would have been liable to pay damages. In those circumstances, it seems to me that there is no defence to the action, and for these reasons which are the reasons given, I think, in substance, by the learned judge in his carefully considered judgment, I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *William Bishop*; *W. C. Crocker.*

[*Reported by* W. C. Sandford, Esq., *Barrister-at-Law.*]

KENT *v.* ATKINSON

[Probate, Divorce and Admiralty Division (Hill, J.), March 26, 28, April 17, 1923]

[Reported [1923] P. 142; 92 L.J.P. 54; 129 L.T. 473; 39 T.L.R. 404]

Divorce—Petition for damages—Claim by petitioner against co-respondent—Petition filed after death of wife—Matrimonial Causes Act, 1857 (20 & 21 *Vict.*, *c.* 85), *s.* 33.

A petition for damages for adultery can be maintained by a husband against the co-respondent notwithstanding that the wife is no longer alive at the time of the filing of the petition. By s. 33 of the Matrimonial Causes Act, 1857, the petition must be heard and tried "on the same principles, in the same manner, and subject to the same or the like rules and regulations, as actions for criminal conversation" (abolished by s. 59 of the Act). An action for criminal conversation could have been maintained by a writ issued after the death of the wife, and there was nothing in the Matrimonial Causes Acts which was inconsistent with that principle applying to a petition under s. 33.

Notes. Applied: *O'Neill v. O'Neill and Piggott*, [1949] 2 All E.R. 649. Considered: *Jacobs* v. *Jacobs and Ceen*, [1950] 1 All E.R. 96.

As to the effect of the death of parties to a matrimonial suit, see 12 Halsbury's Laws (3rd Edn.) 380, 381; and for cases see 27 Digest (Repl.) 331, 332. For Matrimonial Causes Act, 1857, see 11 Halsbury's Statutes (2nd Edn.) 816; and for Act of 1950, see ibid., vol. 29, p. 388.

Cases referred to:

(1) *Bernstein* v. *Bernstein*, [1893] P. 292; 69 L.T. 513; sub nom. *Bernstein* v. *Bernstein, Turner and Sampson*, 63 L.J.P. 3; 9 T.L.R. 639; 37 Sol. Jo. 730; 6 R. 609, C.A.; 27 Digest (Repl.) 403, *3320*.

(2) *Cox* v. *Cox and Warde*, [1906] P. 267; 75 L.J.P. 75; 95 L.T. 546; 22 T.L.R. 557; 27 Digest (Repl.) 331, *2745*.

(3) *Baker* v. *Bolton* (1808), 1 Camp. 493, N.P.; 36 Digest (Repl.) 206, *1081*.

(4) *Osborn* v. *Gillett* (1873), L.R. 8 Exch. 88; 42 L.J.Ex. 53; 28 L.T. 197; 11 W.R. 409; 36 Digest (Repl.) 221, *1173*.

(5) *Clark* v. *London General Omnibus Co., Ltd.*, [1906] 2 K.B. 648; 75 L.J.K.B. 907; 95 L.T. 435; 22 T.L.R. 691; 50 Sol. Jo. 631, C.A.; 36 Digest (Repl.) 207, *1083*.

(6) *Wilton* v. *Webster* (1835), 7 C. & P. 198, N.P.; 27 Digest (Repl.) 549, *4983*.

(7) *M.* v. *M. and A.* (1910), 26 T.L.R. 305; 54 Sol. Jo. 309; 27 Digest (Repl.) 536, *4822*.

(8) *Stocker* v. *Stocker, Brice and Patterson*, [1917] P. 264; 86 L.J.P. 156; 117 L.T. 543; 33 T.L.R. 533; 62 Sol. Jo. 232; 27 Digest (Repl.) 404, *3336*.

(9) *Monsell* v. *Monsell and Cain*, [1922] P. 34; 91 L.J.P. 33; 126 L.T. 544; 38 T.L.R. 197; 27 Digest (Repl.) 536, *4823*.

Also referred to in argument:

Macfadzen v. *Olivant* (1805), 6 East, 387; 2 Smith, K.B. 486; 102 E.R. 1335; 27 Digest (Repl.) 88, *670*.

Ramsden v. *Ramsden and Luck*, *Ramsden* v. *Ramsden* (1886), 2 T.L.R. 867; 27 Digest (Repl.) 409, *3383*.

Bullmore v. *Wynter* (1883), 22 Ch. D. 619; 47 J.P. 373; sub nom. *Re Bullmore*, *Bullmore* v. *Wynter*, 52 L.J.Ch. 456; 48 L.T. 309; sub nom. *Bulmore* v. *Wynter*, 31 W.R. 396; 44 Digest 875, *7314*.

Petition for damages.

The petitioner, George Charles Kent, claimed damages from the respondent, Edgar Hamilton Atkinson, in respect of his adultery with the petitioner's wife Florence Annie Maude Kent, who died on July 13, 1921. The petition was filed on May 2, 1922. The respondent Atkinson, by his answer, denied that he had been guilty of adultery, and also pleaded that the court had no jurisdiction to entertain the suit after the death of the wife.

By s. 33 of the Matrimonial Causes Act, 1857 [see now s. 30 of the Matrimonial Causes Act, 1950 (29 HALSBURY'S STATUTES (2nd Edn.) 388)]:

"Any husband may, either in a petition for dissolution of marriage or for judicial separation, or in a petition limited to such object only, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner and such petition shall be served on the alleged adulterer and the wife, unless the court shall dispense with such service, or direct some other service to be substituted; and the claim made by every such petition shall be heard and tried on the same principles, in the same manner, and subject to the same or the like rules and regulations as actions for criminal conversation are now tried and decided in courts of common law. . . ."

The action for criminal conversation was abolished by s. 59 of the Act of 1857.

Bayford, K.C. (with him *T. Bucknill*) for the respondent Atkinson.

Darnley Clifton (with him *T. M. Hopkins*) for the petitioner.

Cur. adv. vult.

April 17. **HILL, J.**, read a judgment in which, after stating the facts, he said: The question on the present issue is whether such a claim, brought after the death of the wife, is sustainable at all. It is a question of some difficulty. It turns on the interpretation of s. 33 of the Matrimonial Causes Act, 1857. By that Act Parliament abolished the old action of criminal conversation and re-modelled the law applicable to claims for damages for adultery: see LINDLEY, L.J.'s judgment in *Bernstein* v. *Bernstein* (1), making them cognisable only by the Divorce Court. As I understand the decisions, the effect of the section is this. One has to read into the section the principles of the common law as to actions for criminal conversation, and then to strike out so much of them as is inconsistent with the provisions of the

Divorce Acts, which are to be regarded as overriding provisions. Thus, no claim for damages can be maintained if the adultery has been condoned, for s. 30 overrides the common law principle: *Bernstein* v. *Bernstein* (1), nor can it be maintained if the adultery is one to which a discretionary bar applies, and the discretion is not exercised in favour of the petitioner: *Cox* v. *Cox and Warde* (2), for s. 31 overrides any inconsistent common law principle. The issue in the present case therefore depends on two questions: (i) According to the principles of the common law, could an action for criminal conversation have been maintained by writ issued after the death of the wife? (ii) If it could, are there overriding provisions of the Divorce Acts which say that it cannot be maintained?

As to (i) the action was for a wrong done, and the cause of action arose when the wrong was done. It was a personal action such as died with the person, but the persons concerned were the injured husband and the wrongdoer, the adulterer. The wife was only the means whereby the wrong was done, and there was no more reason why the cause of action should die with the death of the wife where the wrong was adultery than there is reason why the cause of action should die with the death of the wife where the wrong was negligence causing damage. In neither case could the death of the wife give any cause of action at common law. But negligence causing damage to the husband, between the injury to the wife and her death, gave a cause of action unaffected by the death of the wife before action was brought: *Baker* v. *Bolton* (3); just as it did in the case of a servant: *Osborn* v. *Gillet* (4); *Clark* v. *London General Omnibus Co., Ltd.* (5). The matter is, I think, really decided by *Wilton* v. *Webster* (6). If the death of the wife pending the suit did not destroy the cause of action, but only went in mitigation of damages, I can see no reason for saying that the death of the wife before the action was brought had any different effect. As I have referred to the analogy of actions for negligence causing damage, it is well to point out that Lord Campbell's Act has no application to an action for damages by adultery, for the act or default would not have entitled the wife (if death had not ensued) to maintain an action.

(ii) There is no doubt that under s. 33 the husband can bring a petition for damages as an independent proceeding, and not merely as a proceeding ancillary to a petition for divorce or judicial separation. The section expressly so provides. It has been decided that if the wife and the co-respondent are served, and the wife dies pending the suit, the petition for damages can still be maintained: *M.* v. *M. and A.* (7). It has also been decided that if a wife and two co-respondents are served, and damages are claimed against the first co-respondent and a decree nisi is pronounced on the ground of adultery with the second co-respondent, the case against the first co-respondent standing over, the petitioner is still entitled to prosecute his claim for damages against the first co-respondent: *Stocker* v. *Stocker, Brice and Patterson* (8). It has been decided that if a decree nisi is obtained and damages are given against the co-respondent, and he pays them into court, and the wife thereafter dies, the court can still deal with the damages: *Monsell* v. *Monsell and Cain* (9). In all these cases the wife was living at the date of the petition, and was served. They are authorities for saying that the suit for damages is not abated by the death of the wife. They do not finally determine that the suit can be instituted after the death of the wife.

If s. 33 is inconsistent with the former common law principle it is because (i) it provides that any husband may claim damages, (ii) the petition shall be served on the wife, (iii) the damages recovered are placed under the control of the court, and it is argued that the Act in s. 33 and elsewhere contemplates a husband and a wife both living at the institution of the suit. I do not pretend that the point is not difficult, but I have come to the conclusion that the Act is not so clearly inconsistent with the common law principle as to override it. "Husband" is in the Act sometimes used to include one who was a husband, e.g., in s. 32 (since repealed), as in its substitute, the Act of 1907 [see now Matrimonial Causes Act, 1950, s. 19 (2)]. I think it follows from the cases I have cited that if a husband obtained a decree absolute on the ground of adultery with a man unknown, and

afterwards discovered the adulterer, he could bring a petition for damages, serving the adulterer and the woman whom he had divorced. If so, "wife" is used to include one who was a wife. Then, is service on the woman a condition? Service on the wife was an innovation upon the common law. The court can dispense with it if the woman is alive. I cannot bring myself to think that because the course of nature has made service on the woman impossible, therefore the suit cannot be maintained. The death of the wife makes it impossible for the court to deal with the damages in her favour, but *Monsell* v. *Monsell and Cain* (9) shows that damages can be dealt with, notwithstanding the death of the wife. I hold that the common law principle is not overridden by any provision of the Matrimonial Causes Acts, and that a suit for damages for adultery can be maintained, notwithstanding that the wife is no longer alive at the time of the institution of the suit. I, therefore, decide in favour of the petitioner, and he must have the costs of the issue.

Solicitors: *H. Anderson*; *Wansey, Stammers & Co.*

[*Reported by* J. A. C. SKINNER, ESQ., *Barrister-at-Law.*]

ATTORNEY-GENERAL *v.* ADELAIDE STEAMSHIP CO., LTD.

[HOUSE OF LORDS (Viscount Cave, L.C., Lord Shaw, Lord Sumner, Lord Parmoor and Lord Wrenbury), February 26, March 23, 1923]

[Reported [1923] A.C. 292; 92 L.J.K.B. 537; 129 L.T. 161; 39 T.L.R. 333; 67 Sol. Jo. 455; 16 Asp.M.L.C. 178; 28 Com. Cas. 315]

Insurance—Marine insurance—Insurance against "consequences of warlike operations"—Ship engaged in warlike operation—Negligent navigation—Collision—Right to recover.

By cl. 18 of the Admiralty Charterparty T.99 the Admiralty was not liable for loss or damage to a vessel requisitioned under the charter due to any cause arising as a sea risk. By cl. 19: "The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following or similar but not more extensive clause: 'Warranted free of . . . all consequences of hostilities or warlike operations. . . .' " During the course of what was admittedly a warlike operation and while she was proceeding at night at high speed and without lights according to Admiralty orders, the *W.*, a ship requisitioned under the charter, was in collision with another vessel. In a collision action it was held that the *W.* had been guilty of negligence and was solely to blame. On a petition of right by which the owners of the *W.* sought to recover under cl. 19 of the charter in respect of damage received by the *W.* and their liability to the other vessel,

Held: the fact that the warlike operation in which the *W.* was engaged at the time of the collision was being conducted negligently did not cause the operation to cease to be a warlike operation, and, therefore, the loss suffered by the owners of the *W.* was a consequence of a warlike operation, and they were entitled to succeed.

Per LORD SUMNER and LORD WRENBURY: If the collision had been the result of a wilful act by those navigating the *W.* there might have been an abandonment of the warlike operation and the only cause of the loss the act of the *W.* herself.

Decision of Court of Appeal, [1923] 1 K.B. 59, affirmed.

Insurance—Fire—Loss caused by negligence of assured.
Insurance—Motor insurance—Loss caused by negligence of assured.

Per LORD WRENBURY: If I insure my house against fire, or my carriage or car against road risks, the risk that my servant may negligently set the house on fire, or that my driver may drive negligently and cause a collision, is exactly one of the risks against which I seek insurance. . . . The fire or collision is the causa proxima of the loss, the negligence is a cause more remote.

Notes. Proceedings against the Crown by petition of right were abolished by the Crown Proceedings Act, 1947 (6 HALSBURY'S STATUTES (2nd Edn.) 46), for which see the present procedure for the enforcement of claims against the Crown.

Applied: *Board of Trade* v. *Hain Steamship Co., Ltd.*, [1929] All E.R.Rep. 26. Considered: *Clan Line Steamers* v. *Board of Trade, The Clan Matheson*, [1929] All E.R.Rep. 17; *Yorkshire Dale Steamship Co.* v. *Minister of War Transport* (*The Coxwold*), [1942] 2 All E.R. 6; *Liverpool and London War Risk Association, Ltd.* v. *Ocean Steamship Co., Ltd.*, [1947] 2 All E.R. 586. Referred to: *Adelaide Steamship Co.* v. *R.* (1925), 95 L.J.K.B. 213; *Cayzer, Irvine & Co., Ltd.* v. *Board of Trade*, [1927] 1 K.B. 269; *Clan Line Steamers, Ltd.* v. *Liverpool and London War Risks Association, Ltd.*, [1942] 2 All E.R. 367; *Larrinaga Steamship Co.* v. *R.*, [1943] 1 All E.R. 450.

As to loss by war risks under a marine policy, fire insurance, and motor insurance, see 22 HALSBURY'S LAWS (3rd Edn.) 76 et seq., 303, 353; and for cases see 29 DIGEST 226–230, 305 et seq., 408.

Cases referred to:

(1) *Re Peninsular and Oriental Branch Service and Commonwealth Shipping Representative*, [1922] 1 K.B. 706; 91 L.J.K.B. 142; 127 L.T. 133; 38 T.L.R. 433; 15 Asp.M.L.C. 522, C.A.; affirmed sub nom. *Commonwealth Shipping Representative* v. *Peninsular and Oriental Branch Service*, [1923] A.C. 191; 92 L.J.K.B. 142; 128 L.T. 546; 39 T.L.R. 133; 67 Sol. Jo. 182; 28 Com. Cas. 296; 16 Asp.M.L.C. 33, H.L; 29 Digest 226, *1838*.

(2) *Busk* v. *Royal Exchange Assurance Co.* (1818), 2 B. & Ald. 73; 106 E.R. 294, 29 Digest 206, *1651*.

(3) *Trinder, Anderson & Co.* v. *Thames and Mersey Marine Insurance Co., Trinder Anderson & Co.* v. *North Queensland Insurance Co., Trinder, Anderson & Co.* v. *Weston, Crocker & Co.*, [1898] 2 Q.B. 114; 67 L.J.Q.B. 666; 78 L.T. 485; 46 W.R. 561; 14 T.L.R. 386; 8 Asp.M.L.C. 373; 3 Com. Cas. 123, C.A.; 29 Digest 196, *1562*.

(4) *Inui Gomei Kaisha* v. *Attolico* (1918), Lloyd's List, July 20; (1919), Lloyd's List, Feb. 10.

(5) *Britain Steamship Co.* v. *R.*, *Green* v. *British India Steam Navigation Co., British India Steam Navigation Co.* v. *Liverpool and London War Risks Association*, [1919] 1 K.B. 575, 632; 88 L.J.K.B. 521; 120 L.T. 275; 35 T.L.R. 269, 271; on appeal, [1919] 2 K.B. 670; 88 L.J.K.B. 1271; 121 L.T. 553, 559; 35 T.L.R. 728; 63 Sol. Jo. 736; 14 Asp.M.L.C. 507, 513, C.A.; affirmed, [1921] 1 A.C. 99; 89 L.J.K.B. 881; 123 L.T. 721; 36 T.L.R. 791; 64 Sol. Jo. 737; 15 Asp.M.L.C. 58; 25 Com. Cas. 301, H.L.; 29 Digest 230, *1860*.

(6) *British and Foreign Steamship Co.* v. *R.*, [1917] 2 K.B. 769; 86 L.J.K.B. 1392; 117 L.T. 94; 33 T.L.R. 520; 14 Asp.M.L.C. 121; affirmed, [1918] 2 K.B. 879; 87 L.J.K.B. 910; 118 L.T. 640; 34 T.L.R. 546; 62 Sol. Jo. 701; 14 Asp.M.L.C. 270, C.A.; 29 Digest 228, *1849*.

(7) *Larchgrove* (*Owners*) v. *R.* (1919), 36 T.L.R. 108; 29 Digest 229, *1853*.

(8) *Ionides* v. *Universal Marine Insurance Co.* (1863), 14 C.B.N.S. 259; 2 New Rep. 123; 32 L.J.C.P. 170; 8 L.T. 705; 10 Jur.N.S. 18; 11 W.R. 858; 1 Mar.L.C. 353; 143 E.R. 445; 29 Digest 229, *1854*.

(9) *Ard Coasters, Ltd.* v. *R.* (1919), 35 T.L.R. 604; affirmed (1920), 36 T.L.R. 555, C.A.; subsequent proceedings sub nom. *Richard de Larrinaga* v.

Admiralty Comrs., [1920] 1 K.B. 700; 122 L.T. 551; 36 T.L.R. 147; affirmed, [1920] 3 K.B. 65; 89 L.J.K.B. 842; 123 L.T. 485; 36 T.L.R. 595, C.A.; affirmed sub nom. *A.-G.* v. *Ard Coasters, Ltd., Liverpool and London War Risks Insurance Association, Ltd.* v. *Steamship Richard de Larrinaga Marine Underwriters*, [1921] 2 A.C. 141; 91 L.J.K.B. 31; 125 L.T. 548; 37 T.L.R. 692; 15 Asp.M.L.C. 353; 26 Com. Cas. 352, H.L.; 29 Digest 228, *1851*.

(10) *Charente Steamship Co., Ltd.* v. *Director of Transports* (1922), 38 T.L.R. 148; affirmed 38 T.L.R. 434; 41 Digest 991, *8754*.

Also referred to in argument:

Thompson v. *Hopper* (1858), E.B. & E. 1038; 27 L.J.Q.B. 441; 32 L.T.O.S. 38; 5 Jur.N.S. 93; 6 W.R. 857; 120 E.R. 796, Ex. Ch.; 29 Digest 205, *1642*.

Appeal from an order of the Court of Appeal on a petition of right.

The respondents, suppliants on the petition of right, were an Australian steamship company of Melbourne. In August, 1915, the *Warilda*, belonging to the respondents, was requisitioned by the Australian government for use as a transport for bringing Australian troops to England. In July, 1916, she was taken over by the British Admiralty for use as a military hospital ship upon the terms of the charterparty T.99, which provided that the Admiralty should accept liability for all war risks, including "all consequences of hostilities or warlike operations" and that the respondents should be liable for marine risks. The vessel was described as an "ambulance transport to be treated as a troop transport." She was armed with one 12-pounder gun placed aft and had instructions to ram any submarine sighted. On Mar. 24, 1918, the *Warilda* was carrying wounded men from Havre to Southampton when, about 4 a.m., she came into collision with another vessel, the *Petingaudet*, and both vessels suffered considerable damage. The night was dark and hazy and the sea smooth. By order of the Admiralty the *Warilda* was being navigated at full speed without any lights showing, and the *Petingaudet* was being navigated without masthead lights. In an action by the owners of the *Petingaudet* against the respondents it was held that the *Warilda* was guilty of negligence, she alone was to blame for the collision, and the respondents were liable for the damage suffered by the *Petingaudet*. The respondents now claimed from the Crown a large sum for the damage sustained by the *Warilda* on the ground that their vessel was injured in consequence of warlike operations and the Admiralty had undertaken this risk. The Crown, in their plea, asserted that the collision was due to the negligent navigation of the *Warilda* and was the result of a maritime risk. The Court of Appeal held, reversing the decision of MCCARDIE, J., (i) that the *Warilda* was engaged in a warlike operation at the time of the collision; and (ii) that in the circumstances the negligence of those in charge of the *Warilda* was immaterial, and the Admiralty were liable. The Attorney-General appealed.

Raeburn, *K.C.*, and *Balloch* (*Sir Ernest Pollock*, *K.C.*, with them) for the appellant.

MacKinnon, *K.C.*, *Dunlop*, *K.C.*, and *Dumas* for the respondents.

Their Lordships took time for consideration.

Mar. 23. The following opinions were read.

VISCOUNT CAVE, L.C.—In the month of March, 1918, the steamship *Warilda* was under requisition by the Admiralty on the terms of the well-known form of charterparty called "T.99." She was being used as an ambulance transport for the conveyance of wounded combatants from France to this country. She was painted grey and armed for defence against enemy submarines; and she had instructions to sail at night and without lights and at the maximum speed compatible with safe navigation. On the night of Mar. 23/24, the *Warilda* was carrying about 600 wounded men, with the usual medical and nursing staff, from Havre to Southampton, and at about 4 a.m. on the 24th, when she was proceeding at

about fifteen knots and without lights, she came into collision off St. Katherine's Head with the steamship *Petingaudet*, which was carrying a cargo of coke from Shields to Rochefort, with the result that serious damage was caused to both vessels. The owners of the *Petingaudet* having brought an action for damage caused to her by the collision, it was held that the collision was due to the negligence of the master of the *Warilda* in not giving way or slackening speed, and judgment was given for the owners of the *Petingaudet*. This decision was affirmed by the Court of Appeal and by this House.

The question of insurance liability then arose. The charterparty T.99 contained the well-known cll. 18 and 19, cl. 18 providing that the Admiralty should not be liable for injury by collision or other cause arising as a sea risk, and cl. 19 providing (in effect) that the Admiralty should be liable for the risks of war including "all consequences of hostile or warlike operations." The owners of the *Warilda* presented a petition of right, alleging that the collision was a consequence of hostilities or warlike operations and claiming to be indemnified against their loss. The trial judge, McCardie, J., decided in favour of the Crown; but his decision was reversed by the Court of Appeal (consisting of Bankes, Warrington and Atkin, L.JJ.), who declared the Crown liable for such sum as should be found due to the suppliants by the Commercial Court. Thereupon the present appeal was brought.

Two questions were argued in the courts below, namely, first, whether at the time of the collision the *Warilda* was engaged in a warlike operation, and, secondly, whether, if so, the collision was a consequence of that warlike operation; and the case for the appellant raised both questions. But before the appeal came on for argument before your Lordships, this House had decided *The Geelong* (*Commonwealth Shipping Representative* v. *Peninsular and Oriental Branch Service*) (1); and counsel for the appellant very properly admitted that in view of that decision and of the reasoning upon which it was founded, he could no longer contend that the *Warilda* was not engaged in a warlike operation. The first point, therefore, was not argued in this House. The second point was put on behalf of the appellant in this way. It was said that the warlike operation of the *Warilda* was not the proximate cause of the collision, that the negligence of her master was a new factor intervening between the warlike operation and the collision, and that the collision was a consequence of that negligence and not of the warlike operation. The Court of Appeal unanimously rejected this argument, and held the Crown responsible. I agree with the view taken by the Court of Appeal. By the terms of the charterparty, the Crown is liable for "all consequences" of hostilities or warlike operations, nothing being said about their being skilfully or unskilfully conducted. The navigation of the *Warilda* in those waters at full speed without lights was clearly a warlike operation, which in itself involved peril to other ships. The operation may have been negligently conducted so far as the safety of other vessels was concerned, but the same may be said of many other warlike operations. The negligence of the master may have contributed to the loss, but its dominant and effective cause was the operation in which the vessel was engaged, and the liability, therefore, attaches. Cases such as *Busk* v. *Royal Exchange Assurance Co.* (2) and *Trinder Anderson & Co.* v. *Thames and Mersey Marine Insurance Co.* (3) may not be directly in point, but the reasoning in those cases affords some analogy to the present, and it is not favourable to the appellant. In my opinion this appeal fails and should be dismissed with costs, and I move your Lordships accordingly.

LORD SHAW.—The steamship *Warilda* was in the year 1915 requisitioned by the Australian government as a transport for bringing Australian troops to England. In July, 1916, she was taken over by the British government for use as a military hospital ship, and she was in fact so used for some time. She was painted white, carried lights and bore a white flag with a red cross, all as provided by the Geneva Convention of 1896 and by the Hague Conference of 1907. As a result, however, of the conduct of the German naval authorities in disregarding the sanctity of

hospital ships, steps were rendered necessary in particular for the protection of vessels in the hospital service across the English Channel. The *Warilda* was, accordingly, taken off the list of hospital ships and was thereafter known as an ambulance transport and treated in the same manner as a troop transport. This was in accordance with the written order of the Ministry of Shipping. The vessel was painted grey with dazzle markings, the Red Cross flag ceased to fly and she steamed without lights. A 12-pounder gun was placed aft and two or three men of the Royal Navy were taken on board for the purpose of erecting the gun if the need arose. It appears, accordingly, to be beyond question that the ambulance transport *Warilda* was part of the naval forces of the country. On Mar. 24, 1918, she was proceeding in accordance with naval orders at a full speed of fifteen knots without lights from Havre to Southampton, carrying 600 wounded men, with the usual staff of doctors and nurses. She came into collision with the steamship *Petingaudet*, which was also steaming at high speed with side lights dimmed. It should further be mentioned that by the naval orders the *Warilda* was directed to proceed even in a fog at full speed. It has been judicially affirmed that the *Warilda* was alone to blame for the collision.

The terms of the requisition under the charterparty have been already cited. The risks of war taken thereunder by the Admiralty are those which would be excluded from an ordinary policy "by the following or similar, but not more extensive, clauses." These clauses which are quoted include the words "and also from all consequences of hostilities or warlike operations." I do not have any doubt that at the time of the collision the *Warilda* was sailing in the course of warlike operations. It was argued that, while this might be so, yet the collision was not a consequence of these operations. I do not think that in the state of the authorities this contention can be sustained. It was admitted that the collision must be attributable to one of two things, either to the warlike operations or to a sea risk, and the enumeration of sea risks even under the requisition of the charterparty no doubt includes "collision . . . or any other cause arising as a sea risk." It seems out of the question to infer from this language that all collisions are ex necessitate sea risks. And, in short, it appears to me that when a ship requisitioned by the naval authorities and actually engaged in what I have explained to be a warlike operation comes into collision with another vessel under, of course, the exceptional conditions of speed, lights doused, and such warlike operations, the category of war risk cannot be changed into the category of sea risk by reason of the negligence of those engaged in conducting those operations. The conduct may have been faulty, but it was a warlike operation although faultily conducted. Faulty navigation on the part of one ship or the other is, of course, the determining factor of responsibility as between the two ships, but, in my opinion, it is not a legitimate factor for the other purpose which is here attempted, namely, of converting a war risk into a sea risk. Once the category of warlike operations attaches to the movements of the vessel, that category must continue to attach, although these movements had an element of negligence in their operations. The appellants' cause was powerfully presented, but I cannot myself see that the shifting of category to which I have alluded can be said to have been accomplished by reason of the negligence of those in charge of the vessel.

LORD SUMNER.—In this case the contract of insurance (for such this clause, No. 19 of charter T.99, in effect is) provides:

> "The risks of war, which are taken by the Admiralty, are those risks which would be excluded from an ordinary English policy of marine insurance by the following, or similar, but not more extensive, clause: '. . . warranted free . . . from all consequences of hostilities or warlike operations. . . .' "

The *Warilda* and the *Petingaudet* were damaged in collision, and collision is a risk included in an ordinary English policy of marine insurance. Accordingly, the suppliants must show that, in the circumstances of this case, the damage would be excluded from the protection of such a policy by such words as those above

quoted. In effect, there is no substantial inaccuracy in saying that the question is: "Was this loss caused directly and proximately by a warlike operation?" and I think there is no substantial doubt that the answer must be "Yes."

The collision came about by both vessels proceeding during their respective voyages on courses which intersected, and at times and speeds which brought them simultaneously to the point of intersection. In keeping those courses the *Petingaudet* was right and the *Warilda* was wrong, but, as each vessel in proceeding to the point of collision was proceeding on her voyage and neither had abandoned either the destination or the purpose of her voyage, it was part of the operation, in which each vessel was engaged, to proceed to that point. By admission the *Warilda's* operation was a warlike operation throughout, and as was the whole so were the parts. Steaming into the *Petingaudet* was one of those parts, and none the less so, whether it was due to mere misfortune, to error of judgment, or to negligent navigation. Had it been done wilfully the case might be different. There might, for example, have been an abandonment of the ship's warlike operation altogether, but it is unnecessary to do more than save such a case. Negligence is a quality of the navigation as carried out when two ships run into one another, but is not a distinct operation in itself. Whether the navigating officer keeps his course when he should have given way, or gives way when he should have kept his course, what proximately causes the damage is the forcible impact of the two vessels, and it has long been settled that, under an ordinary policy against marine risks, an assured can recover for a loss by collision notwithstanding that the collision was solely brought about by the negligence of his employees, the captain or crew. I cannot see any valid ground for deciding otherwise, where the collision is part of a warlike operation, badly conducted on the part of those in charge of the ship, which is engaged in such an operation. At any rate, whatever possibility of debate might arise where the negligence consisted in the positive commission of a false manœuvre none can arise where, as here, the negligence consisted in failing to give way, or in failing to infer, when the *Petingaudet* became visible, that it was the *Warilda's* duty to give way.

I do not think that this view is inconsistent with any decided authority. *Inui Gomei Kaisha* v. *Attolico* (4) turns out, on examination of the language of ROCHE, J., to be quite distinguishable. In that case the warlike operation relied upon was the navigation of two merchantmen on their respective commercial voyages without lights in contravention of the international rules for navigation at sea, because they were ordered to do so by the competent naval authority during and by reason of the war. Whether either vessel was performing a warlike operation or not ceased to be a matter for consideration as soon as it was proved that, lights or no lights, each ship saw the other at a time when appropriate helm action might have been likely to avoid collision but, owing to default, was not taken. From that point the absence of navigating lights was at most a causa sine qua non, as it is called, and probably was no more than a picturesque introduction which might not assist the court but could do the parties no harm. In the result the collision was brought about by actual helm action, taken ad hoc, but taken wrongly, by persons who would have been no better off at the moment if each ship's lights had been burning. The resulting collision was not directly caused by a warlike operation but was caused by collision in the course of a commercial operation, attended by negligent navigation. The judgment of ROCHE, J., is summed up thus in his conclusions:

> "The onus is on the plaintiffs here and involves that they should satisfy me that the collision must have happened, in the sense that the vessels were seen at such a distance that they must have collided, and that either there was no wrong action, or that the wrong action made no difference. . . . I am satisfied at all events that the collision and the loss were neither of them inevitable when the vessels sighted one another, and in these circumstances the plaintiffs

A have not established that navigation without lights is a proximate cause either of this collision or this loss."

Read with this judgment I think that any difficulties which might otherwise arise, on the judgment of Bankes, L.J., in affirming Roche, J., are removed. He says:

> "There was an intervening cause of the collision, because, without this negli-
> B gence, which has been found against the persons in charge of these vessels, the accident would not have happened in spite of the fact that they were being navigated without lights."

"This negligence" here is the taking of helm action, which the respective navigating officers were free to take or not to take, and, as it so happened, that action was negligent, but it constituted a new independent intervening cause, not because it
C was negligent, but because it was independent. This is its material aspect as a peril insured against causing loss. Negligence is the aspect of it, which is further material in a collision action in which legal responsibility for wrong done has to be ascertained .

Various authorities were cited in which it is noted in the judgments that negligence was not proved or not alleged as one of the circumstances of the case. Many
D of the references to negligence in the "warlike operations" cases are merely savings of the present question ex abundanti cautela and cannot be pressed further, e.g., Bailhache, J., in *The Petersham* (5) ([1919] 1 K.B. at pp. 580, 581); Scrutton and Duke, L.JJ., in *The St. Oswald* (6) ([1918] 2 K.B. at pp. 887, 889); Atkin, L.J., in *The Matiana* (5) ([1919] 2 K.B. at p. 698). It appears to me that the dictum of Rowlatt, J., in *The St. Oswald* (6) ([1917] 2 K.B. at p. 773),

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> "if I could say that the *Suffren* was to blame for starboarding I should have held that the negligence of her commander had intervened and immediately caused the disaster,"

is difficult to support, but, as the negligence there suggested was an act of negligent commission, it may not be absolutely necessary to negative it in the present case,
F where the negligence is only a negligent omission. The dicta of Bailhache, J., in *The Matiana* (5) ([1919] 1 K.B. at pp. 636, 637), viz., that, "if the stranding was due to the master's negligence, probably this would prevent its being proximately caused by the warlike operation, if any, which she was performing," while "negligence on the part of the King's officer" would not matter, "the operation would still be a warlike operation, although badly performed," appear to me to be
G right in the latter case, and wrong in the first. Roche, J., says in *The Larchgrove* (7):

> "where negligence existed, it broke the chain of causes and might prevent a loss from being attributable to a warlike operation, though it did not follow that all negligence would be outside of warlike operations."

H With this, as a whole, I agree, understanding it to refer to such an illustration as that put by Erle, C.J., in *Ionides* v. *Universal Marine Insurance Co.* (8), but the initial general words down to "chain of causes" are too wide. So in *The Ardgantock* (9) (35 T.L.R. at p. 605), Bailhache, J., is reported as saying,

> "if negligence on the part of the *Ardgantock* was the effective cause of the loss, the case would be one of marine risk."

I

Literally, this was right, though it is not easy to see what is meant by negligence, as such, being the cause; but no doubt what was meant was that, if the loss of the *Ardgantock* was proved affirmatively to be due to her own fault it would not be caused by the warship and its warlike operations. He proceeds, "as to the *Tartar*, if she was on a warlike operation it would not matter whether she was negligent or not." With this I agree. In *Charente Steamship Co., Ltd.* v. *Director of Transports* (10), Roche, J., lays it down that in a collision between a merchantman and a ship engaged in a warlike operation during the war, both

showing no lights, if the merchantman was solely to blame the collision would not be the result of the other ship's warlike operation; while, if it was the other ship that was to blame, still, in most cases, this would not be a new independent cause, but there would only be a negligent warlike operation, for where the negligence consists in carelessly carrying out the operation in progress, the results are a consequence of hostilities and, he adds: A

> "where an essential and necessary part of the direct and immediate cause of a loss was a warlike operation, whether well or ill conducted, the loss is a consequence of hostilities." B

This was affirmed in the Court of Appeal and seems to me to have been right.

Negligence may be material as going to inevitability, where the inevitability of a series of consequences is part of the proof that a more distant occurrence was truly the proximate cause of the ultimate result. This is the illustration of ERLE, C.J., in *Ionides* v. *Universal Marine Insurance Co.* (8), as I understand it. So, conversely, where a peril is in operation and produces in due course its direct damage, that peril does not become a remote cause because, before the actual collision occurs, attempts are made to avert the result, which fail. This is pointed out by ROWLATT, J., in *The St. Oswald* (6). When damage is done by two ships coming into collision, one being engaged in a warlike operation and the other on an ordinary commercial voyage, the collision is a risk falling on the marine policy unless it is taken out of it by being proved to be caused by warlike operations, and this proof fails when it is shown to be caused by the action of the officer in charge of the commercial operation, all the more so if his action is negligent and blameworthy; but I think the result would be the same if his action was only an error of judgment, or wrong but excusable in what is called the agony of the moment, so long as it is his action that causes the collision effectively and proximately, for the ship engaged in the warlike operation may play a minor role, since it takes two to make a collision. I believe the whole key to these problems is to be found by remembering that negligence is directly material in collision actions when the question is how to attribute blame to persons, but is only evidentiary in insurance actions, where the question is whether the event has happened which entitles the assured to be indemnified. Accordingly, I think that this appeal fails. C D E F

LORD PARMOOR.—A charterparty entered into by the respondents with the Admiralty contained two clauses which are relevant in the present appeal. The first of these provided that the Admiralty should not be held liable if the steamer shall be lost, wrecked, driven on shore, injured or rendered incapable of service by or in consequence of dangers of the sea or tempest, collision, fire, accident, stress of weather or any other cause arising as a sea risk. The second contains the following words: G

> "warranted free of capture, seizure, and detention and the consequences thereof or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war." H

The appellant contends that the collision by which the *Warilda* was injured was a sea risk, from liability for which the Admiralty are exempted under the terms of the charterparty, and that such collision was not the consequence of warlike operations within the meaning of the charterparty on two grounds—(i) that the *Warilda* at the time of the collision was not engaged on a warlike operation, (ii) that, assuming that the *Warilda* was engaged on a warlike operation, the collision from which the damage resulted was not the consequence of that warlike operation. The first point was abandoned on the hearing of the appeal. On the second point it was argued that the collision and damage were not the consequence of a warlike operation, but resulted from the negligent navigation of the master of the *Warilda*. That the *Warilda* at the time of the collision was negligently navigated is not I

questioned. The only question, therefore, which arises is whether the navigation of a warship engaged on a war duty ceases to be a warlike operation when it is performed in a negligent manner. In my opinion, this question can only be answered in the negative. At the material date the *Warilda* had what has appropriately been called the status of a warship, and was engaged on a war duty, namely, the carriage of wounded soldiers. The negligence of the master in navigating the *Warilda* did not affect either the status of the vessel as a warship or the nature of the duty in which she was engaged. On the contrary it occurred while the vessel was in fact carrying out the war duty for which she had been chartered. It follows that the *Warilda* was engaged at the time of the collision in a warlike operation and that it is not an answer to the claim that at the time of the collision there was negligent navigation on the part of the *Warilda* and that the collision was brought about by such negligence. In my opinion, the appeal fails and should be dismissed with costs.

LORD WRENBURY.—In this case two material facts are not in dispute, viz., first, that the *Warilda* was engaged in a warlike operation; and, secondly, that the master of the *Warilda* was negligent. The operation that was in progress was the navigation of the vessel. It was a warlike operation in that the vessel was an "ambulance transport," carrying some 600 wounded and a staff of doctors and nurses from Havre to Southampton and steaming at night at some fifteen knots without lights. By cl. 18 of the charterparty the Admiralty was not liable for sea risks, but by cl. 19 was liable for "consequences of hostilities or warlike operations." The question is whether the collision which took place was a sea risk or a consequence of a warlike operation.

In *Trinder Anderson & Co.* v. *Thames and Mersey Marine Insurance Co.* (3), it was decided that, in the case of a policy of marine insurance, loss by stranding occasioned by the negligent navigation of the master was a loss in respect of which the underwriters were liable. The principle is that the underwriter insures against a loss occasioned by a peril of the sea, and that stranding is none the less a peril of the sea though brought about by negligent navigation. The negligence does not alter the character of the sea peril, which still remains the causa proxima. So if I insure my house against fire, or my carriage or car against road risks, the risk that my servant may negligently set the house on fire, or that my driver may drive negligently and cause a collision, is exactly one of the risks against which I seek insurance. I insured against fire or collision. The fire or collision occurred and the insurance office is to bear that risk to my indemnity. The fire or the collision is the causa proxima of the loss—the negligence is a cause more remote. As regards sea peril, I may perhaps express it by saying that the underwriter insures against the sea peril however it may happen—including, therefore, negligence of the master. It is otherwise if the loss occurs through the wilful negligence or wilful act of the assured. In that case the loss does not "happen," but is caused by the assured himself, and, consequently, he cannot recover.

Collision is a sea risk and cl. 18 of the charterparty holds the Admiralty not liable in the case of collision "or any other cause arising as a sea risk." But cl. 19 renders it liable for "all consequences of hostilities or warlike operations." The question, therefore, is as between sea risk and war risk—Was this loss a consequence of the warlike operation in which the vessel was engaged? Does the fact that the master was negligent render the loss one which was not a consequence of that warlike operation? In my judgment, it does not. The principle of *Trinder Anderson & Co.* v. *Thames and Mersey Marine Insurance Co.* (3) applies. The operation in progress was the navigation of the ship; that operation was a warlike operation, and none the less because the operation was negligently conducted. The loss was occasioned by a warlike operation negligently performed. The Admiralty had insured against the consequences of warlike operations, however they might happen, including, therefore, negligence. The negligence did not alter

the character of the operation, and the loss was a consequence of the warlike operation, which still remained the causa proxima.

For these reasons I think that this appeal fails and should be dismissed with costs.

Appeal dismissed.

Solicitors: *Treasury Solicitor*; *Parker, Garrett & Co.*

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

BRIMELOW *v.* CASSON AND OTHERS

[Chancery Division (Russell, J.), December 10, 11, 21, 1923]

[Reported [1924] 1 Ch. 302; 93 L.J.Ch. 256; 130 L.T. 725; 68 Sol. Jo. 275]

Contract—Inducement to break—Justification—Professional organisation—Breach of contract necessary to procure payment of adequate wages to employees.

Trade Union—Inducement to break contract—Defence under s. 3 of Trade Disputes Act, 1906, only applicable to breach of contract of employment—"Trade dispute"—Dispute between employer and professional organisation regarding wages—Employers among members of organisation—"Trade or industry"—Presentation of theatrical performance.

The defendants, representatives of five associations formed for the protection of the interests of persons engaged in the theatrical profession, induced the manager of a theatre to break a contract by which he engaged the plaintiff's theatrical company to perform at the theatre. The reason for the defendants' action was that they had ascertained that the plaintiff paid chorus girls in his company a wage considerably below the minimum wage approved by the associations with the result that some of the girls were obliged to supplement the insufficient wage by resorting to immorality. In an action by the plaintiff for an injunction and damages,

Held: (i) primâ facie, interference with a person's contractual rights and his right to carry on his business as he would was actionable, but such interference could be justified; the defendants owed a duty to the theatrical profession and its members (quære, and also to the public) to take all necessary peaceful steps to terminate the payment of the insufficient wage in question; and, therefore, they were justified in what they did: (ii) the business of presenting theatrical performances was a "trade or industry" within s. 5 (3) of the Trade Disputes Act, 1906, and so there was a "trade dispute" within the subsection on the question whether the plaintiff was employing actors below the minimum wage; the fact that employers in the theatrical profession were among the bodies represented by the defendant did not prevent the dispute between the parties being a "trade dispute" within s. 5 (3); but s. 3 of the Act provided a defence only in the case of the breach of a contract of employment and so did not afford a defence to the plaintiff's action so far as it related to the inducement of the manager to break his contract with the plaintiff, that contract not being a contract of employment.

Notes. Considered: *Camden Nominees, Ltd.* v. *Forcey (or Slack)*, [1940] 2 All E.R. 1. Referred to: *De Jetley Marks* v. *Greenwood*, [1936] 1 All E.R. 863; *British Industrial Plastics, Ltd.* v. *Ferguson*, [1938] 4 All E.R. 504; *Crofter Hand*

A *Woven Harris Tweed Co.* v. *Veitch*, [1942] 1 All E. R. 142; *Bents Brewery Co.* v. *Hogan*, [1945] 2 All E.R. 570; *Abbott* v. *Sullivan*, [1952] 1 All E. R. 226; *D. C. Thomson & Co.* v. *Deakin*, [1952] 2 All E.R. 361.

As to inducing a breach of contract by a trade union, see 32 HALSBURY'S LAWS (2nd Edn.) 516 et seq.; and for cases see 42 DIGEST 986–990 and 43 DIGEST 113 et seq.

B Cases referred to:

(1) *Glamorgan Coal Co.* v. *South Wales Miners' Federation*, [1903] 2 K.B. 545; 72 L.J.K.B. 893; 89 L.T. 393; 52 W.R. 165; 19 T.L.R. 701, C.A.; affirmed sub nom. *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, [1905] A.C. 239; 74 L.J.K.B. 525; 92 L.T. 710; 53 W.R. 593; 21 T.L.R. 441, H.L.; 43 Digest 114, *1186.*

C (2) *Quinn* v. *Leathem*, [1901] A.C. 495; 70 L.J.P.C. 76; 85 L.T. 289; 65 J.P. 708; 50 W.R. 139; 17 T.L.R. 749, H.L.; 43 Digest 112, *1179.*

(3) *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, [1892] A.C. 25; 61 L.J.Q.B. 295; 66 L.T. 1; 56 J.P. 101; 40 W.R. 337; 8 T.L.R. 182; 7 Asp.M.L.C. 120, H.L.; 43 Digest 10, *51.*

D Also referred to in argument:

Chartered Mercantile Bank of India, London and China v. *Wilson* (1877), 3 Ex. D. 108; 47 L.J.Q.B. 153; 38 L.T. 254; 1 Tax Cas. 179; 43 Digest 5, *1.*

Conway v. *Wade*, [1909] A.C. 506; 78 L.J.K.B. 1025; 101 L.T. 248; 25 T.L.R. 779; 53 Sol. Jo. 754, H.L.; 43 Digest 120, *1237.*

Giblan v. *National Amalgamated Labourers' Union of Great Britain and Ireland*,

E [1903] 2 K.B. 600; 72 L.J.K.B. 907; 89 L.T. 386; 19 T.L.R. 708, C.A.; 43 Digest 118, *1226.*

Grainger & Son v. *Gough*, [1896] A.C. 325; 65 L.J.Q.B. 410; 74 L.T. 435; 60 J.P. 692; 44 W.R. 561; 12 T.L.R. 364; 3 Tax Cas. 462, H.L.; 43 Digest 6, *8.*

Larkin v. *Long*, [1915] A.C. 814; 84 L.J.P.C. 201; 113 L.T. 337; 31 T.L.R. 405; 59 Sol. Jo. 455, H.L.; 43 Digest 121, *1241.*

F *Walker* v. *Crystal Palace Football Club, Ltd.*, [1910] 1 K.B. 87; 79 L.J.K.B. 229; 101 L.T. 645; 26 T.L.R. 71; 54 Sol. Jo. 65; 3 B.W.C.C. 53, C.A.; 34 Digest 239, *2045.*

Ware and De Freville, Ltd. v. *Motor Trade Association*, [1921] 3 K.B. 40; 90 L.J.K.B. 949; 125 L.T. 265; 37 T.L.R. 213; sub nom. *Wake and De Freville, Ltd.* v. *Motor Trade Association*, 65 Sol. Jo. 239, C.A.; 43 Digest 124, *1264.*

G **Witness Action.**

The facts are fully stated in the judgment.

By s. 3 of the Trades Disputes Act, 1906:

"An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade,

H business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills."

Courthope Wilson, K.C., and *J. V. Nesbitt* for the plaintiff.

Patrick Hastings, K.C., *G. B. Hurst, K.C.*, and *C. A. J. Bonner* for the defendants other than the defendant Kennedy.

I *G. B. Hurst, K.C.*, and *Alan Ellis* for the defendant Kennedy.

Cur. adv. vult.

Dec. 21. **RUSSELL, J.,** read the following judgment.—The plaintiff Brimelow, known professionally as Jack Arnold, in this case sues the defendants Casson, Voyce, and Fry for an injunction restraining them from procuring or inducing or conspiring or combining or attempting to procure any person to break any contract with the plaintiff or to abstain from entering into any contract with the plaintiff, and for damages and costs. There is a separate and distinct claim against the defendant Kennedy which I will deal with later.

The plaintiff is the manager of a touring theatrical company, the members of which vary in number from time to time. From Christmas, 1922, until March, 1923, he ran a touring pantomime, which ended at Maidenhead. His company was then reconstituted on a co-operative basis under which profits were to be equally divided, the chorus girls receiving a minimum salary of £1 a week. Under this régime it would appear that the plaintiff ceased to be the employer of members of the company. It came to an end on June 23, 1923. The plaintiff then began to run the company, and still runs it as an employer, but on a percentage basis with minimum guarantees. In the case of chorus girls their contracts provide for a weekly wage of 3 per cent. of the net takings with a guaranteed minimum of £1 10s. a week; they also provide for one week's rehearsal without pay, and for "No play, no pay." The contracts are for no fixed duration; they run apparently from week to week. No tour was booked for any fixed period or for any appreciable time ahead. The plaintiff admits that under this new arrangement the chorus girls never got beyond their guarantee, that is to say, they never received more than their 30s. a week; but he says that in his opinion so long as they got this 30s. it was all right. His view is that a girl can live comfortably on a £1 a week, if two or three of them live together. He also says that he has always found that chorus girls have a fair amount of money. Under this new arrangement the company played at Dorking, Burton-on-Trent, Kettering, Plymouth, Coventry, and Cannock. It was due to play at Dudley (for the week commencing Aug. 13, 1923), and at West Bromwich (for the week commencing Aug. 20, 1923) by virtue of two contracts made between the plaintiff and the defendant Kennedy, who owned theatres at those two towns. Kennedy broke his contracts with the plaintiff at the instigation of the other defendants or some of them and the plaintiff then brought the present action.

It is necessary to explain who these defendants are. There are five associations which represent the interests of the different classes of persons engaged in the theatrical calling, viz.: The Association of Touring Managers, the Variety Artistes' Federation, the Actors' Association, the Musicians' Union, and the National Association of Theatrical Employees; the four last are registered trade unions, the first named is not. In March, 1923, a committee was formed by these five associations composed of representatives of each association and called the joint protection committee. The defendant Casson is a member of it, and is one of the representatives of the Association of Touring Managers; he was until recently chairman of the committee. The defendant Voyce is also a member, and is one of the representatives of the Variety Artistes' Federation; he is secretary of the committee. The defendant Fry is also a member, being one of the representatives of the Actors' Association. At the meeting of the joint protection committee held on March 29, 1923, resolutions were passed in the following terms:

> "(7) That this meeting of delegates of the A.T.M., the V.A.F., the A.A., the M.U., and the N.A.T.E., recognising the societies represented as the appropriate and representative bodies to act and speak on behalf of those sections of the entertainment industry they individually cater for, resolve to hereby establish a joint protection committee to deal specifically with any bogus person engaged in the industry in such manner as may be deemed advisable at any subsequent meeting. (11) That this committee shall be the sole judge as to whether action shall or shall not be taken by the committee against any alleged bogus person."

For some considerable time past the Actors' Association (which includes all the leading actors and actresses among its members) had been struggling, as Mr. Lugg (who is the general secretary of the Actors' Association) told me, to secure a living wage for chorus girls. Experience has shown in the past that in a very large number of cases the absence of a living wage drives such girls to prostitution. The minimum wage stipulated for by the Actors' Association, and embodied in the Valentine contract is, in case of chorus girls, £2 10s. a week, which I imagine

no one would call excessive. Another feature obnoxious to the Actors' Association is the sharing system or commonwealth company, not because it is bad per se (if properly financed and properly conducted, it is not), but because experience has shown that in most cases, most of the money goes to the manager and the others are paid too little or not at all. It is a system obviously capable of abuse, and one in which failure would hit hardest those least able to afford it. Further, the Actors' Association has for some time past occupied itself in dealing with the question of what is called "the bogus manager." Mr. Lugg said that a bogus manager was one who recurrently fails to pay proper salaries. The plaintiff defined him as a person who goes about without money and leaves companies stranded. Mr. Fry's definition, with which Mr. Casson agreed, was a manager who recurrently fails to meet his obligations to his company, or who pays them so little that they cannot afford to live decently. The Actors' Association, or the joint protection committee, had from time to time received reports about the plaintiff, and matters came to a head in July and August of this year [1923]. In this case I have had evidence of the doings and habits of the plaintiff's company. It is a squalid story, but I must deal with it. [His Lordship stated the evidence of Mr. Lugg in connection with the complaints made to him which were brought by him before the joint protection committee, one of which was made by a lady who was a member of the plaintiff's company regarding a girl of 18 who was living in immorality with a dwarf, another member of the company, and continued:] Having passed a resolution on July 25, 1923:

> "That the licence of the Victoria Theatre, Lye, near Stourbridge, run by Jack Arnold be opposed, and that Jack Arnold's show, 'King Wu,' be proscribed as from Aug. 6, it being operated on sharing contracts for performers, and that Mr. Lugg be instructed to proceed to Plymouth this week to make the necessary inquiries,"

the joint protection committee, on July 27, communicated with various managers and managerial associations on a printed form in the following terms:

> "It having been proved to the satisfaction of the joint protection committee that J. B. Arnold of the 'King Wu Tut Tut' Revue, is an undesirable person, every step will be taken by the said committee to prevent his appearance at any place of entertainment.—Signed, Louis Casson, chairman, Albert Voyce, secretary."

They also wrote to the plaintiff a letter in the following terms on July 27, 1923:

> "Dear Sir,—Complaints having been received with regard to the manner in which you are operating the above show, I am instructed to inform you that the fundamental principle of this committee is as follows: That this committee will not accept as a defence to any charge of non-payment of salary that the artistes have agreed to a 'sharing' or 'pro rata' basis, and it wishes to place on record its opinion that that pernicious system is the salient cause of the majority of cases of 'bogus' which comes before the J.P.C. In view of the above conditions we, the J.P.C., have notified all the managerial associations that on and after Aug. 6 you will not be allowed to present your company, and that the J.P.C. are now taking active measures to enforce this resolution."

It is, I think, to be regretted that before taking this step the joint protection committee did not afford the plaintiff an opportunity of attending before them. True it is that later on an opportunity was offered to him, which he refused unless his expenses were paid. Mr. Lugg said:

> "We knew particulars of Arnold's commonwealth company. As a general principle I do not approve of trying a man behind his back and putting judgment into execution, but in Arnold's case it was justified—he had broken every possible rule of the association. He had been written to in 1921 because he was paying chorus girls 35s. a week, out of which they had to provide for tights, shoes, and washing. He was visited by an organiser at Battersea in

March, 1923, who was told that he was paying £2 5s. a week to the chorus and we found that he was only paying £1. In Arnold's case we had sufficient evidence against him to justify us in stopping him."

I think, nevertheless, an opportunity should have been offered to him of attending and stating his case before so serious a step was taken. Mr. Lugg, in accordance with instructions, proceeded to Plymouth on July 27, and in evidence he referred to a letter from a girl as follows:

"Dear Sir,—Some explanation is due to you re my non-appearance at your office last Monday morning. It was impossible for me to travel to London on Sunday as I hadn't a farthing for Sunday night's accommodation. I believe Mr. Arnold has talked his artistes over, from what I can gather . . ."

The girl denies that she told Mr. Lugg that the only reason she was living with the dwarf was that she had not enough money to live on. I prefer, however, Lugg's evidence as to what she said to him at Plymouth. It is difficult to speak of this condition of things with restraint. A young girl, almost a child, forced by under-payment to continue in sexual association with this abnormal man is, to my mind, a most terrible and revolting tragedy. The plaintiff asked me to believe that when he engaged this couple on a joint contract at £3 a week he was not aware that they were then living together, and that he was still unaware of the fact; and this, too, notwithstanding that his wife knows that the girl is about to become a mother. I utterly refuse to believe the plaintiff as to this. I am satisfied that he must have known, and did know, the true facts throughout.

From Plymouth the company proceeded to Coventry, and en route a document, dated July 30, 1923, was prepared, in the first instance, it is said, without the plaintiff's knowledge, but subsequently edited by him. It was signed by the members of the company. It is a letter of protest to the joint protection committee, and in support of the plaintiff as a manager. I need not pause to read it. On Aug. 1, the joint protection committee passed the following resolutions:

"That Jack Arnold of the 'King Wu' be written to that the proscription against him still holds for Aug. 6, but that in accordance with his request he be asked to attend the J.P.C. on Wednesday, 8th inst., at 4 p.m., bringing his returns and balance sheets for the last ten weeks, and that the expenses of Mr. Lugg to Plymouth in this matter, of £4 1s. 4d., be paid";

and on Aug. 2, they wrote the plaintiff a letter in the following terms:

"Your letter and Mr. Lugg's report on his interview with you and some of your company at Plymouth last week was considered by the J.P.C. at their meeting yesterday, and I am instructed to inform you that the J.P.C. adheres to their resolution, the contents of which were conveyed to you by the J.P.C. last week, but that in reply to your request they will be glad if you will attend at 178, Shaftesbury Avenue, at 4 p.m., on Wednesday next, the 8th inst., and bring with you your reports and balance sheets for the last ten weeks."

The company performed at Cannock during the week commencing Aug. 6. The defendant Fry went to see the plaintiff there on Aug. 10. The plaintiff received him with abuse and vile language. The plaintiff wishes me to believe that the complaints against him were discussed with Fry and that Fry was satisfied. Upon this point I accept Fry's evidence and not the plaintiff's.

The company proceeded to Dudley to open on Aug. 13. Fry was there and interviewed Benjamin Kennedy, the proprietor of the theatre, with the result that the company did not play there that week nor at West Bromwich in the week following. As to what took place, the evidence is as follows. The plaintiff's evidence is:

"We went to Dudley to open on Aug. 13. Fry was there at the theatre on the morning of Aug. 13. Benjamin Kennedy told me he could not play me. I asked why. He said, pointing to Fry: 'This man won't let me.' I said: 'Fry has nothing to do with you and I; the contract is between us; I hold you

responsible. If you do not play me, you pay me.' In the evening I heard Fry say to Kennedy: 'This man has stranded hundreds of companies at Lye.' At ten minutes to six I asked Kennedy if he was going to open the doors. He said: "This man won't let me.' The performance did not take place. The members of the company were costumed and ready to perform; they were ready to perform every night. First day Kennedy said I could not play at West Bromwich. . . . There was no mention of a dispute between me and the association."

Fry's evidence is this:

"I went to Dudley on Aug. 12 and saw plaintiff again on Aug. 13. The company did in fact perform at Cannock. I heard conversation between Kennedy and Arnold. Kennedy said: 'I thought you told my brother you had not had a quarrel or dispute with the association.' Arnold said: 'I do not recognise any association.' A notice was put up in the theatre as regards the dispute. The manager, Rothery Ellis, drew it up, it may have been in conjunction with me. When I saw Kennedy on Aug. 13, I said to him that we were in dispute with Arnold, and that the J.P.C. had proscribed him. I said if Arnold attempted to open I would use every means in my power to stop him unless he would put his company under proper conditions. I told Kennedy the J.P.C. meeting was sitting on the Wednesday, and that Arnold could attend if he wished. I got Kennedy to sign an undertaking not to allow Arnold to appear. The document now produced is the document referred to, and is in my handwriting. Mr. Reid suggested that agreement. I drew it up. I suggested to the company that they should refuse to perform for Arnold. They did not agree to that; they desired to perform their contracts with Arnold."

However, the fact remains that Kennedy did break his contract with the plaintiff, and that Fry induced him to do this, acting on the instructions of the joint protection committee and the Actors' Association in order to further the dispute which existed between the plaintiff and the Actors' Association and in which they were supported by the other bodies by reason of the joint protection association having taken the matter up.

The subsequent history of the matter may be briefly stated. The Actors' Association and the joint protection committee each passed a resolution. On Aug. 13 the council of the Actors' Association passed this resolution:

"Jack Arnold—'King Wu Tut Tut Company.' The assistant secretary stated that this was really a J.P.C. case, but that the A.A. had been asked to handle it. Mr. Fry was at the moment at Dudley tackling the company, and in view of the fact that it might be necessary to declare a boycott, the assistant secretary asked for full powers. It was finally proposed by Mr. Lord, seconded by Miss Roscoe, and carried, that full powers be granted in this case, it being a trade dispute."

The resolution passed by the joint protection committee on Aug. 15 is as follows:

"Mr. A. G. Fry reported on the result of his action as per the instructions of the J.P.C. against J. B. Arnold's threatened appearance at the Opera House, Dudley, and informed the committee that he had persuaded the proprietor Mr. Kennedy not to permit the show to appear. Mr. Rothery Ellis, manager of the Opera House, Dudley, attended before the committee in relation to this matter, and was informed that the committee would give Mr. Kennedy the fullest moral support in the event of Arnold taking any action against him. Proposed by Mr. Barry Ono, seconded by Mr. Robert Brain: That Mr. Fry's report be accepted and the thanks of the committee conveyed to him for the excellent result attained."

The writ was issued on Aug. 22. An interim injunction until the trial having been refused by the Vacation judge, the campaign against the plaintiff was

vigorously pursued. It is unnecessary to discuss the details of the subsequent events, for the first three defendants allege and admit that they intend to induce theatre proprietors to break their contracts with the plaintiff, and to abstain from entering into contracts with him with the avowed object of driving him off the road unless and until he pays the minimum living wage of £2 10s. a week.

The question which I have to decide is whether such conduct on the part of these defendants is actionable at the suit of the plaintiff, or whether, in the circumstances of this case, there exists a sufficient justification for the act which in the absence of such justification would be actionable. Before discussing the law of this case, let me say something further about the facts. A multitude of matters and incidents in connection with his companies and the members thereof were put to the plaintiff in cross-examination, but as to most of these no affirmative evidence was given. Counsel for the defendants other than the defendant Kennedy deliberately refrained from calling such evidence, being content to rest his case as to specific incidents on the incident of the unmarried girl and the dwarf, and on the evidence as to another young girl in the company, to whom I now refer. The evidence given shows that in the case of another young girl in the company whose wages were only £1 10s. a week there are reasons for believing that she was resorting to immorality, and it further reveals cases of unpaid landladies' bills. There can be no doubt that the company and its members were leading a hand-to-mouth existence.

In my opinion, it is true to say that the evils which the joint protection committee and the associations represented by it anticipate as results of a company being run by a manager paying insufficient salaries, are to be found in the plaintiff's company. Primâ facie interference with a man's contractual rights and with his right to carry on his business as he wills is actionable, but it is clear on the authorities that interference with contractual rights may be justified. A fortiori the inducing of others not to contract with a person may be justified. I need only cite two passages from the judgment of ROMER, L.J., in *Glamorgan Coal Co.* v. *South Wales Miners' Federation* (1). The learned lord justice says ([1903] 2 K.B. at p. 573):

> "The law applicable to this case is, I think, well settled. I need only refer to two passages in which that law is shortly and comprehensively stated. In *Quinn* v. *Leathem* (2) LORD MACNAGHTEN said:
>
> > 'A violation of legal right committed knowingly is a cause of action, and it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference.'
>
> And in *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, BOWEN, L.J., included in what is forbidden
>
> > 'the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it.'
>
> But although, in my judgment, there is no doubt as to the law, yet I fully recognise that considerable difficulties may arise in applying it to the circumstances of any particular case."

Later on he says (ibid. at p. 574):

> "I respectfully agree with what BOWEN, L.J., said in the *Mogul Case* (3) when considering the difficulty that might arise whether there was sufficient justification or not."

Then the learned lord justice quotes from BOWEN, L.J., these words:

> " 'The good sense of the tribunal which had to decide would have to analyse the circumstances and to discover on which side of the line the case fell.' I will only add that, in analysing or considering the circumstances, I think, that regard might be had to the nature of the contract broken; the position of the parties to the contract; the grounds for the breach; the means

A employed to procure the breach; the relation of the person procuring the breach to the person who breaks the contract; and, I think, also to the object of the person in procuring the breach."

My task here is to decide whether, in the circumstances of this case, justification existed for the acts done. Let me summarise the salient facts of the present case. B The plaintiff is carrying on a business which involves the employment for wage of persons engaged in the theatrical calling, a calling in which numberless persons of both sexes are engaged in different classes of work throughout the country. The unions or associations formed for the purpose of representing and advancing the interests of those persons in connection with their different classes of work, and the interests of the calling as a whole, have ascertained by experience (and no one C could doubt the fact) that it is essential for the safeguarding of those interests that there should be no sweating by employers. They have found by experience that in the case of chorus girls the payment of less than a living wage frequently drives such girls to supplement the insufficient wage by indulging in misconduct for the purpose of gain, thus ruining themselves in morals and bringing discredit on the theatrical calling. With the object of protecting those girls and of safeguarding D the interests of the theatrical calling and its various members they have fixed standards of minimum wages, the minimum wage for chorus girls being fixed by the Actors' Association at the sum of £2 10s. a week. They find that the plaintiff is paying to his chorus girls wages on which no girl could with decency feed, clothe, and lodge herself, wages far below the minimum fixed by the Actors' Association. They have had previous experience of the plaintiff, and they cause E fresh inquiries to be made, with the result that they are satisfied that many, if not all, of the results anticipated by them to flow from such under-payment are present in the plaintiff's company. They desire, in the interest of the theatrical calling, and the members thereof, to stop such under-payment, with its evil consequences. The only way they can do so is by inducing the proprietors of theatres not to allow persons like the plaintiff the use of their theatres, either by breaking contracts F already made or by refusing to enter into contracts. They adopt this course as regards the plaintiff as the only means open to them of bringing to an end this practice of under-payment which, according to their experience, is fruitful of danger to the theatrical calling and its members.

In these circumstances, have the defendants justification for their acts? That they would have the sympathy and support of decent men and women I can have G no doubt. But have they in law justification for those acts? As has been pointed out, no general rule can be laid down as a general guide in such cases, but I confess that, if justification does not exist here, I can hardly conceive the case in which it would be present. These defendants, as it seems to me, owed a duty to their calling and to its members (and I am tempted to add to the public) to take all necessary peaceful steps to terminate the payment of this insufficient wage H which in the plaintiff's company had apparently been in fact productive of those results which their past experience had led them to anticipate. "The good sense" of this tribunal leads me to decide that in the circumstances of the present case justification did exist.

The result on this part of the case is that the defendants Casson, Voyce, and Fry have established a good defence to the plaintiff's action. This decision renders it I unnecessary to consider the defence raised by them under s. 3 of the Trade Disputes Act, 1906, but in case the opinion of a higher court is sought, it may be convenient to indicate shortly my views thereon. The plaintiff urged various points against this defence: (i) He said that the case of actors was not within the section at all because by the definition section—s. 5 (3) of the Act—the words "trade dispute" mean a dispute in which workmen are concerned, that is, "persons employed in trade or industry," and that acting is neither a trade nor an industry. This appears to me a narrow view of the section. There is no definition of "trade or industry" in the Act, but it seems to me that the business of presenting

histrionic performances to the public for profit may fairly be described as a trade or industry in which many persons (including actors) are employed. (ii) It was further said that there was no trade dispute in fact. I do not agree. There was a dispute between the Actor's Association and the plaintiff upon the question whether the plaintiff was employing actors at wages below the minimum wage. (iii) Another point urged was that this could not be a trade dispute within the Act because certain employers (namely, the Association of Touring Managers) were represented on the joint protection committee. This fact does not, in my opinion, alter the nature of the dispute or the parties to it. It was essentially a dispute which concerned the general body of actors represented by the Actors' Association on the one hand and an employer of actors on the other. (iv) Finally, it was said that the Act could afford no defence to the action so far as it related to the inducement of Kennedy to break his contracts, because those contracts were not contracts of employment. As at present advised, this appears to me a good point. The protection of the section only extends to the grounds of actionability there specified. If the act is actionable on other grounds it is still actionable on those grounds. The section appears to me to afford no defence to an action brought in respect of the procurement of breach of a contract not being a contract of employment.

The remainder of the case, namely, the action against the defendant Kennedy, may be disposed of shortly. In ordinary circumstances Kennedy would be responsible for such damages (if any) as the plaintiff suffered by reason of Kennedy's breaches of contract. But Kennedy alleges that the contracts were brought about by reason of a representation made by the plaintiff which was false, and known by the plaintiff to be false. It is alleged by the defendant Kennedy that before the contracts were signed the plaintiff was asked how he stood with the association, and that he replied: "Quite all right. I have never been approached by any of the association ever since I have been on the road." The plaintiff denies this. I do not accept his denial. I am quite satisfied by the evidence that the statement was made by the plaintiff. The statement was false, and false to the plaintiff's knowledge. If this be so, it is admitted by his counsel that he cannot recover. The defendant Kennedy counterclaims for damages. The only damage proved is a small sum of £3 in respect of a printer's bill which the defendant Kennedy has either paid, or has become liable to pay. This sum he is, in my opinion, entitled to recover. The result is that the action is dismissed with costs.

Solicitors: *Hatchett-Jones & Co.*, for *Higgs & Sons*, Brierley Hill, Staffs; *Theodore Goddard & Co.*; *Murr & Co.*, for *Sharpe, Darby & Millichip*, West Bromwich.

[*Reported by* J. L. Denison, Esq., *Barrister-at-Law.*]

A

Re HUMMELTENBERG. BEATTY *v.* LONDON SPIRITUALISTIC ALLIANCE

[CHANCERY DIVISION (Russell, J.), January 16, 17, 26, 1923]

B [Reported [1923] 1 Ch. 237; 92 L.J.Ch. 326; 129 L.T. 124; 39 T.L.R. 203; 67 Sol. Jo. 313]

Charity—Benefit to community—Need to prove in all cases—Question for the court—Possibility of administration by court—Gift for training spiritualistic mediums.

No matter within which of the four classes in LORD MACNAGHTEN'S classification of charitable gifts in *Income Tax Special Purposes Comrs.* v. *Pemsel* (1), [1891] A.C. 531, a gift may primâ facie fall, it is still necessary to show (i) that the gift will or may be operative for the public benefit, and (ii) that the trust is one the administration of which the court itself could, if necessary, undertake and control. The question whether a gift is or may be operative for the public benefit is to be answered by the court by forming an opinion on the evidence before it, and is not a matter to be decided by the donor.

A testator bequeathed the sum of £3,000 to the London Spiritualistic Alliance, Ltd., to establish a college for the training and developing of suitable persons, male and female, as mediums. The gift, while directing that preference be given to healing mediums and mediums engaged in diagnosing disease, could be applied in the training of mediums other than those preferred.

Held: it had not been proved to the satisfaction of the court (i) that the gift would or might operate for the benefit of the public, and (ii) that the trust was one which the court could, if necessary, administer and control, and, therefore, the gift was not a valid charitable gift, and failed.

Quære: whether the training of spiritualist mediums involved, or tended to involve, illegality, and was, therefore, illegal, or at all events against public policy.

Notes. Considered: *I.R.Comrs.* v. *Temperance Council of Christian Churches of England and Wales* (1926), 136 L.T. 27. Approved: *Re Grove-Grady, Plowden* v. *Lawrence*, [1929] All E.R.Rep. 158. Considered: *Tribune Press, Lahore (Trustees)* v. *Income Tax Comr., Punjab, Lahore*, [1939] 3 All E.R. 469. Followed: *Re Price, Midland Bank Executor and Trustee Co.* v. *Harwood*, [1943] Ch. 422. Approved: *National Anti-Vivisection Society* v. *I.R.Comrs.*, [1947] 2 All E.R. 217. Considered: *Re Hopkinson, Lloyds Bank, Ltd.* v. *Baker*, [1949] 1 All E.R. 346; *Re Shaw's Will Trusts, National Provincial Bank, Ltd.* v. *National City Bank, Ltd.*, [1952] 1 All E.R. 49. Referred to: *Gilmour* v. *Coats*, [1949] 1 All E.R. 848; *Re Bland-Sutton's Will Trusts, National Provincial Bank, Ltd.* v. *Middlesex Hospital Medical School Council*, [1950] 2 All E.R. 466.

As to what are "charities" and charitable purposes, see 4 HALSBURY'S LAWS (3rd Edn.) 206 et seq.; and for cases see 8 DIGEST (Repl.) 312 et seq.

Cases referred to:

(1) *Income Tax Special Purposes Comrs.* v. *Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 7 T.L.R. 657; 3 Tax Cas. 53, H.L.; 8 Digest (Repl.) 312, *1.*

(2) *Morice* v. *Bishop of Durham* (1805), 10 Ves. 522; 32 E.R. 947, L.C.; 8 Digest (Repl.) 390, *836.*

(3) *Re Cranston, Webb v. Oldfield*, [1898] 1 I.R. 431; 8 Digest (Repl.) 352, **131.*

(4) *Re Foveaux, Cross* v. *London Anti-Vivisection Society*, [1895] 2 Ch. 501; 64 L.J.Ch. 856; 73 L.T. 202; 43 W.R. 661; 11 T.L.R. 540; 39 Sol. Jo. 671; 13 R. 730; 8 Digest (Repl.) 348, *291.*

Also referred to in argument:

Re Macduff, Macduff v. *Macduff*, [1896] 2 Ch. 451; 65 L.J.Ch. 700; 74 L.T.

706; 45 W.R. 154; 12 T.L.R. 452; 40 Sol. Jo. 651, C.A.; 8 Digest (Repl.) 395, *879*. A

Thornton v. *Howe* (1862), 31 Beav. 14; 31 L.J.Ch. 767; 6 L.T. 525; 26 J.P. 774; 8 Jur.N.S. 663; 10 W.R. 642; 54 E.R. 1042; 8 Digest (Repl.) 335, *159*.

Re Wedgwood, Allen v. *Wedgwood*, [1915] 1 Ch. 113; 84 L.J.Ch. 107; 112 L.T. 66; 31 T.L.R. 43; 59 Sol. Jo. 73, C.A.; 8 Digest (Repl.) 348, *293*.

Originating Summons taken out by the executors of a will for the determination B of the question whether a gift under the will was a valid charitable bequest.

The gift was in the following terms:

"I give and bequeath to the treasurer for the time being of the London Spiritualistic Alliance, Ltd., of 110, St. Martin's Lane, W.C., the sum of £3,000 to form the nucleus of a fund for the purpose of establishing a college C for the training and developing of suitable persons male and female as mediums preference being given to healing mediums and those for diagnosis of disease and I direct that a committee of three of the council shall control the said sum of £3,000 by investing the same in sound securities and use the interest thereof for the above express purpose of developing such mediums. It would be desirable if mediums during development could be employed in garden or D farm work such occupation might be helpful to their development. If at any time it should be found by the council to be no longer necessary or impracticable to develop such mediums, then the said sum of £3,000 or the interest thereof or both capital and interest shall be used for the general purpose of spreading and advancing the cause of spiritualism as seems best to the council of the said alliance. Should at any time the London Spiritualistic Alliance E cease to exist then the said sum of £3,000 and interest thereof, if any, or as much thereof as remains unexpended shall be divided in equal parts between six spiritualistic societies of England as the said council may decide."

Errington for the executors.

G. B. Hurst, K.C., and *Peck* for the society.

Preston, K.C., and Vaisey; *Bryan Farrer*; and *Andrewes-Uthwatt* for residuary F legatees.

Cur. adv. vult.

Jan. 26. **RUSSELL, J.,** read a judgment in which he stated the question for decision and continued: Primâ facie the gift is bad as creating a perpetuity, but the defendants, the London Spiritualistic Alliance, Ltd., claim the gift to be good on G the ground that it is a valid charitable bequest. Although the testator has added certain qualifications and directions to the gift, the gift which is the subject-matter of these proceedings is a gift for the purpose of "training and developing suitable persons male and female as mediums." The London Spiritualistic Alliance, Ltd., alive to the fact that it lies with them to satisfy the court as to the validity of the gift, have filed four affidavits. They are, probably of necessity, vague and lacking H in detail, and they afford little or no assistance to the court. In the absence of evidence all parties relied without objection on definitions contained in dictionaries and other works, and from these I learn that in connection with what is known as spiritualism the primary meaning of the word "medium" is (I am using my own language), an individual who professes to act as an intermediate for communication between the living and the spirits of persons now dead. Is a gift for the purpose I of training and developing such individuals a good charitable gift?

Counsel for the society claims that it is on three grounds. First, he says, it is a trust for the advancement of education, being a trust to train persons to pursue a calling which is not unlawful. Secondly, he says it is a trust beneficial to a section of the public, namely, that section which proposes or intends to engage in the calling of a medium. Thirdly, he says it is a trust beneficial to the whole community because its object is to increase the number of trained mediums in the world, and especially those trained for the purpose of diagnosing and healing

A disease. His second and third contentions are framed so as to bring the case within the fourth branch of LORD MACNAGHTEN'S well-known classification of charitable gifts in *Pemsel's Case* (1). But no matter within which of the four classes a gift may primâ facie fall, it is still, in my opinion, necessary (in order to establish that it is charitable in the legal sense) to show (i) that the gift will or may be operative for the public benefit, and (ii) that the trust is one the admini-
B stration of which the court itself could, if necessary, undertake and control. To quote what LORD ELDON said in *Morice* v. *Bishop of Durham* (2) (10 Ves. at p. 539):

> "As it is a maxim that the execution of a trust shall be under the control of the court, it must be of such a nature that it can be under that control, so that the administration of it can be reviewed by the court; or, if the trustee
C dies, the court itself can execute the trust: a trust, therefore, which, in case of mal-administration, could be reformed; and a due administration directed; and then, unless the subject and the objects can be ascertained, upon principles, familiar in other cases, it must be decided, that the court can neither reform mal-administration, nor direct a due administration."

D In the present case the defendants, the London Spiritualistic Alliance, Ltd., have wholly failed to satisfy me on either point. There is no evidence worthy of the name—nothing but vague expressions of opinions and belief, directed in the main to alleged powers of diagnosis and healing attributed to some mediums. Even if I were to assume that some of these persons called mediums possess powers of diagnosis or powers of healing, or both (in which event it could scarcely be denied that a gift the object of which was to increase their number would be operative for
E the public benefit) still the gift here is not limited to that purpose. It is a gift which consistently with its terms could be wholly applied in the training and development of mediums other than what for convenience may be termed therapeutic mediums. I am not satisfied that a gift for that purpose is or may be in any sense of the words operative for the benefit of the public. Further, I am wholly unable to say, upon the evidence, that a trust for either the more limited
F purpose or the more general purpose is a trust the administration of which the court could in any way undertake or control. Indeed, so far as one can form an opinion upon the present materials, it would appear to be a trust the administration of which the court would be quite unable to undertake or control.

It was contended that the court was not the tribunal to determine whether a gift or trust was or was not a gift or a trust for the benefit of the public. It was
G said that the only judge of this was the donor of the gift or the creator of the trust. For this view reliance was placed on the views expressed by the Master of the Rolls and by some members of the Court of Appeal in Ireland in *Re Cranston, Webb* v. *Oldfield* (3). Reliance was also placed on a sentence in the judgment of CHITTY, J., in *Re Foveaux, Cross* v. *London Anti-Vivisection Society* (4). So
H far as the views so expressed declare that the personal or private opinion of the judge is immaterial, I agree; but so far as they lay down or suggest that the donor of the gift or the creator of the trust is to determine whether the purpose is beneficial to the public, I respectfully disagree. If a testator by stating or indicating his view that a trust is beneficial to the public can establish that fact beyond question, trusts might be established in perpetuity for the promotion of all kinds of fantastic (though not unlawful) objects of which the training of poodles
I to dance might be a mild example. In my opinion, the question whether a gift is or may be operative for the public benefit is a question to be answered by the court by forming an opinion upon the evidence before it.

The grounds upon which I decide this case render it unnecessary for me to consider another point which was urged before me, namely, that the training of mediums necessarily involves, or tends to involve, illegality, and is, therefore, illegal, or at all events against public policy. There is much to be said on both sides, and I prefer to express no opinion until it becomes necessary to do so. I hold this gift to be invalid, involving as it does a perpetuity, because it has not

been established that the trust is one which is or may be operative for the public benefit, or one which the court could administer or control. There will be a declaration that the bequest is not a valid charitable bequest, and that it fails and falls into residue. The costs of all parties will be taxed and paid out of the testator's estate.

Solicitors: *Cooper, Bake, Roche & Fettes*; *Stephens & Sons*; *Waterhouse & Co.*; *Gedge, Fiske & Gedge.*

[*Reported by* J. L. Denison, Esq., *Barrister-at-Law.*]

Re BRITISH AMERICAN CONTINENTAL BANK, LTD. LISSER AND ROSENKRANZ'S CLAIM

[Court of Appeal (Lord Sterndale, M.R., Warrington and Younger, L.JJ.), February 13, 1923]

[Reported [1923] 1 Ch. 276; 92 L.J.Ch. 241; 128 L.T. 727]

Contract—Breach—Damages—Conversion of foreign currency—Rate of exchange —Rate obtaining at date of breach.

The bank contracted to deliver foreign currency to the applicants, a German firm, carrying on business in Hamburg, on Dec. 31, 1920, but failed to do so, and on Jan. 15, 1921, the applicants purchased the currency for a sum of German marks. On a summons in the winding-up of the bank in which they sought to prove for their loss owing to the bank's breach of contract,

Held: the purchase of the currency having been in marks, for the purpose of a judgment in the English courts the amount of the applicants' loss must be converted into sterling, and, as the loss resulted from a breach of contract, the date at which the rate of exchange for the conversion must be determined was the date of the breach.

Re British American Continental Bank, Ltd., Goldzieher and Penso's Claim (1) [1922] 2 Ch. 575; and *Celia* (*Owners*) v. *Volturno* (*Owners*) (2) [1921] 2 A.C. 544, applied.

Notes. Considered: *Re Chesterman's Trusts, Mott* v. *Browning*, post, p. 705; *Madeleine Vionnet et Cie* v. *Wills*, [1939] 4 All E.R. 136. Referred to: *Rhokana Corpn., Ltd.* v. *I.R.Comrs.*, [1936] 2 All E.R. 678; *Madeleine Vionnet et Cie* v. *Wills*, [1939] 4 All E.R. 136.

As to the conversion of damages in a foreign currency for breach of contract, see 11 Halsbury's Laws (3rd Edn.) 306, 307; and for cases see 17 Digest (Repl.) 173–175.

Cases referred to:

(1) *Re British American Continental Bank, Ltd., Goldzieher and Penso's Claim*, [1922] 2 Ch. 575; 91 L.J.Ch. 760; 38 T.L.R. 785; 66 Sol. Jo. 647, C.A.; 17 Digest (Repl.) 174, *690*.

(2) *Celia* (*Owners*) v. *Volturno* (*Owners*), [1921] 2 A.C. 544; 90 L.J.P. 385; 126 L.T. 1; 37 T.L.R. 969; 15 Asp.M.L.C. 374; 27 Com. Cas. 46, H.L.; 17 Digest (Repl.) 173, *685*.

Adjourned Summons in companies winding-up.

At some time prior to Dec. 31, 1920, the applicants, Lisser and Rosenkranz, a German firm carrying on the business of bankers in Hamburg, contracted to sell to the British American Continental Bank, Ltd., 200,000 Swiss francs for delivery

on Dec. 31, 1920, against payment on that day of £9,039 11s. 7d. sterling, and the bank had contracted to sell to the applicants, also for delivery on Dec. 31, 1920, (a) 30,000 American dollars against payment on that day of 2,047,500 German marks, and (b) 20,000 American dollars against payment on that day of £5,747 2s. 6d. sterling. The result of these transactions was that on Dec. 31, 1920, the applicants had to deliver to the bank 200,000 Swiss francs and 2,047,500 German marks, and the bank had to deliver to the applicants 50,000 American dollars and £3,292 9s. 1d. sterling (being the difference between the £9,039 11s. 7d. payable by the bank for the 200,000 Swiss francs, and the £5,747 2s. 6d. payable by the applicants for the 20,000 American dollars). On Dec. 31, 1920, the applicants in performance of their part of the contract, delivered to the bank the 200,000 Swiss francs and the 2,047,500 German marks. The bank, on the other hand, entirely failed to carry out its part of the contract. It neither delivered the 50,000 American dollars nor the £3,292 9s. 1d. sterling. On Jan. 6, 1921, the bank suspended payment, and on Jan. 25, 1921, the court made the usual compulsory order to wind up the bank on the petition of a creditor. On Jan. 15, 1921, the applicants (in order to fulfil their obligations to their own customers and to minimise their loss) had purchased 50,000 American dollars and £3,292 9s. 1d. sterling, against the bank, paying for them 4,339,919 German marks which represented the market price ruling on that day. On April 15, 1921, the liquidator wrote a letter to the applicants stating that a first dividend was intended to be declared, that the applicants had not yet proved their debt, and if they did not do so by May 15, 1921, they would be excluded from that dividend. On May 15, 1921, the liquidator, in reply to a letter received by him from the applicants, wrote informing the applicants that it would be quite in order if their claim were to reach him before May 21. On or about May 19, 1921, the applicants lodged their proof in the winding-up. In this proof the applicants claimed that the bank was indebted to them in the sum of £20,138 16s. 9d. for the balance shown by the accounts annexed to the proof. The proof contained a statement that it was lodged without prejudice to the applicants' claim in certain proceedings then pending for the recovery of 200,000 Swiss francs, and that, in the event of those proceedings' proving successful, the applicants were prepared to reduce their claim by the amount recovered. Annexed to the proof was a statement of account in which the applicants had debited the bank with the 4,339,919 German marks which the applicants had paid for the American and English currency as mentioned. The sum of £20,138 16s. 9d., for which the applicants claimed to prove, represented the 4,339,919 German marks converted into English money at the rate of exchange ruling on Jan. 25, 1921, the date of the winding-up order. The proceedings mentioned in the proof were proceedings which the applicants had taken in Switzerland to assert a lien on the 200,000 Swiss francs in respect of the unpaid purchase money.

On July 8, 1921, the liquidator wrote a letter to the applicants referring to their proof, and informing them that a question had arisen as to the rate of exchange to be applied, which question had been referred to the court for decision. The liquidator added that the date of conversion and the rate of exchange applicable would appear to lie between two dates, namely, Jan. 6, 1921, when the bank suspended payment, and Jan. 25, 1921, the date of the winding-up order, and that, pending the decision of the court, he had been able to make a distribution of 5s. in the pound to those creditors whose claims had been admitted, and suggested that the applicants should allow their claim to be converted into sterling at the mean rate ruling on Jan. 6, 1921 (the rate most favourable to the applicants), in which case he would then be in a position immediately to distribute to the applicants the sum equivalent to 5s. in the pound thereon. He also added that if the court should decide that Jan. 25 was the material date, he would allow the applicants to make an additional proof for any difference which might arise in their claim as the result thereof, and that if the applicants were willing to adopt this suggestion, he would convert the applicants' claim at the mean rate ruling on

Jan. 6, 1921, and would make the necessary application to the Board of Trade for a cheque covering the amount of the first dividend of 5s. in the pound payable thereon, which would then be transmitted to the applicants. On July 31, 1921, the applicants wrote to the liquidator agreeing to accept 5s. in the pound at the rate of exchange ruling on Jan. 6, 1921, and stating that they had taken note that, if the court decided that the conversion should take place on Jan. 25, 1921, an additional proof might be made. On July 25, 1921, the liquidator wrote to the applicants that he was dealing with their proof in the manner suggested, but regretted that he could not remit the amount of the dividend as the question of the ownership of the 200,000 Swiss francs had not been determined by the court, and in the event of the court's deciding that those francs should be paid over to the applicants, they would have to give the bank credit for the sterling equivalent thereof. The German mark having considerably depreciated after the month of January, 1921, the liquidator, on Oct. 14, 1921, wrote to the applicants stating that, subject to the approval of the court, the committee of inspection were prepared to authorise him to pay the applicants' claim in German currency without interest, provided the applicants withdrew any claim they were still maintaining against the 200,000 Swiss francs. In reply to this letter the applicants wrote that they were not prepared to accept the proposal therein contained.

The German mark having still further depreciated, the liquidator, on Dec. 20, 1921, made an ex parte application to the registrar and obtained his leave to purchase out of the bank's assets such an amount of German marks as would be sufficient to pay to the applicants 4,339,919 German marks with interest thereon at the rate of 5 per cent. per annum from Jan. 15, 1921, to the date of payment, and to pay the same to the applicants in satisfaction of their claim. In his affidavit in support of that application, the liquidator stated (inter alia) that he could purchase the requisite German marks for about £5,425, and that, as he had already paid dividends in the liquidation amounting to 6s. 3d. in the pound and was about to pay another 1s. 3d. in the pound, it was clearly much to the advantage of the English creditors to redeem the Swiss francs without fighting the question of any attachment orders being right. Shortly after obtaining this leave, the liquidator purchased 4,542,052 German marks (being 4,339,919 marks for principal and 202,133 marks for interest), and on Jan. 5, 1922, caused these marks to be tendered to the applicants in Hamburg in full satisfaction of their claim against the bank. This tender was refused by the applicants. In the meantime the court of first instance in Switzerland had decided that the applicants had no lien upon or interest in the 200,000 Swiss francs, and the applicants had lodged an appeal against this decision. Later, however, the applicants abandoned their appeal, and thereupon, on Jan. 10, 1922, their solicitors wrote a letter to the liquidator in which (after referring to the fact that on the abandonment of the appeal the decision of the court of first instance had become finally binding upon the parties) they stated that they would be glad to know whether the liquidator was prepared to pay to the applicants the first and second dividends which he had declared, and, if so, they requested him to pay the same to the applicants. On Jan. 18, 1922, the liquidator wrote a letter in reply in which he stated that he could not admit the applicants' contention that their claim had been admitted to rank for dividend, and that, as the amount of the claim had been tendered in full, no question of proof could arise. In conclusion, he stated that he was not prepared to deal with the applicants' claim, as suggested in the letter under reply, but was quite prepared to pay over to the applicants the 4,542,052 German marks, and that in his view no claim could arise as payment in full with interest had been offered by order of the court. On Feb. 27, 1922, the applicants issued the present summons, asking for a declaration that they were entitled to prove for the sum of £20,138 16s. 9d., and that the liquidator be directed to admit the proof and to pay to the applicants the dividends already declared, and any further dividends that might be declared pari passu with the unsecured creditors of the bank, and that the costs of the applicants be paid by the liquidator out of the assets of the bank.

In giving judgment P. O. Lawrence, J., said that the present case was indistinguishable from *Re British American Continental Bank, Ltd., Goldzieher and Penso's Claim* (1), which is binding upon me, and he held that the applicants were entitled to be admitted as creditors in the winding-up for such an amount as represented the 4,339,919 German marks converted into English money at the rate of exchange ruling on Dec. 31, 1920, and to receive the dividends already declared and hereafter to be declared on that amount. The liquidator appealed.

Schiller, K.C., and *M. Hilbery* for the liquidator.

Tomlin, K.C., and *Gavin T. Simonds* for the applicants.

LORD STERNDALE, M.R.—I think this judgment is quite right. The matter arises in the liquidation of the British American Continental Bank, Ltd., on a contract in these terms:

> "In accordance with our forward contracts you have to deliver to us Frs. 200,000—Zurich, on the 31st instant, and we would be obliged if you will pay the amount in question to the Union de Banques Suisses, Zurich, for the credit of our account with them on the 31st instant. We in our turn have credited you on current account with £9,039 11s. 7d. value 31st instant. Furthermore we have to deliver to you $50,000.—TT New York on the 31st instant, and would be obliged in view of the intervening holidays if you would let us have your instructions for the disposal of same at your earliest convenience. Against the above dollars you will have credited us with Mks. 2,047,500—value 31st inst. (equivalent of $30,000) and we have debited you on current account with £5,747 2s. 6d. value 31st instant (equivalent of $20,000)."

The bank got into difficulties and went into liquidation and was not able to deliver either the dollars or the sterling. The claimants, Messrs. Lisser and Rosenkrantz, bought sterling and dollars against the bank in consequence of their failure to deliver, and the amount that they paid was, after giving credit for certain things to which the bank were entitled to credit, some 4,300,000 marks odd. They then put in a proof for £20,138 16s. 9d., which was the amount of the 4,330,000 marks at the rate of exchange at that date. It is true that they went on and called it "balance in account £20,000," but I do not think it was in the ordinary sense a balance in account which would refer to debts. It may be called "balance in account" because, after claiming damages on one side and giving credit for other things on the other side, that was what remained; in that sense it was a balance in account and in no other. The claim really was in respect of damages for breach of contract to deliver what the bank had agreed to deliver. Correspondence, with which I need not trouble, passed between the parties with the result that some year or two afterwards the liquidator of the bank got the permission of the court to invest some of the assets in the purchase of a quantity of marks sufficient to pay this 4,300,000 marks odd and interest and he then tendered to the claimants that amount of marks in full discharge of their debt. When he bought them the value of those marks amounted to some £5,000 odd instead of some £20,000 odd and it was very much to the benefit of the other creditors if the liquidator could carry that transaction through. The claimants not unnaturally refused to accept the marks.

I think that the learned judge was right in saying that this case is governed by the case in the liquidation of the same bank of *Goldzieher and Penso's Claim* (1). I cannot distinguish it at all and I think it is quite a fallacy to say that there was any debt of this 4,330,000 marks in the sense of being an ordinary debt as distinguished from the ascertainment of damages for breach of contract. What the effect might be if it were a debt I do not propose to discuss. It seems to me that the learned judge was quite right when he said that

> "The purchase by the applicants of the American and English currency against the bank happens in the present case to have fixed the amount of these damages."

That is what it did and that is all it did. Suppose they had not bought against the bank, but had done nothing and had come now and said: "Measure these damages which we have sustained by breach of contract," there is no doubt whatever on the authorities that the amount would have been ascertained, if it were any question of conversion of marks into sterling at the date of the breach. That would be the position then, and it seems to me to be the position now. They had fixed the amount of damages by the transaction which took place in Germany, and according to the case to which I have referred, a decision of the Court of Appeal, and according I think also to the decision of the House of Lords in *Celia* (*Owners*) v. *Volturno* (*Owners*) (2) on these same points, the date at which that is to be ascertained is the date of the breach, and, therefore, the date at which the German currency which they have expended in order to cover their loss has to be converted into British sterling is also the date of the breach. I think the reasons and the conclusions of P. O. LAWRENCE, J., are both right and it is not necessary to say any more about it except that I agree with the judgment and I think that the appeal should be dismissed with costs.

WARRINGTON, L.J.—I am of the same opinion. Once one arrives at the fact, which seems to me to be abundantly established, that the claim here is a claim for damages for breach of contract and not for the recovery of debt, it seems to me that the case is perfectly clear. All that the claimants did was to ascertain the amount of their damages by actually buying the dollars and the sterling in Germany. They need not have done that; they might have made claim for the loss they had sustained by not having their dollars in sterling. Probably the amount would have been the same, but that does not matter. All that the purchase of marks effected was to fix the amount of the loss which the breach of the contract had caused, and, accordingly, this being a claim for damages for breach of contract, the matter falls, I think, within the authority of the case already referred to in the Court of Appeal in the winding-up of the same company, *Goldzieher and Penso's Claim* (1), and I think the learned judge is quite correct in fixing the date of the breach, that is to say, Dec. 31, 1920, as the date as at which the claim in marks ought to be converted into English currency.

YOUNGER, L.J.—I am of the same opinion.

Solicitors: *H. Hilbery & Son*; *Rehder & Higgs.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

WOOD *v.* CARWARDINE

[KING'S BENCH DIVISION (McCardie, J.), March 20, 1923]

[Reported [1923] 2 K.B. 185; 92 L.J.K.B. 593; 129 L.T. 314; 39 T.L.R. 300; 21 L.G.R. 306]

Rent Restriction—Premises not within the Acts—Rent including payment for attendance—"Attendance"—Supply of hot water—Delivery to tenants by caretaker of letters, messages, and parcels—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12 (2), *proviso* (*i*).

By proviso (i) to s. 12 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, that Act "shall not . . . apply to a dwelling-house bona fide let at a rent which includes payments in respect of . . . attendance . . ."

To ascertain whether or not a letting is excluded from the Act by the existence of attendance within the meaning of the proviso it is essential that the court should confine itself to the terms of the lease or agreement, and certainly so where the document is a formal one under seal, and not have regard to the actual practice which has prevailed on the premises during the currency of the letting.

By an agreement the landlord let to the tenant a flat for a term of three years, the landlord covenanting "to provide and supply a good and sufficient supply of hot water for the said demised premises at all times of the day." The supply of hot water was furnished through pipes leading from the heating apparatus in the basement, the basement being under the control of the landlord. By general regulations attached to the lease it was provided that the resident caretaker of the premises, who was paid by the landlord, should receive all letters, messages and parcels and deliver the same to the tenants. On the expiration of the lease the landlord claimed possession.

Held: the word "attendance" in the proviso referred to actual personal attendance by the landlord's servants or agents and was not apt to cover the supply of water in the present case; the receipt and delivery by the caretaker of letters, messages, and parcels was so small a part of his duties that that service fell within the rule de minimis non curat lex, which must be applied with robust vigour in favour of the tenant if the protective object of the Act was not to be substantially defeated; and, therefore, the premises were not excluded from the Act by the proviso, and the landlord was not entitled to possession.

Notes. Referred to: *Rimmer* v. *Carson* (1923), 39 T.L.R. 349; *Re Leicester Temperance and General Permanent Building Society's Application*, [1942] 1 All E.R. 580; *Palser* v. *Grinling*, *Property Holding Co.* v. *Mischeff*, [1948] 1 All E.R. 1.

As to lettings at rents which include attendance, see 23 HALSBURY'S LAWS (3rd Edn.) 748–751; and for cases see 31 DIGEST (Repl.) 650–652. For Rent &c. (Restrictions) Act, 1920, see 13 HALSBURY'S STATUTES (2nd Edn.) 981.

Cases referred to:

(1) *Nye* v. *Davis*, [1922] 2 K.B. 56; 91 L.J.K.B. 545; 126 L.T. 537; 20 L.G.R. 483, D.C.; 31 Digest (Repl.) 651, *7545*.

(2) *King* v. *Millen*, [1922] 2 K.B. 647; 92 L.J.K.B. 123; 128 L.T. 280; 67 Sol. Jo. 48; 20 L.G.R. 715, D.C.; 31 Digest (Repl.) 652, *7549*.

(3) *Wilkes* v. *Goodwin*, post, p. 61; [1923] 2 K.B. 86; 92 L.J.K.B. 580; 129 L.T. 44; 39 T.L.R. 262; 67 Sol. Jo. 437; 21 L.G.R. 329, C.A.; 31 Digest (Repl.) 652, *7560*.

(4) *Dick* v. *Duncan*, [1923] W.N. 90; 92 L.J.Ch. 320; 67 Sol. Jo. 384; 31 Digest (Repl.) 652, *7546*.

(5) *Wood* v. *Wallace* (1920), 90 L.J.K.B. 319; 124 L.T. 539; 37 T.L.R. 147; 65 Sol. Jo. 135; 84 J.P.Jo. 517; 31 Digest (Repl.) 650, *7538*.

(6) *Hocker* v. *Solomon* (1921), 91 L.J.Ch. 8; 127 L.T. 144; 31 Digest (Repl.) 651, *7539*. A

(7) *Crane* v. *Cox* (1923), 92 L.J.K.B. 544; 128 L.T. 831; 39 T.L.R. 204; 67 Sol. Jo. 335; 21 L.G.R. 226, D.C.; 31 Digest (Repl.) 652, *7562*.

Action tried by McCardie, J.

The plaintiff was the landlord and the defendant was the tenant of a flat at Eastbourne. The plaintiff claimed possession of the premises on the expiry of the lease. The tenant relied on the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. B

Horton Smith for the plaintiff.
John Flowers for the defendant.

The facts and the arguments sufficiently appear from the judgment. C

McCARDIE, J.—This action raises again a problem which has been discussed in connection with s. 12 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and the proviso (i) to sub-s. (2) of that section. The proviso says:

> "This Act shall not, save as otherwise expressly provided, apply to a dwelling-house bona fide let at a rent which includes payments in respect of board, attendance, or use of furniture." D

The facts of the present case are these. The lease was made between the parties in 1919 for a term of three years. It expired on Sept. 29, 1922, and the plaintiff (the landlord) thereupon claimed possession of the premises. The defendant refused to give up possession on the ground that he was protected by the provisions of the Act of 1920, and he is protected by that Act unless the plaintiff E can show that the proviso which I have read applies to this case. The lease was a lease of the second floor of a building at Eastbourne, No. 28, Hyde Gardens. By cl. 2 the tenant covenants to pay the rent, and, secondly,

> "to observe and strictly conform to the general regulations for the time being governing all suites of rooms in the said building contained in the schedule hereto." F

By cl. 3 the landlord covenants with the tenants as follows:

> "To keep the exterior of said premises and the roof thereof in good and substantial repair at all times during the said term; to keep the entrance to the said messuage and the hall and staircase clean and in good order and the hall and the staircase properly and adequately lighted. . . . to provide and G supply a good and sufficient supply of hot water for the said demised premises at all times of the day. . . ."

There are at the end of the lease certain general regulations, and among them is one to the effect that the care of the front entrance should be the duty of the resident caretaker and that such entrance should be kept open or shut by him or her according to the landlord's instructions. There is a further regulation as H follows:

> "All coals required shall be brought up from the cellars and all refuse taken down to the dustbin before 9 a.m."

Then there are regulations as to the resident caretaker. The first is that

> "the caretaker shall be appointed and removeable by the landlord and shall be paid by him for the performance of his or her duties." I

The regulations then state the general duties of the resident caretaker. He or she is to reside in the building and is properly to cleanse the entrance hall and staircase, to attend to the lights, and "to receive and deliver to the several tenants all letters messages and parcels."

The plaintiff to a substantial degree, if not at all times, did supply the defendant with hot water in accordance with the terms of the lease, up to the afternoon

A and, therefore, for a substantial part of each day the defendant got hot water. The resident caretaker took up coal for the defendant several times a week, and took down refuse from the defendant's flat, but in neither case did the caretaker enter into the flat. She delivered the coal outside the flat and removed the refuse from where it had been deposited outside the flat. To a large extent, also, the caretaker took up letters and parcels to the defendant's flat and handed them B in. The caretaker did not do this invariably, for at times letters and parcels were left in the hall, and, if seen, were taken up by the defendant or his wife.

Do the facts which I have stated exclude this lease from the operation of the Act? I desire to say at once that, in my opinion, the actual practice which has prevailed at the flat during the currency of the lease, whether attributable to courtesy or otherwise, is not material except in so far as it may have some bearing C on the construction of the lease. To ascertain whether or not the letting is excluded from the Act, I think it is essential to confine oneself to the actual terms of the letting, and certainly so in such a case as the present, where the document is a formal one under seal. It is, therefore, necessary to look at the terms of the lease, but before I do so I desire to express my own personal view as to the object with which the proviso was inserted in s. 12. In my opinion, the object of the D proviso was to exclude from the operation of the Act flats in which the landlord renders by his servants, actual service within the flat itself, whether by a chambermaid, valet, waiter, or the like. Whatever my own view may be, however, I am, of course, bound to pay the fullest attention and respect to the decisions which have been given by the courts in regard to the matter.

This proviso has been interpreted in several cases. In *Nye* v. *Davis* (1) before E the Divisional Court, there was a covenant by the landlord to remove refuse from the flat and to carry up to the flat the coal which was required. That was not an interior service to the flat, yet the court held that there was attendance within the meaning of the proviso. *Nye* v. *Davis* (1), although much criticised and frequently doubted, is not, so far as I know, definitely overthrown as an authority. Indeed, I think if one looks at the decision it must be treated as a decision, which, F so far as it goes, is still binding. The next decision on the point was *King* v. *Millen* (2). In that case the substance of the landlord's obligation to his tenant was that he should allow the tenant to use the main entrance door and staircase and the light, and that the landlord should keep the hall and staircase properly clean. In that case the Divisional Court distinguished *Nye* v. *Davis* (1), which obviously did not commend itself fully to them, and they held that the agreement G to keep the hall and staircase properly cleaned did not constitute "attendance" within the meaning of the proviso. In other words, they held that there was no specific personal duty fulfilled by the landlord to the tenant either in the flat itself or in carrying up to and taking down articles from the flat. I gather from the decision of the Court of Appeal in *Wilkes* v. *Goodwin* (3), post, p. 61, that the two cases to which I have referred are not regarded as other than existing authorities. H The next case which has been referred to and calls for mention is the very recent case of *Dick* v. *Duncan* (4). On reading the report of this case I at first formed the view that the decision went beyond that in *Nye* v. *Davis* (1), but I have been able to consult the lease which was there in question, and I now appreciate the statement by Eve, J., that in substance the agreement in the case before him was the same as that in *Nye* v. *Davis* (1). In those circumstances, I do not think I that the decision in *Dick* v. *Duncan* (4) carries the matter any further, but it is important as showing that a learned and experienced judge of the Chancery Division recognised that *Nye* v. *Davis* (1) was an existing authority notwithstanding *King* v. *Millen* (2).

That being the state of the authorities, let me take the first point mentioned by counsel for the landlord as bringing the present case within *Nye* v. *Davis* (1). He says that the landlord here covenanted to provide and supply a good and sufficient supply of hot water for the demised premises at all times, and he invites me to hold that that constitutes "attendance" within the meaning of the

proviso. In my view, it is not attendance within the meaning of the proviso, and in dealing with cases under this Act I think it is desirable that a judge should express a definite view. If it is right, so be it, and if it is wrong, then let another tribunal say so. I think that the word "attendance" in the proviso refers to actual personal attendance by the landlord's servants or agents having actual corporeal existence. This view is, I think, supported by the meaning given to the word "attendance" in DR. JOHNSON'S DICTIONARY and in the IMPERIAL DICTIONARY, and I see nothing in the definition of the word in LES TERMES DE LA LEY to which I was referred to destroy the conclusion I have formed. If the supply of hot water is to be deemed personal attendance I cannot understand how the decision in *King* v. *Millen* (2) could exist as an authority. I also wish to point out that if it be "attendance" to send hot water through pipes it is difficult to see why gas supplied through a pipe which can be operated by a tap in the basement should not also amount to "attendance," or electricity supplied by means of a wire. In my opinion, in the present case there is no attendance at all. If, however, contrary to my opinion, it should be held that a supply of hot water through a pipe is to be deemed attendance, in the present case it is plain that the "attendance" would be of a sufficiently substantial nature to make the lease bona fide within the Act, because the cost of this hot water system is a substantial matter. I only desire to add on this point that in my view *Wood* v. *Wallace* (5) and *Hocker* v. *Solomon* (6) do not affect the points now raised.

The words which, further, counsel for the landlord suggests apply are those appearing in the rules for the resident caretaker which I have read. It is there provided that the caretaker shall receive and deliver to the tenants all letters, messages and parcels. Those words undoubtedly indicate personal service and I agree that they constitute a difficulty in the tenant's way which must be carefully considered. Upon the whole, although there is no express covenant by the landlord in regard to this matter, I incline to the view that there is an implied contract on his part, and I need only refer to the authorities mentioned in LEAKE ON CONTRACTS (7th Edn.) at pp. 157 et seq. If there be, as I think there is, a covenant by the landlord with respect to these letters, messages and parcels, there does arise in this case definitely and unavoidably a consideration of the rule de minimis non curat lex which was recently referred to in the Court of Appeal in *Wilkes* v. *Goodwin* (3). I observe that neither of the lords justices who constituted the majority of the court on that occasion gave any definite indication of their views as to the principles on which the rule is to be applied. It is a rule which it is easy to state; the difficulty lies in the measure and extent of its application, and each judge, I presume, must decide this matter for himself. I express again my own clear personal view, that, bowing as I must to the opinion of the majority of the Court of Appeal, and following their view as against that of YOUNGER, L.J., the rule de minimis non curat lex must be applied in cases such as the present with robust vigour in favour of the tenant unless the protective object of the Act is to be substantially defeated. I think there is much force in the observations made by the court in *Crane* v. *Cox* (7), although I agree that the ratio of the judgment in that case must be considered in the light of the opinion of the majority of the Court of Appeal in *Wilkes* v. *Goodwin* (3). In considering the application of the rule the observations of BANKES, L.J., in that case are important, because he refers to the question of substantiality as being an important matter in dealing with the question of the rule. In the present case, holding as I do that the provision of hot water is not de minimis non curat lex, I ask myself: "Can I say that this lease is excluded from the provisions of the Act of 1920 because the landlord agreed that the caretaker should receive and deliver to the tenants all letters, messages and parcels?" I am compelled to hold that this is a case for the application of the rule de minimis non curat lex. If it is not a case for the application of the rule, I know not how the rule could ever be applied at all. The landlord has a caretaker resident on the premises whose business it is to look after the hot water, the lights, and many other things. The whole substance of

the caretaker's business is outside the delivery of letters, parcels and messages, which forms a most trivial part of his duties, involving two or three strolls upstairs in the course of the day. It is so slender a portion of the caretaker's duties that it cannot, in my judgment, be regarded as other than de minimis non curat lex. If the landlord in the present case were to say that these particular services of the caretaker were to cease to be rendered, my own view is that there would not be one shilling alteration in the rent which would be asked for the premises.

The result is, therefore, applying these views which I have deemed it proper to express with absolute frankness in order to secure for this Act some working clarity. I hold that the landlord is not entitled to possession, and that there is not any letting of the premises at a rent which bona fide includes attendance within the meaning of the proviso (i) to sub-s. (2) of s. 12.

Judgment for defendant.

Solicitors: *F. H. Loseby*, for *C. W. Mayo*, Eastbourne; *Langhams*, for *R. A. Niedermayer*, Eastbourne.

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

WILKES AND ANOTHER *v.* GOODWIN

[Court of Appeal (Bankes, Scrutton and Younger, L.JJ.), February 14, 15, March 8, 1923]

[Reported [1923] 2 K.B. 86; 92 L.J.K.B. 580; 129 L.T. 44; 39 T.L.R. 262; 67 Sol. Jo. 437; 21 L.G.R. 239]

Rent Restriction—Premises not within the Acts—Furnished letting—"Furniture"—Test of what constitutes—Application of de minimis rule—Linoleum—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo. 5, c. 17), s. 12 (2) (i).*

By s. 12 (2) proviso (i) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920: "This Act shall not . . . apply to a dwelling-house bona fide let at a rent which includes payments in respect of board, attendance, or use of furniture." The guide to what constitutes "furniture" within this proviso is whether the articles in question come within the ordinary meaning of the word, or (per Scrutton, L.J.) whether they would pass under a contract to buy, or under a will bequeathing, the furniture in a house. If they do (or would), any amount of furniture will satisfy the test, subject to its being excluded from consideration under the de minimis rule as being so trifling in value or in amount as to be negligible. These are questions of fact for the county court judge.

So **held** by Bankes, L.J., and Scrutton, L.J., Younger, L.J., dissentiente.

Per **Curiam**: (i) (Younger, L.J., dubitante) linoleum laid in rooms in the demised premises is capable of being "furniture" within the proviso; (Younger, L.J., dissentiente) the proviso does not indicate whether full or partial board, complete or intermittent attendance, much or little furniture, is aimed at.

Rent Restriction—Construction of the Acts—Construction depriving tenants of benefits presumably intended for them to be avoided.

Per Younger, L.J.: The Rent Restrictions Acts are essentially tenants' Acts, and, the court, before adopting a construction of any provision in them which would deprive tenants of benefits presumably intended to be provided for them,

must satisfy itself that that is the only construction properly to be placed on the words of the Acts.

Notes. Considered: *Dick* v. *Duncan* (1923), 92 L.J.Ch. 320; *Rimmer* v. *Carson* (1923) 39 T.L.R. 349; *Seabrook* v. *Mervyn*, [1947] 1 All E.R. 295. Followed: *Artillery Mansions, Ltd.* v. *Mabartney*, [1947] 1 All E.R. 686. Considered: *Property Holding Co.* v. *Clark*, [1948] 1 All E.R. 165; *Alliance Property Co.* v. *Shaffer*, [1949] 1 All E.R. 312. Referred to: *Wood* v. *Cawardine*, ante, p. 57; *Re Leicester Temperance and General Permanent Building Society's Application*, [1942] 1 All E.R. 580; *Gray* v. *Fidler*, [1943] 2 All E.R. 289; *Signy* v. *Abbey National Building Society*, [1944] 1 All E.R. 448.

As to furnished lettings excluded from Acts, see 23 HALSBURY'S LAWS (3rd Edn.) 748–751; and for cases see 31 DIGEST (Repl.) 652–655. For Increase of Rent &c. (Restrictions) Act, 1920, see 13 HALSBURY'S STATUTES (2nd Edn.) 981.

Cases referred to:

(1) *Nye* v. *Davis*, [1922] 2 K.B. 56; 91 L.J.K.B. 545; 126 L.T. 537; 20 L.G.R. 483, D.C.; 31 Digest (Repl.) 651, *7545*.

(2) *Wood* v. *Wallace* (1920), 90 L.J.K.B. 319; 124 L.T. 539; 37 T.L.R. 147; 65 Sol. Jo. 135; 84 J.P.Jo. 517; 31 Digest (Repl.) 650, *7538*.

(3) *Hocker* v. *Solomon* (1921), 91 L.J.Ch. 8; 127 L.T. 144; 31 Digest (Repl.) 651, *7539*.

(4) *Burns Wallace* v. *Hardingham* (1921), unreported.

(5) *Crane* v. *Cox* (1923), 92 L.J.K.B. 544; 128 L.T. 831; 39 T.L.R. 204; 67 Sol. Jo. 335; 21 L.G.R. 226, D.C.; 31 Digest (Repl.) 652, *7562*.

(6) *Kerr* v. *Bryde*, [1923] A.C. 16; 92 L.J.P.C. 1; 128 L.T. 140; 87 J.P. 16; 39 T.L.R. 61; 67 Sol. Jo. 112; 21 L.G.R. 1, H.L.; 31 Digest (Repl.) 683, *7754*.

Also referred to in argument:

Bolton v. *Madden* (1873), L.R. 9 Q.B. 55; 43 L.J.Q.B. 35; 29 L.T. 505; 38 J.P. 118; 22 W.R. 207; 12 Digest (Repl.) 277, *2130*.

Hellawell v. *Eastwood* (1851), 6 Exch. 295; Cox, M. & H. 452; 20 L.J.Ex. 154; 15 J.P. 724; 155 E.R. 554; sub nom. *Helliwell* v. *Eastwood*, 17 L.T.O.S. 96; 31 Digest (Repl.) 205, *3361*.

Appeal from an order of the Divisional Court.

The plaintiffs were the tenants of a maisonette at Brighton of which the defendant was the landlady. The maisonette consisted of three floors—a basement containing a front room, kitchen, and scullery, the ground floor with dining room and two bedrooms, and the first floor with drawing room and one bedroom. The tenants were also entitled to the use of the hall, bathroom, and lavatory jointly with the tenant of the upper maisonette. The original rent was £32 10s. a quarter, with an additional £1 5s. a quarter for the use of the linoleum laid on the ground floor and in the bedroom on the first floor. On Jan. 26, 1921, a new agreement was entered into for a quarterly tenancy from Dec. 25, 1920, under which the rent was £20 a quarter, to include rates and taxes and the use of the linoleum. The standard rent of the whole house being £55, the plaintiffs applied to the county court at Brighton for apportionment of the rent. The defendant contended that the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, did not apply to the premises in question by reason of proviso (i) to s. 12 (2) of the Act which provided,

> "This Act shall not, save as otherwise expressly provided, apply to a dwelling-house bona fide let at a rent which includes payments in respect of board, attendance, or use of furniture."

The registrar held that linoleum was "furniture" and that furniture must form a real part of the consideration in the mind of the tenant. In view of the small value of the linoleum as contrasted with the rent and of the fact that the tenants did not want the linoleum which was forced upon them, he held that this could not be said to be a bona fide letting at a rent which included payments for the use

A of furniture, and the court had, therefore, power to apportion. On appeal the county court judge held that the linoleum in question was furniture. He held, further, that, in view of the decision in *Nye* v. *Davis* (1), the inclusion in the rent of a payment for the use of the linoleum was not a mere colourable evasion of the Act, and that he must, therefore, hold that these premises were bona fide let to the plaintiffs at a rent which included payments for use of furniture. He was not at B liberty to consider whether the use of the linoleum in this case was too trivial a matter to take this letting out of the operation of the Act, though, but for the decision in *Nye* v. *Davis* (1), he should have so held. He, accordingly, allowed the appeal and reversed the decision of the registrar. The tenants appealed to the Divisional Court who dismissed the appeal, and the tenants appealed to the Court of Appeal.

C *John Flowers* for the tenants.

Herbert Jacobs for the landlord.

Mar. 8. The following judgments were read. *Cur. adv. vult.*

BANKES, L.J.—This appeal raises the question whether certain premises D occupied by the plaintiffs are exempted from the operation of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, on the ground that they were bona fide let at a rent which included payments in respect of the use of furniture within the meaning of s. 12 (2), proviso (i). The facts of the case have given rise to a strange conflict of judicial opinion. The county court judge differed from his registrar. The two judges composing the Divisional Court differed from the E registrar and from the county court judge and from each other.

The facts lie in a narrow compass. By an agreement made on Oct. 12, 1920, the landlord let to the tenants certain rooms on the first and ground floors and in the basement of a house at Brighton on a quarterly tenancy at a quarterly rent of £32 10s., payable in advance, and a further sum of £1 5s. a quarter, also payable in advance, for the use of the linoleum in the maisonette. The point does not F arise in this case, but we have been referred to the two decisions of *Wood* v. *Wallace* (2) and *Hocker* v. *Solomon* (3), in which the learned judges expressed the view that where an agreement provides for a separate payment for the use of furniture the premises do not come within the proviso. I express no opinion on this point except that I think that it is one which will require careful consideration if ever it has to be decided by this court. This first tenancy agreement was superseded by a G later one of Jan. 26, 1921, under which the plaintiffs became tenants of the same premises on a quarterly tenancy at the quarterly rent of £20, "to include the use of the linoleum." It is with reference to this agreement that the conflict of judicial opinion has raged. Except on two points I do not propose to refer to the different views expressed. The learned county court judge was of opinion that the effect of the decision in *Nye* v. *Davis* (1) was that, if the bona fides of the H letting was established to his satisfaction, he was not at liberty to consider whether the amount of the linoleum included in the letting was trivial or not. In this I think that he was wrong. The decision does not warrant any such conclusion. The learned judge probably acted on what was only an incomplete report of the case, as in his judgment he refers to a report in the WEEKLY NOTES.

The many difficulties which have arisen on the construction and application of I the Rent Restrictions Acts have been due to a large extent to the infinite variety of the circumstances to which the provisions of the statutes have had to be applied. I feel sure that the way of safety in construing these statutes is, wherever possible, to give to the language used its ordinary meaning, and, whenever possible, to call in aid to assist in construing the statutes some accepted rule of universal application rather than one depending for its terms on the individual view of the person called upon to interpret the statutes as to what the legislature must have, or possibly ought to have, intended in the particular circumstances under consideration. Broadly speaking, the statute divides all dwelling-houses into two

classes, the one within and the other outside the provisions of the statute. If by taking action which the statute authorises a landlord removes his house out of the one class and puts it into the other, he is merely doing what the statute allows him to do. To talk of evading the Act in such circumstances is a wrong way of approaching the construction of the statute, and is likely to lead to a misinterpretation of it. In the case of the proviso now to be interpreted, the language used by the legislature appears to be reasonably plain, and the application of the proviso can be ascertained by calling in aid a universally accepted rule of law. If the result is not what the legislature intended, it is for the legislature to amend the proviso, rather than for the courts to attempt the necessary amendment by investing plain language with some other than its natural meaning in order to produce a result which it is thought that the legislature must have intended. The proviso is introduced into the section, which defines the dwelling-house to which the Act shall apply, for the purposes of excluding a certain class of dwelling-house from the operation of the Act. It does so by the application of two tests. The one is the bona fides of the letting, and the other is that the rent includes payments in respect of board, attendance, or use of furniture. The first test depends upon a question of intention; the second is a question of fact and of degree. In some cases the tests may run the one into the other; in others they may stand independently of each other.

I will take the second test first. Three quite common and well-understood words are used—viz., board, attendance, furniture. The words are used quite generally and without any limitation. The statute does not indicate whether full or partial board, complete or intermittent attendance, much or little furniture is aimed at. It uses the words quite generally, and any amount of board, any amount of attendance, any amount of furniture will satisfy this second test which is not ruled out of consideration by the application of the rule de minimis non curat lex. The best expression of the application of this rule for the purpose of interpreting the proviso that I have come across in the cases to which we have been referred is in the judgment of His Honour Judge Granger, in *Burns Wallace* v. *Hardingham* (4), where he speaks of the question which he has to decide in reference to certain articles as a question whether they were so trifling in value, or in amount, as to be negligible. The first test, as I have already said, must depend on the question of intention. Where the amount of board, attendance, or furniture said to be included in the rent is so small as to be negligible, that, no doubt, would go far to dispose of the question of the bona fides of the letting. Apart from the amount of board, attendance, or furniture involved, there must always be, in order to satisfy the first test, the intention to include in the rent a real charge in respect of board, attendance, or furniture.

The application of the two tests to the circumstances of any case must, if there is any evidence to support the case for exclusion, depend upon questions of fact, which are for the county court judge and for the Divisional Court or for this court. In the present case the county court judge has decided the question of the bona fides of the letting, but under what I consider was an erroneous view of the decision in *Nye* v. *Davis* (1) he refrained from giving any decision on the question whether the use of the linoleum was so trivial a matter as to be negligible, though he indicated what his opinion might have been had he been called upon at that time to give a decision on that point. Everyone who has hitherto been concerned in the decision of this case has accepted the view that linoleum, fitted as the linoleum in the present case is, comes within the popular meaning of the expression "furniture." There can, I think, be no question on that point. Whether the linoleum in question is so trifling in value or in amount as to be negligible is for the learned county court judge to decide, and not for the Divisional Court or for this court There is no dispute about the facts. The floors of four out of the five principal rooms of which the maisonette consists are covered with fitted linoleum. The inference to be drawn from this fact, coupled with the other facts in the case, is the question which the county court judge alone can decide.

In conclusion, there is one passage in the judgment of AVORY, J., to which I think I ought to refer. He attaches importance to the language of the side-note to s. 9 (1), as indicating the intention of the legislature. [Section 9 was repealed by the Rent Act, 1957. The side-note referred to was: "Limitation on rent of houses let furnished."] With all respect to the learned judge and to the author of the side-note, I think that it is a misleading guide. In the popular sense a house is not "let furnished" unless it is more or less completely furnished. It cannot be disputed that s. 9 must apply to houses only partially or incompletely furnished, as well as to furnished houses. This conclusion drives one back upon the question, What is meant by the expression in the body of s. 9 (1) and in the proviso (i) to s. 12 (2), "payment in respect of the use of furniture"? I cannot think that this expression was intended to refer to houses let furnished. On the contrary, it appears to me to have been deliberately selected to indicate something different from the letting of a furnished house. If I am correct in this view, it strengthens the conclusion that the only safe guide to what constitutes "furniture" within the meaning of the Act is to consider, first, whether the article, or articles, come within the popular meaning of the word, and, if they do, then to decide whether they are excluded from the consideration by the application of the rule de minimis. The action must go back to the county court for the learned judge to decide this question, and all the costs, both here and below, must abide the event of his decision.

SCRUTTON, L.J.—This appeal raises a question which has been the subject of much discussion in the county courts and elsewhere. Linoleum would not, at first sight, seem a subject likely to arouse acute differences of opinion, but it has given rise to many disputes on the meaning of a provision in the Rent Restriction Acts. The Act of 1915 [repealed by the Act of 1920] contained the following proviso (s. 2 (2)):

> "Provided that this Act shall not apply to dwelling-house let at a rent which includes payments in respect of board, attendance, or use of furniture."

The Act of 1920 re-enacted the proviso, inserting the words "bona fide" before the word "let," and inserted the words "save as otherwise expressly provided," which refer to s. 9 and s. 10 of the Act of 1920, intended to prevent excessive charge for the use of furniture by making the excess irrecoverable, and providing that the demand of extortionate excess shall be a criminal offence. On the words "rent which includes payment," ROCHE, J., in *Wood* v. *Wallace* (2) has held, and SARGANT, J., in *Hocker* v. *Solomon* (3), has followed his decision, that the words do not cover a tenancy when one sum is agreed to be payable for rent and another for board, attendance, or use of furniture, for the rent does not "include a payment." They take the words to refer to cases where one inclusive sum is agreed to be paid for rent proper, and board, attendance, or furniture. ROCHE, J., says that this is a very literal construction, and deals with form rather than substance. I agree with him and reserve myself liberty to consider its correctness when a case raises the point before us.

On the rest of the proviso, in my view, "board" is not confined to the full board of an ordinary tenant, "attendance" to full attendance, or "furniture" to the complete furniture of a "furnished house." Partial board, partial attendance, or some furniture, though the house is not completely furnished, will suffice to bring the proviso into operation. Parliament might have made the other provision, but have not, in my opinion, done so. If some furniture will do, how much will suffice? This seems to me to require an answer to three questions: (i) Is part of the subject of the letting what can be properly called "furniture?" (ii) Did the parties agree in the rent to include payment for the use of that "furniture?" (iii) Is there a bona fide contract to that effect, or is such a term only a pretended agreement inserted to take the case out of the Act, without involving any real transaction of tenancy or hire of furniture?

The first two questions involve the words "a rent which includes payment for the use of furniture," and the third the words "bona fide let." The first question will be answered by taking the ordinary use of "furniture" and excluding things so insignificant as to be negligible, such as a window-wedge, a saucepan, a door-mat, a gas-globe. Would the article or articles in question pass under a contract to buy the "furniture" in a house, or a will bequeathing the "furniture" in a house? The answer is a question of fact, if there is any evidence justifying it, and to some extent of degree. As to the second question, what the parties agree must be judged by the words used, and if they have expressly included the particular furniture in the consideration for the rent agreed to be paid, it would seem that the rent "includes payment for the use of the furniture." If it is substantial, and important enough to be expressly mentioned in the consideration, or if the landlord, in withdrawing it from the house, would commit a breach of contract, it is difficult to say that payment for it is not included in the rent. It would be enough, however, that the agreement should cover "use of furniture" if the furniture in fact included is sufficiently substantial to be called furniture. But the answer to the third question may require consideration of the amount of furniture. A piece of furniture may be so small and insignificant that its express mention may show that the agreement about it is not a bona fide letting, but a collusive agreement to take the case out of the Act by inserting a sham term in the tenancy. For this purpose it may be necessary to consider surrounding circumstances and the negotiations of the parties to see whether there was a genuine agreement to let and hire the furniture, or merely a pretended one.

I turn now to the facts of the case. The tenants took eight rooms, part of a house within the Act. They had some linoleum which they did not want to store, and, therefore, did not want the landlady's linoleum. But the landlady also had some linoleum which she did not want to store, covering the floors of the principal rooms, and sixty-three yards in superficial area. The landlady valued it at £30, the county court judge puts its value at £15. Anyone who has recently bought linoleum knows that the price of sixty square yards may represent some substantial figure. The landlady would not let without the linoleum and the tenant gave way. In the first agreement she agreed to pay £130 rent plus 25s. a quarter for the use of the linoleum. In the second agreement, in force at the time of the dispute, "at the quarterly rent of £20, to include the use of the linoleum in the maisonette." There is no evidence that either lady knew anything about the provisions of the Rent Restriction Act, or made the agreement in this form because of these provisions. The case has already had four opinions pronounced on it, all differing. According to the county court rules, it went in the first instance to the registrar, who delivered a very careful judgment. He found that the linoleum might be furniture, but held that the furniture let

> "must form a real part of the consideration in the mind of the tenant . . . a substantial part of the consideration in the mind of the parties," and that as "the tenant did not want the linoleum there was not a bona fide letting."

But it appears to me that a person who does not want a thing may yet, bona fide, agree to hire it, if he cannot get something he does want unless he hires it, and if, in those circumstances, he expressly includes it in the consideration for the rent, there is a bona fide letting. The county court judge reversed this decision. He agreed that the linoleum was "furniture," and "furniture within the section." He thought himself bound by *Nye* v. *Davis* (1) to hold that, if it was furniture, the question of the amount was immaterial, unless there was "a colourable evasion of the Act," and that as there was not a colourable evasion of the Act here (by which I understand him to mean that the parties really bargained whether the tenant should hire the linoleum and pay for its use in the rent) its amount was immaterial. But for his view about *Nye* v. *Davis* (1) he would have held that the use of the linoleum was too trivial to be considered. I should have thought that this really meant that there was so little linoleum that it could not be properly

called "furniture," either in ordinary language or within the meaning of the Act, but the learned judge had earlier in the judgment found that this linoleum was "furniture" in both senses. Being "furniture" and having found that there was no colourable evasion of the Act, I should have thought the result of the judgment of the county court judge correct. "Colourable evasion," must, I think, mean either that something is treated as furniture which is not furniture or that a pretence is made to agree a rent for the use of furniture when there is no real agreement in either case for the purpose of pretending that the letting is outside the Act when it is really within it. If there is "furniture" and the parties honestly intend to include the use of it in the consideration for the rent, it seems to me immaterial that they thereby evade or escape the operation of the Act.

In *Nye* v. *Davis* (1) some, though slight, attendance in the flat was part of the consideration for the rent agreed. The Divisional Court, finding a bona fide bargain on the subject, held that the tenancy was outside the Act. They did not decide, in my view, that one could not consider the trivial character of the subject-matter in deciding whether it was "attendance" or "furniture," or whether there was a bona fide letting. As the county court judge has, I think, misunderstood the effect of *Nye* v. *Davis* (1), and, anyhow, as his findings appear contradictory, I think a new trial should be ordered, to find (i) whether the sixty-three square yards of linoleum in four rooms is "furniture" (on this, trivial character may be considered, though I should have thought that the quantity was substantial and not negligible); (ii) if so, whether the parties did agree to include the use of this "furniture" in the consideration for the rent and, therefore, payment for it in the rent: the agreement itself seems to answer this question; (iii) whether the agreement was an honest bargain as to the use of the linoleum. I think the county court judge has already answered this in the affirmative. Triviality of subject-matter may disprove this, though I am not sure that the real importance is not whether there is enough linoleum to be "furniture" at all. The Divisional Court disagreed in opinion and the judgment of the county court judge, therefore, stood. AVORY, J., took the view that the statute did not include in furniture an amount less than would suffice to furnish a house, basing this decision on the side-notes to s. 9 and s. 10. There is, I think, nothing else than side-notes to support this view. The learned judge refers to one of the few authorities for considering marginal notes, but not to the many, including WILLES, J., BOVILL, C.J., JAMES, L.J., JESSEL, M.R., and LORD ESHER, M.R., to the contrary: see MAXWELL ON THE INTERPRETATION OF STATUTES (6th Edn.) p. 76. The side-notes are not part of the Act and I believe are not considered or amended by the legislature. I think, therefore, the learned judge put too great reliance on them. If Parliament had meant only to exclude "furnished houses," it could easily have said so. AVORY, J., agrees that there was no intention to evade the Act but thinks that (i) the county court judge should have determined as a matter of fact whether there was a rent which included payments for the use of this furniture. This question, as I have said, is, I think, answered by the agreement. If the landlady had taken away the linoleum, the tenant could have sued for breach of contract, and recovered the reasonable cost of substituted linoleum as damages; (ii) he should determine whether the linoleum was furniture at all. From the language used it would appear that AVORY, J., thought the fact that the tenant did not want it was material on this point. I do not understand this, but perhaps the report here is incorrect. AVORY, J., would, therefore, remit the case to the county court judge for consideration on these questions with directions on construction, which I think erroneous. SALTER, J., did not agree. He held that this amount of linoleum was furniture, that a payment for the use of it was included in the rent, and that there was a bona fide letting. He also comments on the language used by the judge at the end of his judgment. I do not myself think that that language is consistent with the earlier part of the judgment, and while agreeing in the main with the judgment of SALTER, J., I am led to order a new trial here because the substantial questions here are questions of fact, which I

do not think the county court judge has decided on relevant considerations only, and which the Court of Appeal cannot decide. If we could decide them, I, personally, should agree with the result of the judgment of the county court judge and SALTER, J., and hold that there was here a letting in good faith of a quantity of linoleum sufficient to be called furniture at a rent which included payment for the use of it, and that the landlady should succeed.

With regard to the other cases cited, in *Burns Wallace* v. *Hardingham* (4) there was an agreement endorsed "lease of unfurnished house," wherein a house was let with "fixtures as in schedule," and the schedule mentioned (inter alia) "linoleum." The county court judge found that the quantity of linoleum was such as to make it "furniture," and, therefore, the house was outside the Act, and the Divisional Court, composed of LORD STERNDALE and ATKIN, L.J., sitting temporarily in the King's Bench Division, reversed the county court judge. I do not disagree with this decision as the parties themselves did not treat the linoleum as "furniture," but as fixtures. In *Crane* v. *Cox* (5) there was a small piece of linoleum on the premises left by a previous tenant. The county court judge had thought he was bound by the present case to hold that it was "furniture." The Divisional Court reversed him, and I should agree on the facts but not with the reasons given by the court. BAILHACHE, J., thought that furniture must involve a series of pieces of furniture—not a single piece. This would exclude a bona fide payment for the use of a grand piano, a wardrobe, a sofa, or a large dining table, which would, in my opinion, clearly be "furniture." MCCARDIE, J., thought that the court were bound by the decision in *Burns Wallace* v. *Hardingham* (4), but he cannot have had before him the facts of and papers in that case as we have had. I should not differ from the decision in that case but only from the reasons. I regret, therefore, that the case must go for a new trial with such guidance as the county court judge can obtain from the judgments of this court. The costs of all the proceedings to date should abide the event of the new trial.

YOUNGER, L.J.—At one time the facts of this case were in acute controversy. Now the findings of the learned registrar with regard to them are, I think, accepted by both parties to the dispute. Shortly stated, to the extent to which they are relevant to the broad question before us, they are these. Under an agreement of Jan. 26, 1921, this house, No. 28, Cameron Place, Brighton, so far as its basement of three rooms, its ground floor of three rooms, and its first floor of two rooms are concerned, is, "together with the use of the linoleum in the maisonette," let by the landlady to the tenants on a quarterly tenancy at an inclusive rent of £80 a year, payable quarterly in advance. The linoleum referred to belongs to the landlady. It covers the floors of the three rooms on the ground floor and of one of the rooms, a bedroom, on the first floor. There is no linoleum either in the three rooms of the basement or in the drawing room, the other and principal room of the first floor. There is some linoleum in the hall, the bathroom and the lavatory of the house. These places, however, are not included in the demise, although the appellants have the use of them in common with the respondent's tenant of the two upper floors. The value of all the linoleum was put by the landlady when before the learned registrar at £30. He, however, was satisfied that it had not cost her anything like that sum, probably not half of it. It is, I think, clear that the learned registrar did not find the linoleum to be worth much more than he believed the lady had paid for it. The linoleum is the only article even remotely susceptible of the description of furniture to the use of which it is now suggested that the tenants are entitled. In every other respect the maisonette as let was an entirely unfurnished house, and unless the use of this linoleum enjoyed by the tenants under the agreement of tenancy suffices, so far as fixity of tenure is concerned, to take the tenancy out of the Act, this maisonette as let is a dwelling-house to which without qualification the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applies.

What on this appeal we have to do is to ascertain if we can, from the terms of

A the Act, whether the learned county court judge directed himself properly when, deferring as he thought to authority, and contrary, I gather, to his own unfettered judgment, he held that this maisonette, circumstanced as I have described it, was within the exception in s. 12 (2), proviso (i), of the Act a dwelling-house "bona fide let at a rent which includes" a payment "in respect of . . . use of furniture." Upon this question so raised there seems to exist a clear divergence of judicial B opinion of which the end is not yet. In the present case itself the learned county court judge differed from his learned registrar. The learned judges of the Divisional Court were not in agreement either with one another or with the learned county court judge or with his registrar. I am not quite sure that I find anywhere complete support for the conclusion at which I have myself arrived, but I am glad to think that there is no great difference between the views of AVORY, J., and C my own. Although I am not able to subscribe to the principle of construction by means of which he reaches his conclusion, I have little doubt that in the great majority of cases there would be no difference in result between the application of the principle adopted by him and that which, as it seems to me, is properly permissible. And, indeed, when the judgments in this case in the courts below are considered, and those delivered in other cases dealing with this exception are D considered also, it will, I think, be found that underneath a greater apparent diversity of opinion are really existent only two contrasted views of the exception, although between them the difference is fundamental. Of these two views, and in each case in its most extreme form, AVORY, J., in his judgment here is representative of one and SALTER, J., of the other. In AVORY, J.'s opinion the exception in the statute is, in this part of it, dealing with the letting of furnished houses— E a conclusion which, of course, carries with it the requirement that the furniture left for use must both in quantity and effect be substantial. In SALTER, J.'s view, on the other hand, so soon as the judge of fact is satisfied that premises are bona fide let at a rent which includes a payment in respect of the use of furniture, he has no power to look and see whether the element of furniture is large or small. That question is, in SALTER, J.'s opinion, relevant only on the issue of good faith. F On this principle many lettings where, as in the present case, the furniture left for use is relatively insignificant will be within the exception. Here is to be found the real line of cleavage between the two conceptions of the clause. Now with the views of SALTER, J., so expressed, HORRIDGE, J., and SHEARMAN, J., would, I think, as is shown by their decision in *Nye* v. *Davis* (1) on the associated word "attendance," be in sympathy. On the other side would be ranged the Master G of the Rolls and ATKIN, L.J., as shown by their observations in *Burns Wallace* v. *Hardingham* (4), whether or not these observations were necessary for the actual decision, and also of BAILHACHE, J., and MCCARDIE, J., as shown by their judgments in *Crane* v. *Cox* (5). These all would be of opinion, putting it broadly, that it was at least necessary in order to bring a letting within the exception that the tenant should have the use of a substantial quantity of furniture. It is in that H state of the authorities that we are in the Court of Appeal, constituted as such, called upon for the first time to deal with this exception, and it being manifest that its true effect has become a matter of widespread general interest affecting many tenancies all over the country, the ascertainment of its true range has become an issue almost of first importance.

Desiring, as I do, to deal with the question on the most general lines possible, I I will keep separate three aspects of it special to this case which were much discussed in the courts below. The first of these three aspects was concerned with the question whether the letting here was bona fide; the second with the question whether the linoleum was furniture within the meaning of the exception; the third with the question whether in this case the rent in fact included any "payment" for its use. As to the first, the most relevant facts are that the present Restrictions Act was passed on July 2, 1920. The first tenancy of this maisonette was entered into on Oct. 12, 1920. That was a quarterly tenancy at an inclusive rent of £130 with "a further sum of £1 5s. a quarter payable in advance for the

"use of linoleum" in the maisonette. In November, 1920, ROCHE, J., in *Wood* v. *Wallace* (2), decided that a payment for "attendance" exclusive of and in addition to the rent left the tenancy outside the exception of s. 12 (2) of the Act of 1920. It is manifest, if that case was well decided, that the tenancy agreement of Oct. 12, 1920, was also outside the exception, and certain it is that if *Wood* v. *Wallace* (2) was law its effect was got over by the altered arrangement as to the use of the linoleum embodied in the subsisting agreement of Jan. 26, 1921, which superseded the agreement of October, 1920. But even if a relevant test of the absence of bona fides in these cases be that the provisions of the tenancy agreement are framed with the intention of keeping the letting outside the Act—a proposition with which I am unable to profess any sympathy—I do not find that the test is complied with here. It can at the most be a matter of suspicion whether the judgment of ROCHE, J., was known to any of the parties to the present agreement. I doubt very much if it was. The form of that agreement, in my judgment, is more clearly referable to the circumstances to be alluded to later, which raises the third of these particular questions. But even if this were not so, in my judgment, as at present advised, the agreement of Oct. 12, 1920, was in point of form more clearly within the exception than is the agreement of Jan. 26, 1921. I am not prepared at the moment to accept upon this point either the decision of ROCHE, J., in *Wood* v. *Wallace* (2), or the decision of SARGANT, J., in *Hocker* v. *Solomon* (3), which followed it. These decisions, as it seems to me, ignore two important considerations, both of which militate against them. The first of these is that the word "rent" in this exception surely means not rent in the strict sense, but the total payment under the instrument of letting. The exception assumes that "rent" so called may include, e.g., "board," payment of which is not rent. I am here paraphrasing the statement of SHEARMAN, J., in *Nye* v. *Davis* (1), with which I agree. The second consideration is that the exception contemplates separate "payments" for any of the three things it specifies—viz., board, attendance, use of furniture—the plural "payments" being in striking contrast with the singular "payment" in s. 9, where only one of these three things—viz., use of furniture—is being dealt with. In my judgment, so far from the exception contemplating primarily a tenancy in which rent strictly so called is with these other "payments" or one of them lumped together under one composite payment designated rent, the contrary is the case. Such a composite payment may, indeed, be within the exception, but separate payments are within its more immediate contemplation. Having said so much, I need not discuss the other grounds on which it was suggested that this tenancy was not bona fide. I am not prepared to hold on any of them that this was other than a bona fide letting within the meaning of the exception.

On the second question, whether the linoleum here was "furniture" within the meaning of the exception, I am not prepared to say it was not. But the question to my mind is not free from difficulty. The linoleum would be fairly included among a collection of articles, useful or ornamental, and properly described as furniture of a house, I do not doubt. But it is, to my mind, not quite the same thing to say that with no addition of any other article of furniture to support it some squares of linoleum can properly satisfy the words "use of furniture" in this exception. However, I am not prepared to say that they cannot. I concur in the decision that they may. Whether they do so here is another matter.

The third of these questions, viz., the question whether the reduced rent of £80 payable under the agreement of Jan. 26, 1921, in fact included any "payment" for the use of this linoleum—is to my mind one of much difficulty. The learned registrar's findings on this subject are very significant. The inference I should myself be inclined to draw from the facts which he finds is that the reduced rent of £80 was arrived at without any reference at all to the linoleum, which was merely thrown in as much for the convenience of the landlady as of the tenants. I do not, however, press this view. I prefer to dispose of this case on more general considerations in the hope that such treatment of it, even if it fail to find

acceptance, may be of greater assistance in other cases. It may, perhaps, lead to an ascertainment of the true range of this exception if we trace its development historically. It is first found in the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, s. 2 (2), in these words:

> "Provided that this Act shall not apply to a dwelling-house let at a rent which includes payments in respect of board, attendance, or use of furniture."

Two things are noticeable with reference to this form of the exception. The first is that there is no requirement here, as there is in the exception in its current form, that the letting shall be bona fide. One result of that is, if SALTER, J.'s view of the present exception be correct, that under this exception in the Act of 1915 a tenancy to which the Act applied was in every case taken entirely out of it if the tenant under his agreement were given the use of the most meagre article of furniture—e.g., a table or a chair. Whether this result is consistent with any reasonable view of the exception I will examine later. The second matter to notice in relation to the exception in the Act of 1915 is that its effect was to exclude altogether from the operation of that Act every case to which the exception applied. This, under the exception in the existing Act, is still true where the payments are made in respect of board and of attendance. Where, however, as in the present case, the payment is said to be made in respect of "use of furniture," the exclusion is only partial. The tenant, under s. 9 of the Act of 1920, may, in cases otherwise within the Act, still control the amount of rent which he can be called upon to pay. He loses, however, the benefit of any fixity of tenure to which tenants holding tenancies to which the Act applies are entitled. This provision, now to be found in s. 9 of the present Act [of 1920], first appeared in a different form in s. 6 of the Act of 1919. Further inquiry into the difference in effect between the provision in s. 6 of the Act of 1919, as applied to the exception in the Act of 1915, and the provision of s. 9 of the present Act as applied to the exception in s. 12 (2), would be interesting and, I think, striking in result. But the occasion for it does not arise in the present case, and I pass on. The exception in the Act of 1915 remained operative until that Act was repealed by the Act of 1920. The exception now contained in s. 12 (2) (i) takes its place. I do not need to set it forth again at length. This series of Acts, progressively extending the value of the dwelling-houses to which they applied, although, in some respects, expanding in the later Acts the greatly curtailed privileges of landlords under the 1915 Act, are all of them tenants' Acts, designed to secure for the tenants of houses to which they apply fixity of tenure at rents not exceeding prescribed limits. It is common to all the Acts that the houses to which they are applicable are houses of limited annual values, in which the tenant is left to provide for himself what are called in the exceptions board, attendance, and furniture. The exception in the 1915 Act excludes from all the benefits of that Act and the exception in the Act of 1920 excludes from nearly all of its benefits cases where the accommodation let and hired includes board or attendance or use of the landlord's furniture.

Bearing in mind, as the court, it seems to me, must bear in mind, that these are essentially tenants' Acts, it is primâ facie unlikely that the legislature would exclude from their benefits, except on substantial grounds, tenancies to which otherwise the Acts clearly apply. If, therefore, the words it has used to describe these excepted tenancies are equally susceptible of two meanings, one indicating a substantial service or consideration, while the other is satisfied by a trivial or insignificant one, it would, I think, be the duty of the court to prefer the first of the two meanings. A fortiori would this be its duty if it finds that two of the words so capable of a double meaning are linked with a third which is entirely or equally susceptible only of one, and that a substantial service on the part of the landlord. Such, I think, will appear to be the case here. I might express this aspect of the matter in another way. In my judgment, in construing these Acts, the court, before adopting a construction of any provision in them which would deprive tenants of benefits presumably intended to be provided for them, must

satisfy itself that that is the only construction properly to be placed on the words of the Act. Whatever may be said of the construction which the majority of the House of Lords felt compelled in *Kerr* v. *Bryde* (6) to place upon the words "would be entitled to obtain possession," as used in the Act, this at least is true, that the result of that construction operated in favour of the tenant, which would not be the case if the views adopted here by SALTER, J., are to prevail. In *Nye* v. *Davis* (1) HORRIDGE and SHEARMAN, JJ., held that an obligation on the part of the landlord of a flat to bring up his tenant's coals once a day and remove his ashes was "attendance" sufficient to take the tenancy in that case out of the Act. SALTER, J., in the present case has expressed the opinion that the provision by the landlord of a minimum of furniture might be sufficient to bring a tenancy within the other exception —"use of furniture." I cannot refrain from saying that, if either of these views be correct, the result is, in my judgment, to make something very like nonsense of this exception. It seems to me impossible to believe that the legislature could have intended by it that a tenant should lose all the benefit of the statute because, in the one case, he had not to carry up his own coals, and the substantial benefit of the Act because, in the other, he had the use of a few of his landlord's chairs. And it will not be forgotten that under the exception in the Act of 1915 the full benefit of the Act was, on this construction, lost in both cases with no protection at all from the presence of the words "bona fide."

Accordingly, I ask myself: Is the court imperatively required by the force of the language used to place such a construction upon this exception? In my judgment, nothing less constraining will justify it in doing so. In my opinion, we have no such burden laid on us. I quite agree that as a mere matter of language, such a service as carrying up coals is "attendance," partial though it be. I agree also that, in the same way, the use of a few chairs is the "use of furniture," insignificant though they be. As a mere matter of words, each of these expressions may quite properly be taken to mean very little, although, with at least equal propriety they may be taken to connote a great deal more. But, in my judgment, so much may not be said of the third word "board" with which these two other expressions are associated. The word chosen is, it will be noticed, not "food" or "drink," but "board." "Food" may, of course, mean much or little; "drink," I hope, is entitled to an equally non-committal construction; "board," however, is a different word altogether. It is defined, I see, in MURRAY'S ENGLISH DICTIONARY as "daily meals provided in a lodging or boarding house, according to stipulation; the supply of daily provisions." The word, without suffix or affix, suggests, to my mind, sufficiency. It could never, I think, be satisfied by the provision, say, of an early morning cup of tea. If one wishes to accentuate its abundance one may call it "full board," but if one would convey that it is limited, then one must call it "partial" or qualify it by the use of some other adjective of limitation. It appears to me that the natural interpretation of the word as we find it in this exception involves the conception of a provision by the landlord of such food as, in the case of any particular tenancy, would ordinarily be consumed at daily meals and would be obtained and prepared by a tenant for himself if it were not provided by somebody else. If a de minimis construction of the word is open at all, and, deferring to my Lord, I must recognise that it is, it is, at least I think, not so fairly open as the other, a consideration which confirms the conclusion to which I have already on broader grounds been led with reference to that word, as well as to either of the other two expressions of the exception—"attendance" and "use of furniture."

If the reasoning of this judgment be so far justified, does it indicate any useful test or standard within the four corners of the Act by reference to which, in any particular case, the judge of fact can direct himself upon the issue whether the tenancy in question is within the exception of the statute or is outside it? I think it does. Remembering that the Act applies to prescribed tenancies of what I may call, for brevity, unfurnished and unattended houses, I think it may properly be said that a tenancy is within the exception and is outside the Act if the landlord receives payment for, and provides and prepares food for, his tenant's meals,

which, having regard to all the circumstances of the case, the tenant would otherwise ordinarily provide for himself; or provides such attendance as, for ordinary household purposes, the tenant would, in the circumstances, otherwise provide for himself; or provides for the tenant's use so much furniture that, when it is in the house, that house can no longer be described as an unfurnished house. Notwithstanding the side note to s. 9, it is not, I think, possible to say, as AVORY, J., does, that the words "use of furniture" necessarily import that the house must be in the ordinary intendment of language, as applied to the particular residence, "a furnished house." But in my judgment, to satisfy the words "use of furniture" in the place where they are found, it is at least essential that the furniture in the house of which the use is enjoyed is sufficient in quantity and character to require the judge to say that the house let is no longer one to which the Act normally applies—namely, an unfurnished house. This Act applies to many different kinds of houses, and to tenancies in all parts of the country, varying toto coelo one from another. What is "board," "attendance," or "use of furniture" in relation to one tenancy may be nothing of the kind in relation to a second. The county court judge is the judge of fact in every disputed case, and he will, of course, have regard to all its circumstances. Directions for his guidance, if they are to be sound, must, therefore, be general. For that reason they may not in every case be helpful. But these which I have ventured to indicate are, at all events, in my judgment, not without justification from the terms of the Act itself, and they would help, I should hope, to decide this and many other cases. I am of opinion that this appeal should be allowed, and for myself I would be for referring the case back to the learned county court judge to decide the question between the parties, directing himself by the considerations which I have endeavoured in this judgment to explain.

New trial ordered.

Solicitors: *Blyth, Dutton, Hartley & Blyth*, for *Graham-Hooper & Betteridge*, Brighton; *Radford & Frankland*, for *J. Lord Thompson & Weeks*, Brighton.

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

STANDARD OIL CO. OF NEW YORK *v.* CLAN LINE STEAMERS, LTD.

[HOUSE OF LORDS (Earl of Birkenhead, Viscount Haldane, Lord Atkinson and Lord Parmoor), July 24, 25, 26, November 23, 1923]

[Reported [1924] A.C. 100; 93 L.J.P.C. 49; 130 L.T. 481; 40 T.L.R. 148; 68 Sol. Jo. 234; 16 Asp.M.L.C. 273; 29 Com. Cas. 75]

Shipping—Seaworthiness—Inefficiency of master—Ignorance of matters relating to safety of ship—Failure of owners to communicate instructions by builders—Negligence—Limitation of liability—"Actual fault or privity" of shipowners—Merchant Shipping Act, 1894 (57 & 58 *Vict.*, *c.* 60), *s.* 503 (1) (*b*).

A ship may be rendered unseaworthy by the inefficiency of the master who commands her. There is no difference between want of skill and want of knowledge, and the principle applies where the master's inefficiency consists in his ignorance as to how his ship may, owing to the peculiarities of her structure, behave in circumstances likely to be met with on an ordinary voyage. Owners who withhold from the master necessary information with regard to that matter

(as, for instance, instructions by the builders relating to the loading and management of such a ship) are as responsible for the result of the master's ignorance as if they have deprived the master of the general skill and efficiency which he presumably possessed, and, therefore, such owners cannot avail themselves of a clause in a bill of lading excepting them from liability for loss or damage to cargo occasioned by specified causes "not resulting, however, in any case from want of due diligence by the owners of the ship," nor does such loss or damage take place "without their actual fault or privity" within s. 503 (1) (b) of the Merchant Shipping Act, 1894, so as to entitle them to the limitation of liability provided by that section.

Decision of the First Division of the Court of Session, 1923, S.C. 245, reversed.

Notes. Considered: *Tempus Shipping Co.* v. *Louis Dreyfus & Co.*, [1931] All E.R.Rep. 577; *Smith, Hogg & Co.* v. *Black Sea & Baltic General Insurance Co.*, [1940] 3 All E.R. 402; *H.M.S. Truculent, The Admiralty* v. *The Divina (Owners)*, [1951] 2 All E.R. 968. Referred to: *Rio Tinto Co.* v. *Seed Shipping Co.* (1926), 134 L.T. 764; *Cosmopolitan Shipping Co. (Inc.)* v. *Holton & Cookson, Ltd. (Liverpool)* (1929), 143 L.T. 296; *Imperial Smelting Corpn., Ltd.* v. *Joseph Constantine Steamship Line, Ltd.*, [1940] 3 All E.R. 211; *Monarch Steamship Co.* v. *Karlshamns Oljefabriker (A/B)*, [1949] 1 All E.R. 1; *Beauchamp* v. *Turrell*, [1952] 1 All E.R. 719; *The Empire Jamaica, Western Steamship Co.* v. *N.V. Koninklijke Rotterdamsche Lloyd*, [1955] 3 All E.R. 60.

As to exceptions relieving the shipowner, seaworthiness, and the limitation of the liability of shipowners, see 30 HALSBURY'S LAWS (2nd Edn.) 315, 463, 940; and for cases see 41 DIGEST 407, 471, 914. For Merchant Shipping Act, 1894, see 23 HALSBURY'S STATUTES (2nd Edn.) 395.

Cases referred to:

(1) *The Schwan*, [1909] A.C. 450; 78 L.J.P. 112; 101 L.T. 289; 25 T.L.R. 742; 53 Sol. Jo. 696; 11 Asp.M.L.C. 286, H.L.; 41 Digest 479, *3124*.

(2) *Anglo-African Co.* v. *Lamzed* (1866), L.R. 1 C.P. 226; Har. & Ruth. 216; 35 L.J.C.P. 145; 13 L.T. 796; 12 Jur.N.S. 294; 14 W.R. 477; 2 Mar. L.C. 309; 41 Digest 470, *3017*.

(3) *Hayn* v. *Culliford* (1878), 3 C.P.D. 410; 47 L.J.Q.B. 755; 39 L.T. 288; 4 Asp.M.L.C. 48; affirmed (1879), 4 C.P.D. 182; 48 L.J.Q.B. 372; 40 L.T. 536; 27 W.R. 541; 4 Asp.M.L.C. 128, C.A.; 41 Digest 430, *2699*.

Also referred to in argument:

The Carib Prince (1897), 170 U.S. 655.

The Glendarroch, [1894] P. 226; 63 L.J.P. 89; 70 L.T. 344; 10 T.L.R. 269; 38 Sol. Jo. 362; 7 Asp.M.L.C. 420; 6 R. 686, C.A.; 41 Digest 414, *2580*.

Gunford Ship Co. v. *Thames and Mersey Marine Insurance Co.*, 1910 S.C. 1072; 47 S.L.T. 860; affirmed sub nom. *Thames and Mersey Marine Insurance Co.* v. *Gunford Ship Co., Southern Marine Mutual Insurance Association* v. *Gunford Ship Co.*, [1911] A.C. 529; 80 L.J.P.C. 146; 105 L.T. 312; 27 T.L.R. 518; 55 Sol. Jo. 631; 12 Asp.M.L.C. 49; 16 Com. Cas. 270, H.L.; 29 Digest 123, *765*

International Navigation Co. v. *Farr Manufacturing Co.* (1900), 181 U.S. 218.

Lennard's Carrying Co., Ltd. v. *Asiatic Petroleum Co., Ltd.*, [1915] A.C. 705; 84 L.J.K.B. 1281; 113 L.T. 195; 31 T.L.R. 294; 59 Sol. Jo. 411; 13 Asp.M.L.C. 81; 20 Com. Cas. 283, H.L.; 41 Digest 418, *2616*.

Lyons v. *Mells* (1804), 5 East, 428; 1 Smith, K.B. 478; 102 E.R. 1134; 41 Digest 472, *3039*.

McFadden v. *Blue Star Line*, [1905] 1 K.B. 697; 74 L.J.K.B. 423; 93 L.T. 52; 53 W.R. 576; 21 T.L.R. 345; 10 Asp.M.L.C. 55; 10 Com. Cas. 123; 41 Digest 445, *2796*.

Moes, Moliere and Tromp v. *Leith and Amsterdam Shipping Co.* (1867), 5 Macph. (Ct. of Sess.) 988; 39 Sc. Jur. 546; 41 Digest 442, *l*.

Moore v. *Lunn* (1922), 38 T.L.R. 649; affirmed (1923), 39 T.L.R. 526; 41 Digest 480, *3128*.

Royal Exchange Assurance v. *Kingsley Navigation Co.*, [1923] A.C. 235, P.C.; 128 L.T. 673; 41 Digest 419, *l*.

Smitton v. *Orient Steam Navigation Co., Ltd.* (1907), 96 L.T. 848; 23 T.L.R. 359; 51 Sol. Jo. 343; 10 Asp.M.L.C. 459; 12 Com. Cas. 270; 8 Digest (Repl.) 131, *848*.

Tait v. *Levi* (1811), 14 East, 481; 104 E.R. 686; 29 Digest 146, *985*.

The Wildcroft (1905), 201 U.S. 235.

Nitrate Producers Steamship Co., Ltd. v. *Short Bros., Ltd.* (1922), 91 L.J.K.B. 871; 127 L.T. 726; 38 T.L.R. 747, H.L.; Digest Practice 611, *2506*.

Appeal from a decision of the First Division of the Court of Session (the Lord President (Lord Clyde), Lord Skerrington and Lord Cullen, Lord Sands dissenting), recalling an interlocutor of the Lord Ordinary (Lord Hunter).

The appellants sued the respondents for damages for failure to deliver a cargo of motor spirit, refined petroleum, and paraffin wax shipped on the respondents' turret-built steamship *Clan Gordon*, under the terms of a charterparty, dated April 2, 1919, and lost at sea through the sinking of the vessel in calm weather on July 30, 1919, when she was two days out from New York, the port of loading. The vessel carried a full cargo of 12,500 cases of Pratt's motor spirit; 79,512 cases of refined petroleum, and 12,534 bags of paraffin wax. Loading commenced on July 12 and finished on July 28. The total weight of the cargo so loaded was 4,435 tons, of which 1,925 tons were loaded in the 'tween deck cargo spaces and 2,510 tons in the lower holds. There were also shipped 770 tons of bunker coal. Of this, all but 246 tons was in the vessel's permanent bunkers, the 246 tons being carried in the cargo space, No. 3 'tween decks. When the vessel was loaded, her cargo spaces were practically full, one of them containing this coal instead of cargo. When loading commenced the ballast tanks were full, but as loading progressed tanks were emptied, so that when the vessel sailed ballast tanks Nos. 1 and 2, which contained respectively 95 tons and 195 tons of water, were alone filled, and the vessel was then down to her marks. The master had intended to empty these tanks also before sailing and only failed to have that done because he wished to spare the engineers the labour of pumping. The vessel sailed at 5 p.m. on July 28, and all went well till July 30. On that day, the pumping out of No. 1 ballast tank was begun at 8 a. m. by the master's orders. At noon, No. 1 tank was empty and the pumping out of No. 2 tank commenced. At 4 p.m., No. 2 tank contained only six inches of water on the port side. By that time the vessel had taken a slight list to port and the quantity of water in No. 2 tank, represented by six inches of water in the listed condition of the ship, was eight tons. At 4.30 p.m. the master ordered the helm to be put over first slowly and then hard-a-port. When the hard-a-port order was executed, the vessel listed, first about fourteen degrees to port and then, in spite of the master's endeavour to right her by ordering the helm hard-a-starboard, she fell over to 60 or 70 degrees and soon afterwards sank. The vessel and her whole cargo were thus lost. It was not disputed that the emptying of the ballast tanks deprived the vessel of all stability so that the putting hard over of the helm was sufficient to upset her. The master explained the objects which he wished to attain by emptying the ballast tanks. These were to increase the speed of the vessel by ridding her of a weight which he thought was useless, and to increase her freeboard, because it was the hurricane season on the coast of Mexico and he wanted all the freeboard he could get in case he encountered a hurricane. The master was a skilled seaman, with experience of all classes of vessels. He held an extra master's certificate. He has been in the respondents' service for twenty years. His records were good and he had commanded the *Clan Gordon* for fourteen months before her loss. The voyage in question was the first one on which he had carried a full cargo of oil and wax, and he had considered the question of the vessel's stability for the voyage before loading, having in view that she was to carry a full homogeneous cargo.

The *Clan Gordon* was one of seven sister ships constructed in 1900 by William Doxford and Sons, Ltd., Sunderland, for the respondents. The vessels were "turret" ships. They were then a comparatively new type. They differed from the ordinary, or "wall-sided," ship mainly in that, whereas the ordinary ship had sides which were nearly perpendicular from the bottom upwards, the sides of the turret ship were cut away at what was known as the "harbour deck," upon which there was erected a structure not extending to the whole width of the harbour deck and covered by the turret deck. In or about 1910 Messrs. Doxford were asked by the respondents to give certain information about the stability of ships of the *Clan Gordon* type. They, accordingly, made experiments and calculations with results which impelled them to prepare general instructions for loading, not only for each of the remaining sister ships of the *Clan Gordon*, but for all turret ships built by them. These instructions were filled up for each of such vessels and sent to her owners. They contained a definite warning against loading these vessels with a full homogeneous cargo, such as that carried by the *Clan Gordon*, without retaining water ballast. The appellants submitted that the loss resulted from the respondents' failure to make the instructions available to the master of the *Clan Gordon*, because no competent seaman, and, in particular, the master of the *Clan Gordon*, would have pumped out the tanks of the *Clan Gordon* on the occasion in question had he had the instructions before him, and they contended that the respondents were liable because (i) on a sound construction of the contract, they had failed to prove that the loss was occasioned by an excepted cause; and (ii) the vessel was unseaworthy at the time of sailing from New York as her master was not instructed competently to command her.

The bills of lading issued under the charterparty provided that

> "the carrier shall not be liable for loss or damage occasioned by causes beyond his control, by the perils of the sea . . . collisions, stranding or other accidents of navigation of whatsoever kind (even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowner, not resulting however, in any case from want of due diligence by the owners, or the ship, or any of them, only the ship's husband or manager)."

The Harter Act (1893) of the United States Congress provided:

> ". . . if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and property manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation, or in the management of the said vessel . . ."

The Lord Ordinary (Lord Hunter) decerned against the respondents for payment to the appellants of £97,892, but the First Division recalled the interlocutor. The pursuers appealed.

Condie Sandeman, *D.F.*, and *Normand* (both of the Scottish Bar) for the appellants.

Macmillan, *K.C.* (of the Scottish Bar), *Mackinnon*, *K.C.* (with them *Douglas Jamieson*, of the Scottish Bar), for the respondents.

Their Lordships took time for consideration.

Nov. 23. The following opinions were read.

VISCOUNT HALDANE.—The mixed question of fact and law which is raised in this appeal is one which necessitates close examination. Only after modifying my own views from time to time as the arguments at the Bar proceeded, and after subsequently re-studying the whole of the evidence and the judgments in the courts below, have I arrived at the conclusion that the Lord Ordinary and Lord Sands were right, and that the judgment of the majority in the First Division cannot

A stand. Having regard to the concurrence of findings in what is an issue of fact, I think that we are bound to hold that it was established by the respondents that when the *Clan Gordon* left New York she was physically seaworthy. But it appears to me to be not less clearly shown that she was thus seaworthy only to the footing of having two out of six of her ballast tanks filled, to the extent of containing 290 tons of water. Without this amount of water in the tanks, she was not, having B regard to her loading, seaworthy, and the master in charge of her had to know this and observe the requirement through his voyage. He did not know it; he pumped out the water; and the ship heeled over and was lost two days after the commencement of her voyage. I think that the requirement as to this ballasting was due to the construction of this steamer as a turret vessel. Only scientific calculation could show the absolute character of a requirement which, if not observed, C would render the ship unseaworthy. The master had not been instructed as to its special significance in the case of a turret ship like the *Clan Gordon*. He could not divine it, nor could the ordinary experience of a master not informed of the special peril due to abnormal construction be relied on to disclose it. The master did not know the unusual risk which he was called on to undertake. The fault of this absence of knowledge lay, not with him, but with the owners, whose duty D it was to have instructed him that while the vessel was seaworthy, it was only conditionally seaworthy. The breach of the condition was, therefore, an occurrence for which they were personally in fault. In the light of what has been proved, the two tanks held just enough water to give the vessel the stability indicated in the builders' instructions. But it is significant that the master was not shown to have been specially warned that the presence of the water ballast was E essential to the ship as loaded, if its stability was to be preserved. The instructions of the builders rendered such ballasting essential, and the master was not told of it. In his evidence Captain McLean says that it was the first cargo of the kind which he had actually loaded himself, and that before he sailed he had intended to sail with his ballast tanks empty. This makes it not surprising that two days later he directed that the tanks should be pumped empty. He hoped to F obtain thus more freeboard for his vessel. He says that he had got no instructions from his owners that, with a homogeneous cargo, he was on no account to pump out the ballast tanks. All that he knew was that those in charge of turret ships were to be careful of them. But he knew nothing of the builders' instructions. Had he been informed of them, he says that he would have obeyed them. But the reason of the necessity for what they prescribed was not known to him. He had G been in command of the *Clan Gordon* for some time previously, and had been employed on other turret ships, and had found no difficulty. The case with which he had to deal of a ship loaded just as this one was, however, was new to him, and he appears to have somewhat overestimated the proportion between the cargo in the lower holds and that between the decks. If he had known that there was not so much weight in the lower holds, it may be that he would not have emptied H the tanks. Captain McLean was admittedly a competent and experienced officer, and there had been no difficulty with turret ships excepting in the case of the *Clan Ranald*, when the disaster was due to the carelessness of another master. Captain McLean simply did not imagine that he could be running a serious risk when he began to pump out the tanks at sea, and nothing in his experience of turret ships had pointed to there being such a risk as there actually was.

I No doubt the primary and immediate cause of the disaster which occurred to the *Clan Gordon* must be taken to be, not defect in the initial loading, but the pumping out of the tanks at sea just before the disaster happened. But then, if the builders' instructions meant anything, they meant that such pumping must not take place. Whether its effect would be to destroy general stability, or to enable the free water to cause a dangerous disturbance of stability by the rush to the sides of the half empty tanks, does not matter. The instructions obviously implied not only that water must be kept in tanks which were filled, but that it must not be withdrawn. On this point at least the instructions do not seem to me

to be ambiguous, and, if they had been given to Captain McLean, we must take it that he would have interpreted them properly and carried them out. There is no doubt that the builders sent them round as being suggested by their investigation of the circumstances which led to the overturning of the *Clan Ranald*. It may be that ordinary ships might have proved to be subject to some analogous peril, but not, so far as we can gather the views of the builders, to the same extent. Their chief assistant draughtsman says in his evidence that the document, a copy of which was sent out for each turret ship, was meant to prescribe what was to be provided when loading. It is difficult to draw any other conclusion than that the builders thought there were risks in the case of turret ships, as to which special guidance for masters was required. It is true that the instructions were prepared and sent out by the builders, not only long after the ship was built, but many years before the accident, and that they are open to some criticism of the calculations on which they are founded, but the substance which underlies what they prescribe remains. They suggest to instructed persons that, as in the case of a turret ship there is danger of righting force diminishing more rapidly than in the case of a wall-sided ship, it is necessary to provide an appropriate amount of special ballast. This seems to follow from the proposition that the ship is not to be loaded down to her marks with a homogeneous cargo without water or other adequate ballast. In so far as this is scientifically true, no amount of fortunate experience in the course of which the peril happens not to have matured can properly be set against it.

In these circumstances, and with the builders' warning in their hands, was it the duty of the owners to inform the masters of their turret ships of the special risk to which the turret form gave rise? I think that it was. On the mere experience and skill of the individual master, they could not safely rely. He might never have given thought to any unusual critical point as possible in the stability of his ship, or have been in circumstances from which he could derive the necessary experience. The deduction of the critical point was, as I have said, the outcome of scientific calculation, rather than of practice. But that circumstance did not render it the less important, or justify people in thinking that it was of such a nature that it could be left to be divined by those who had not been specially instructed. I think that the true conclusion as to this case is that expressed in a passage near the end of Lord Sands' dissenting judgment in the First Division.

> "The broad view of the matter appears to me to be this: A vessel of a peculiar type was lost under circumstances not satisfactorily explained. This led the builders to issue certain instructions in regard to the loading of such vessels. If these instructions had been observed the *Clan Gordon* would not have been lost. The defenders took no steps to bring these instructions to the knowledge of the master of the *Clan Gordon*."

I see no sufficient answer to the reasoning either of Lord Hunter, the Lord Ordinary, or of Lord Sands. Not the less it is hardly admissible to come to this result easily without careful consideration of the judgments of the majority in the First Division, for I have rarely read judicial opinions on a technical question which impressed me more by their care in expression than those of the majority as well as of the minority in the courts below. The Lord President holds that the builders' instructions were fallacious in that, even if the cargo was so far from being homogeneous that the ratio of the density of what was between decks to what was in the lower holds was only 83 per cent., somewhere near 500 tons of water was required in the ballast tanks to give stability. This he thinks to be out of the question, inasmuch as the ship was shown to be actually stable with only 290 tons of water in the tanks. He attributes this error to defective calculation by the builders about the cargo. But he goes on to say that, even if this be so, it is not wholly fatal to the pursuers' case, inasmuch as the master admitted that if the owners had communicated to him the builders' instructions he would not have pumped out the 290 tons after leaving port, whatever he might have thought about

A the necessity of these instructions. I am not satisfied that all the criticisms on calculation of the cargo made by the Lord President were wholly well founded. But even if they were, I think that he has given the answer to them, for it is not in serious dispute that the vessel was defective in righting power, and, therefore, unseaworthy when loaded unballasted down to her marks with a homogeneous cargo. The criticism of the Lord President does not affect this proposition. It B may be that the wash over of the water in the half-emptied tanks contributed to and accelerated the turning over of the vessel. But if the master had been told that she was unstable without 290 tons of water ballast, he would not have begun to pump out the tanks. It is no answer to say that the *Clan Gordon* and other steamers of the same turret consideration had previously made successful voyages without any water ballast. That may have been their good fortune. But it does C not prove that to make such voyages without special ballast was safe. Careful scientific calculation has, in my opinion, demonstrated conclusively that it was not, having regard to the restriction on righting force in the case of a turret ship, and the tendency of the righting force to diminish rapidly after a point has been reached which is only reached substantially later in the case of a wall-sided vessel. The Lord President thinks that the danger to the ship was one which neither arose D from a latent peril in her construction, as in *The Schwan* (1), nor from anything lying beyond the scope of competent seamanlike skill. He is, therefore, of opinion that, if there was blame for the accident, it is the master and not the owners who are made responsible for it under the charterparty and the bills of lading and the Harter Act. But surely, in this case, specific danger had been established as being a special and exceptional one by the calculation by the builders. The owners E ought to have known of this, and it is obvious that the master might well not have known. Even experienced navigators seem not to have come to suspect it in the course of their voyages in these turret ships. Captain McLean suspected danger so little that, if left to himself, he tells us that he would have pumped out his tanks before leaving New York. The instructions from the builders' office, of which he knew nothing, were, as the managing director of the respondents says, F a surprise to the respondents themselves, who appear not to have taken them seriously, nor to have made any independent attempt at the time to see whether they were or were not well founded. Yet her righting power depends largely on the shape of a vessel, and is a matter which can only be accurately ascertained by highly technical and highly scientific study. I am, therefore, unable to agree with the Lord President when he says that it would be detrimental to security G at sea to put on owners who have appointed a competent master the duty of giving him instructions even in such special circumstances. Unless this is done, the most competent master may not be aware of risks of which only exact knowledge, extending beyond any which he can be assumed to possess can inform him.

The reasons just given leave open, even assuming the view which I have expressed to be true, yet another point urged on their behalf by the respondents. H They argue that, as the instructions from the builders were, when received, passed on to the respondents' engineer, now dead, this relieves them from responsibility, for he was their servant and as such responsible to them for all structural matters, and for giving instructions to the masters of their ships. If this be so, they contend that their liability cannot extend to the full sum of £97,892 17s. 7d. awarded to the pursuers by the Lord Ordinary, but is limited to £27,581 0s. 9d., I being the amount calculated on the footing of a liability of £8 for each ton of the ship's tonnage. This contention they base on s. 503 of the Merchant Shipping Act, 1894 (as amended by s. 69 of the Merchant Shipping Act, 1906), which limits the liability where the damage has been occasioned without the actual fault or privity of the owner. It is now well settled that those who plead the section as a defence must discharge the burden of proving that they come within its terms. That is to say, they must show that they were themselves in no way in fault or privy to what occurred in this case, to the failure to render the ship properly seaworthy, by taking care that the master was instructed about the special risk

arising from its shape. Even on the assumption that the engineer was fully directed to instruct the master on this point, and that the failure to do so was his fault, the owners are surely not discharged from responsibility, for their personal duty was to provide a seaworthy ship, and the ship was not seaworthy if the master was not instructed on the special matter in question. That they left their duty to be discharged by their servant or agent, therefore, does not relieve the owners of blame. Their responsibility as regards seaworthiness was an individual one of which they could not divest themselves, and when they left its discharge to their engineer they did so at their own risk. I am well aware of the magnitude and seriousness of the consequences of this conclusion to the respondents, but I am unable to see how what they did divested their breach of duty of these consequences. I, therefore, think that the interlocutor of the Lord Ordinary should be restored, and that the respondents must pay the costs here and in the Inner House. As to the point made by counsel for the respondents about expenses, it is true that the pursuers failed technically in the part of their case which related to physical seaworthiness in New York harbour. But the evidence which they led on this point was not easily severable from the evidence required on the broader issue on which they succeeded. Accordingly, I do not think that we ought to interfere with the exercise made of his discretion by the Lord Ordinary in giving the pursuers the whole of their expenses.

The appeal was admirably argued on both sides, and I wish before sitting down to state again the broad reasons which have made me finally feel myself compelled to prefer the argument of the appellants. These reasons are as follows. The vessel was unseaworthy in that she could not safely undertake a voyage with a cargo of an approximately homogeneous character, unless she had, and retained, at least 290 tons of water in her lower tanks. That this was her indisputable condition for safety is not the less true because she, and vessels resembling her in shape and construction, had successfully made a certain number of voyages with a full cargo, and without this minimum ballast required. To be put about under a rapid action of the helm is what in the case of every vessel which undertakes a long voyage may be necessary, and in the case before us the operation is proved to have been a dangerous one for a turret ship without sufficient ballast. The inherent danger was one which a master not specially instructed might well overlook. Even a long experience might chance not to reveal it. It was a danger, however, which scientific calculation could reveal, calculation of a kind which no ordinary master, however long his experience at sea, could be reckoned on as having either made or as having been able to make. Thus it was the duty of the owners, whose business, in making their ship seaworthy, was to have the master instructed as to all defects in seaworthiness during the voyage arising from inherent causes which were not obvious, and of which his merely practical knowledge could not be relied on, to inform him. This the owners in the case before us failed to do, when they did not bring to the mind of the master of a turret ship the builders' special instructions. These instructions may be open to criticism in detail, although I think that the Lord President attaches more importance than is due to the effect on their substantial validity of the points which he made. But, as the Lord President himself concedes, they show that it was unsafe to get rid of the water ballast after the ship had started. Speaking broadly, the builders' investigation had shown the reason for such unsafeness, and its direct relation to the shape of the ship. The investigation was of a technical character. The master could not himself be expected to make an investigation leading to a calculated result like this, or to learn for himself what was implied merely in the course of ordinary experience. I differ at this point from what I understand the Lord President to suggest, and I draw the inference that the ship was inherently unseaworthy in certain not improbable conditions, unless special precautions were taken which it was the duty of the owners to enjoin, as being required by the structure of their ship. I am, therefore, of opinion that the appeal must be allowed.

EARL OF BIRKENHEAD.—I concur.

LORD ATKINSON.—It having been admitted that the *Clan Gordon* was not, by reason of want of stability, unseaworthy when she left New York harbour, the main questions for decision in this appeal are whether the neglect of her owners to communicate to the master the contents of a certain document rendered him incompetent to navigate his ship laden as she was, and, therefore, rendered that ship unseaworthy, and whether the owners had exercised due diligence to make the ship seaworthy. The appellants filed the following pleas in law: (i) The defenders, having failed to carry and deliver the pursuers' said cargo in terms of their contract, are liable in damages. (ii) The sum sued for being the loss to the pursuers caused by the said breach of contract, decree should be pronounced in terms of the conclusion of the summons. (iii) The *Clan Gordon* having been sent to sea in an unseaworthy condition, and the pursuers having thereby suffered loss and damage as condescended on, the pursuers are entitled to decree on the terms of the conclusion of the summons. (iv) The *Clan Gordon* having been lost for a cause for which the defendants are liable under the contract condescended on, the pursuers are entitled to a decree in terms of the conclusion of the summons. (v) The defenders having failed to exercise due diligence to make the *Clan Gordon* seaworthy, and the pursuers having suffered loss and damage through this unseaworthiness as condescended on, the pursuers are entitled to decree in terms of the conclusions of the summons. The first and second of these pleas rest upon the breach by the respondents of the contract contained in the bills of lading to deliver at the ports of Dalny or Taku Bar the goods shipped in the *Clan Gordon* under order of the appellants or their assigns. This breach of contract admittedly took place. The burden rests upon the respondents to show that they are not responsible for it. By the charterparty it is provided, among other things, that the vessel, namely, the *Clan Gordon*, was tight, staunch, strong, and in every way fitted for the voyage, including proper ballast and dunnage, and should receive on board, for the voyage, a full cargo of refined petroleum in customary low top cases of ten American gallons each, which the charterers (that is, the appellants) were to provide and furnish. By cl. 21 of this charterparty it is expressly provided that it is subject to all the terms and provisions of, and all exemptions from liability contained in, the American statute known as the Harter Act, and that bills of lading shall be issued in conformity with that Act. Accordingly, the bills of lading provided that the shipment was subject to all the terms and provisions of, and to all the exemptions from, liability contained in the Act of Congress of the United States relating to navigation approved on Feb. 13, 1893, that is, the Harter Act. The relevant provisions of the Harter Act are contained in its third section, which runs thus:

> ". . . if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of the said vessel . . ."

In addition to the provisions thus imported into the bills of lading, each of the latter (three in number) contained a clause the relevant portions of which run as follows:

> "It is also mutually agreed that the carrier shall not be liable for loss or damage occasioned by causes beyond his control, by the perils of the sea or other waters, by fire from any cause wheresoever occurring; by barratry of the master or crew, by enemies, pirates or robbers, by arrest and restraint of princes, rulers or people, riots, strikes, or stoppage of labour; by explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances; by collisions, stranding, or other accidents of navigation of whatsoever kind

(even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners, or other servants of the shipowner, not resulting, however, in any case from want of due diligence by the owners of the ship or any of them, or by the ship's husband or manager) . . ." A

It will be observed that, under the Harter Act, it is the absence on the part of the owners of due diligence to make their vessel seaworthy which deprives them of protection, whereas under the clause in the bills of lading it is the omission of the owners of the ship, or any of them, or of the ship's husband, or manager of the like kind, to exercise due diligence, which deprives the owners of the named protection. B

I fancied that it was suggested by counsel for the respondents in the able argument which he addressed to the House that it was the duty of the first officer of a ship exclusively to superintend the stowage of her cargo, and that the master was altogether relieved of that duty by this officer. I do not think that is quite so. In *Anglo-African Co.* v. *Lamzed* (2), WILLES, J., said (L.R. 1 C.P. at p. 229): "The master is by law required to be a competent stevedore himself." In CARVER ON CARRIAGE OF GOODS BY SEA (4th Edn.), para 48, it is laid down on the authority of *Hayn* v. *Culliford* (3) that it is the primâ facie duty of the master to stow safely the goods carried in his ship. I observe that in the respondents' case it is stated that C D

"At the time the *Clan Gordon* sailed, two of her ballast tanks, Nos. 1 and 2 containing 95 and 195 tons of water respectively, were full, and that she was loaded down to her marks."

It may, of course, well be that, in any given case, the responsibility for the proper stowage of the cargo of a vessel is, by the agreement of the shipper and shipowner, thrown upon some person or persons other than the master, such as stevedores. But even if such an arrangement is made, although it may relieve the master from attending to, or being responsible for, the actual operation of stowing the cargo, it by no means follows that he is relieved from the duty of ascertaining accurately what is the result of the completed work of stowage upon the stability of his ship, such as the relative weights of the portions of the cargo stowed in the hold and stowed atween decks. It is set forth in the respondents' case that the *Clan Gordon* had a dead weight carrying capacity of 5,675 tons, that she was a turret ship, a class of vessel differing from wall-side steamers in the configuration of their sides, that Messrs. Doxford and Sons, shipbuilders, of Sunderland, had built nearly 200 of these ships, that they were good sea boats, of better seagoing capacity, and rolling less heavily than wall-sided ships, due to the fact that, owing to their configuration, less weight was carried in the upper part of the ship relatively to the lower than in wall-sided ships. But another result of their configuration was that, while up to eighteen degrees of inclination or heel they possessed a greater power of righting themselves than did the wall-sided ships, yet beyond that angle of inclination they possessed much less power of righting themselves than did the others. It is not disputed that, before leaving New York on July 28, 1919, the goods mentioned in the bills of lading had, with a number of tons of bunker coal, been loaded in the *Clan Gordon*, and that the cargo so loaded was so stowed that the contents of the 'tween decks represented a density of ninety-five or thereabouts, as against a density of a hundred represented by the contents of the lower holds and bunkers. E F G H I

The captain in his evidence says that the cargo actually loaded was the first of its kind that he had ever loaded himself, and after the pilot left him he tried on his ship the test of stability. The test consisted in this—that when going full speed (ten knots) he would have the ship's helm put hard over both ways; that if the ship should be tender she would take a list. The *Clan Gordon* showed, he says, no sign whatever of tenderness upon the test; the sea was, he says, more or less calm. He then adds: "I had my 290 tons of water ballast on board. Tanks Nos. 1 and 2 were full." A not unnatural conclusion to draw from this evidence

A is that, if those tanks had been kept full his ship would not have been lost as she was lost. A list of voyages made by the *Clan Gordon* and by other ships with homogeneous cargoes from March, 1909, to December, 1915, was given in evidence, and apparently relied upon by the respondents to establish that this ship might, although heavily laden, have been safely navigated with empty ballast tanks. In the fifteen voyages mentioned in this list, only four appear to have been made with B empty tanks. Besides, it is not the respondents' case that the master was acting rightly in this case in emptying his ballast tanks after leaving New York. On the contrary, in their case it is stated that it is not disputed that the immediate cause of the loss of the *Clan Gordon* was the pumping out of the water from the two ballast tanks. Neither is it disputed that the captain, in giving the order to pump those tanks, committed an error in the management of his vessel. There is not a C particle of evidence to show that Captain McLean ever sailed this vessel with empty water tanks, or that he applied to his ship the test on which he so much relied when all her ballast tanks were empty. He seems to have concluded that, because the vessel showed no tenderness and was safe when her two ballast tanks named were full, she would also show no tenderness and be safe when they were empty. The sequel shows how fatal was his error in this, and it would appear to me to show, D too, how much he needed instruction on this question of the stability of his ship when loaded with a homogeneous cargo, or a cargo closely approaching to a homogeneous one. His description of what happened would appear to enforce this last conclusion. He says that, after tank No. 1 had been emptied, and No. 2 emptied all but six inches, the ship took a list of about five degrees to port. He was then steering on a course south-west true, making ten knots; that about 4.30 he wanted E to get bearings and ordered the quartermaster to port his helm; that the latter began to do so, a little at first; that nothing happened immediately; that he then ordered the quartermaster to put the helm hard aport; that then she began to list; at first she went over fourteen degrees and then fell right over sixty or seventy degrees; that this happened very quickly. The ship then sank; that before she sank he saw her turn with her keel up. The sea was calm.

F There is nothing to show that what actually occurred would not appear to a competent seaman, properly instructed, to be the thing which would most probably occur in the circumstances. The evidence, I think, establishes that the master's handling of his ship amounted to gross and flagrant mismanagement for which there was no excuse. Although this be so, the main question still remains: Did the default of the master in this respect result from want of due, that is, reason- G able, diligence on the part of the owners of this ship, or any of them, or of the ship's husband or manager, in not having the advice and instruction contained in the document brought home to the mind and knowledge of Captain McLean before they entrusted him with the navigation of this ship on her voyage from New York to the eastern ports named in the charterparty with the cargo mentioned? It is not disputed, I think, that a ship may be rendered unseaworthy by the inefficiency H of the master who commands her. Does not that principle apply where the master's inefficiency consists, whatever his general efficiency may be, in his ignorance as to how his ship may, owing to the peculiarities of her structure, behave in circumstances likely to be met with on an ordinary ocean voyage? There cannot be any difference in principle, I think, between disabling want of skill and disabling want of knowledge. Each equally renders the master unfit and unqualified I to command, and, therefore, makes the ship which he commands unseaworthy, and the owner who withholds from the master the necessary information should, in all reason, be as responsible for the result of the master's ignorance as if he deprived the latter of the general skill and efficiency which he presumably possessed.

The vital necessity, the appellants contend, was to get the contents of this document into the heads of the captains of turret ships. The mode or method in or by which that could be effected is quite immaterial. It is the effect of the acquired knowledge on the master's management of his ship which is the matter of importance, since the master would, by the instructions, be warned against a

somewhat undiscoverable or hidden danger, which, if unknown or disregarded, might lead to lamentable results. It is essential to consider the history of this document. The tragedies from which it sprang, the disasters which it aimed at preventing, the persons by whom it was framed, as well as those to whom it was distributed, are all important. In the year 1909 a ship named the *Clan Ranald*, a sister ship of the *Clan Gordon*, built by the same builders and belonging to the same owners, the respondents, while on a voyage from Australia to South Africa laden with flour and grain, overturned and sank in fine weather very much as did the *Clan Gordon*. Forty men were drowned, including the master, chief engineer, second, third, and fourth engineers, second mate and chief steward. A public court of inquiry was held at Adelaide, Australia, under the Merchant Shipping Act, 1894, into the circumstances attending the loss of the ship. The report made by this court was given in evidence. It is a very significant document. The finding of the court as set forth in it is to the effect that the *Clan Ranald*, at the time of her departure at 7 a.m. on Jan. 31, laden with grain and flour, had a list to starboard of four degrees. That on reaching the open sea this list increased to six degrees; that about 2 p.m. the vessel heeled to starboard, placing the side of her turret deck under water; that she never righted again, yet she continued on her course firing rockets (of distress presumably); that the helm was starboarded with a view to correct the list, but without effect; that at 5 p.m. the helm was put hard-a-port, but she still maintained her dangerous angle of inclination, and at 10 p.m. sank out of sight. It was also proved that her ballast tanks had been pumped dry before she left the port of Adelaide. It was further found that this ship, when lost, was practically a full ship, having approximately 6,500 tons of cargo on board, and in addition seventy tons of coal on her turret deck, fifty on the starboard side, twenty on the port side, and about fifty on each side of the fiddle deck. There was no finding that the cargo had shifted nor was there any finding that the cargo had been badly loaded or stowed. This latter fact is very important, considering the evidence given at the trial of this case by the secretary and a director of the respondents. This disaster obviously affected vitally the pecuniary interests both of the builders, who were very extensive, if not the most extensive builders of these turret ships, but also of the respondents, who were possibly the largest owners of them. Both naturally and properly desired to prevent, by all reasonable precautions, the recurrence of such a misfortune, and, accordingly, they turned their respective attentions to the best mode and method of loading these turret ships under certain possible conditions so as to secure their stability. They, accordingly, determined to compile general instructions for the loading of the turret ships. Experiments and calculations were made to get material for this compilation. The assistant chief draughtsman of the builders filled in the forms ultimately adopted. He stated that the object of preparing these was the guidance of masters of these vessels. The compilation is the document in question. It is headed "General Instructions as to loading Turret Ships issued by Messrs. William Doxford & Sons, Ltd., Sunderland." Copies of this document, he says, were sent to all the British owners of turret ships—a copy for each ship. In particular, he says, a copy was sent to the owners of the *Clan Gordon*. He believes that some of the owners asked for extra copies. He did not think that any owner ever wrote to say that he did not understand them. After a most careful perusal of all the evidence, I have come to the conclusion that the respondents have failed to establish that the instructions contained in this document were either obsolete, unintelligible, or useless. I think that, on the contrary, even to masters of turret ships of general capacity, as seamen, they were very helpful towards the safe navigation of those ships, under conditions which frequently exist, by directing attention to the dangers which might arise from unskilful loading, and indicating how those dangers might be avoided. I think that the respondents, by leaving the captain of the *Clan Gordon* in ignorance of these instructions, by failing to bring them to his notice so that he would grasp and understand them, failed to discharge the duty which they owed to the shippers

of the cargo which the vessel carried, and failed to use due diligence to make their ship seaworthy. The fact, if it be a fact, that few disasters befell the fleet of the respondents in the interval between the loss of the *Clan Ranald* and that of the *Clan Gordon* is no proof that these instructions were useless, or were disregarded, or were not helpful. It is quite as rational, indeed more rational, to conclude that this fortunate immunity was due to the observance of these instructions rather than to the disregard of them. It follows from what I have said, that, in my view, the loss of the *Clan Gordon* did not take place without the fault or privity of the respondents within the meaning of s. 503 of the Merchant Shipping Act of 1894. On the whole, I think that the appeal succeeds, that the decision appealed from was erroneous and should be reversed, and that the appeal should be allowed with costs here and in the First Division of the Court of Session.

LORD PARMOOR.—The appellants are a company incorporated under the laws of the United States of America, carrying on business in New York, and elsewhere, as oil merchants. The respondents have their registered office in Glasgow, and are owners of the *Clan Gordon*, a turret steamer built of steel in 1900, and of the burden of 2,292.45 tons register. In July, 1919, the *Clan Gordon* loaded, at the port of New York, a cargo of motor spirit, and of refined petroleum in cases, and of refined wax in bags, to be delivered at Dalny and/or Taku Bar to the order of the appellants or their assigns. The *Clan Gordon* sailed from New York on July 28, 1919. On July 30, 1919, she listed to port, turned turtle in a calm sea, and was totally lost with her whole cargo. The appellants brought an action for loss and damage, pleading in law that the respondents, having failed to carry and deliver the appellants' cargo, in terms of their contract, were liable in damages. It was alleged that the *Clan Gordon* had been sent to sea in an unseaworthy condition, and that the respondents had failed to exercise due diligence to make the *Clan Gordon* in all respects seaworthy. At the hearing, the appellants endeavoured to prove that the *Clan Gordon* was not structurally seaworthy when she left New York. Both the Lord Ordinary, Lord Hunter, and the judges of the First Division have found that the *Clan Gordon* was structurally seaworthy when she left New York, being tight, staunch and strong, and well equipped for the carriage of her cargo, and in condition to encounter whatever perils a ship of that character and burden may be fairly expected to encounter on the voyage for which she is destined. The finding of the Lord Ordinary, and of the judges of the First Division on this issue, was not questioned on the hearing of the appeal before their Lordships.

The question to be decided on appeal is whether the respondents committed a breach of duty for which they are liable, in not communicating to the captain of the *Clan Gordon*, certain information which they possessed which related to turret vessels of the *Clan Gordon* type. The Lord Ordinary found in favour of the appellants, but his interlocutor was recalled by the judges of the First Division. Lord Sands dissented, and was of opinion that the interlocutor of the Lord Ordinary ought to be affirmed. A further question is raised as to the quantum of damages. The respondents contend that, if there is any liability, they are entitled, in terms of s. 503 of the Merchant Shipping Act, 1894, to have their liability limited to £8 of each ton of the ship's tonnage.

The *Clan Gordon* was built for the respondents by William Doxford & Sons, shipbuilders, Sunderland. She belonged to a class of turret steamers, of which, at one time, the respondents had no less than twenty-nine in their fleet. Turret vessels, up to a certain angle of inclination, or list, possess a greater stability and power of righting themselves than wall-sided vessels; but if this angle of inclination, or list, is exceeded, then, owing to the shape of a turret steamer, the centre of buoyancy is shifted, and there is a greater risk that the vessel may turn turtle. Captain McLean, who was master of the *Clan Gordon* on the voyage in question, was, as regards skill in seamanship, a competent master, but the appellants maintain that the ship was not well manned on the voyage in question, in that Captain McLean was not furnished with, and had not had brought to his notice, a document of

general instructions as to loading of turret ships, issued by the builders, William Doxford & Sons, and headed: "*Clan Gordon*. General Instructions as to loading." The first instruction is that this vessel is not intended to load down to her marks with a homogeneous cargo without water ballast. A homogeneous cargo, in this context, denotes a cargo of approximately the same density throughout, and of quantity sufficient to fill reasonably the whole cargo space. I agree in the conclusion of the Lord Ordinary and LORD SANDS that the cargo on the *Clan Gordon* was in substance a homogeneous cargo within the meaning of this instruction. When the *Clan Gordon* was loaded in New York, two of her ballast tanks were filled, holding an aggregate amount of 290 tons. After leaving New York the captain determined that he would pump out the water ballast from both tanks. The actual pumping began on July 30. At noon it was reported that one tank was empty, and the pumping of the second tank was then started. At four o'clock it was reported that the second tank only contained six inches of water on the port side. At about 4.30 an order was given to put the helm hard-a-port, and the *Clan Gordon* began to list, subsequently falling right over, and sinking in the open sea.

The question is whether there was any duty upon the respondents in the exercise of due diligence in their business as shipowners to bring these general instructions to the notice of Captain McLean. By the terms of the contract of carriage, it was agreed that the respondents should not be liable for

> "loss or damage occasioned by causes beyond their control by perils of the sea . . . collisions, stranding or other accidents of navigation, not resulting from want of due diligence by the owners."

In addition, the provisions of s. 3 of the Harter Act applied:

> "That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects, seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel . . ."

In substance, the same considerations arise under the clause in the bill of lading, and under the above section of the Harter Act. If, therefore, the loss, of which the appellants complain, resulted from want of due diligence on the part of the respondents as owners of the ship, the respondents are under obligations, as carriers, either to deliver the goods shipped on the *Clan Gordon*, or to pay damages for loss. In considering whether, in these circumstances, the respondents committed a breach of duty, I think that the tests stated by LORD GORELL in *The Schwan* (1) are applicable although they refer to conditions of an entirely different character. In that case the *Schwan* was held not to be seaworthy owing to danger from a defect in a three-way cock, and that the shipowners were liable as their agent had not exercised reasonable care and diligence within the meaning of the second clause of the bill of lading. There was no evidence that the chief engineer, or any of his subordinates, had been warned about the danger, or knew anything of the peculiar construction of the cock, and if the cock had been of a proper and usual character there would have been no danger in its use. LORD GORELL says, in his judgment ([1909] A.C. at pp. 462, 463):

> "The question then seems to be: Is a vessel seaworthy which is fitted with an unusual and dangerous fitting which will permit of water passing from the sea into her holds unless special care is used, and those who have to use the fitting in the ordinary course of navigation, have no intimation or knowledge of its unusual and dangerous character, or of the need for the exercise of special care, and might, as engineers of the ship, reasonably assume and act upon the assumption that the fitting was of the ordinary and proper character, which would not permit of water so passing however the fitting was used? I think this question should be answered in the negative."

In the case under appeal I am unable to come to any other conclusion than that a vessel, which requires special precautions of an unusual character to be taken in the maintenance of a sufficient water ballast to ensure conditions of stability, which would not be known to a captain of ordinary skill and experience and have not been brought to his notice, although they had been specifically indicated to the shipowners in instructions sent to them from the shipbuilders, is not manned so as to be seaworthy, and that there was a duty on the respondents to have brought such instructions to the notice of the captain.

The relevant considerations may be summarised in the following order: (i) The *Clan Gordon*, when she sailed from New York, was approximately loaded down to her marks with a homogeneous cargo, so that any competent captain, to whom the general instructions issued by William Doxford & Sons had been communicated, would have known that the first paragraph applied to the conditions of loading in the *Clan Gordon*. (ii) That the *Clan Gordon*, as loaded when sailing for New York, was not seaworthy without water ballast, and that it was in consequence of the pumping out of the water ballast that she failed to right herself, and sank on a fair day, in a calm sea. (iii) That the margin of stability in a turret ship of the construction of the *Clan Gordon* is ascertainable by exact calculation, and that the respondents, by means of the general instructions issued by Doxford & Sons, knew that the margin of stability had been ascertained, and that the *Clan Gordon* was not seaworthy, as loaded, without water ballast. (iv) That the information conveyed to the respondents in para. (1) of the general instructions had not been brought to the notice of the captain of the *Clan Gordon* at the time she sailed from New York. This information was not a matter within his knowledge, although it is admitted that he had all ordinary knowledge in seamanship which a competent skilled seaman should possess. (v) That if the information contained in para. (1) of the general instructions had been communicated to the captain of the *Clan Gordon* he would not have pumped out the water ballast, and the vessel would not have sunk. The captain, in giving evidence at the inquiry before the Board of Trade in 1920, was asked: "If you had had these instructions before you, don't you think that you would have refrained from pumping out those two water ballast tanks at sea?" He answered: "Yes, I would have refrained from pumping out those two water ballast tanks, at any rate until I had worked all my coal off 'tween decks." It is true that he qualified this answer on the following day, on the ground that he would not have taken much notice of these instructions because they are entirely contrary to other experience of those turret ships, but it is difficult to appreciate how such experience could have been gained when the result of an experiment would necessarily be disastrous. The captain was further asked: "Why did the *Clan Gordon* turn turtle?" He answered: "I presume she turned turtle because the tanks were pumped out."

The above considerations are, in my opinion, amply sufficient to establish a primâ facie case that there was a duty on the respondents to communicate the instructions to the captain of the *Clan Gordon*. The question, therefore, arises whether sufficient explanation has been given by the respondents to justify them in their negative action. Mr. Barr, who had been registered manager for the respondents since the *Clan Gordon* was built in June, 1900, expresses quite frankly the reasons which influenced the respondents in not communicating the instructions to their captains, including the captain of the *Clan Gordon*. He states that when the respondents get vessels they consider that they get their vessels sufficiently stable to carry homogeneous cargo without water ballast. This general statement may be accepted, but it emphasises the duty to communicate a special instruction, which indicated that a vessel of the *Clan Gordon* type was not sufficiently stable to carry homogeneous cargo without water ballast. He further states that an instruction of this kind is so utterly against all experience of the steamers which the respondents had that it would certainly not appeal to them as a document which would be of any use to them, or as a serious document, a document of which they need take serious notice. No doubt this explanation must be taken

in reference to the special circumstances, but I think that it was an additional reason for giving weight to the instructions that they were of such a special nature as to be entirely against all former experience. A

Counsel, in his able argument on behalf of the respondents, supported the judgment of the First Division on the following grounds. He said that the case presented facts of an unprecedented character, and that there was no instance in the books of the owner of a ship being held liable for not bringing the instructions of B the builders, relating to the stability of the ship, to the notice of the captain. This may be admitted; but the question, nevertheless, arises, whether the facts as disclosed in the present appeal do not disclose a danger of an unusual character known to the respondents, which it was their duty to bring to the notice of the captain of the *Clan Gordon*. For reasons already stated, I think that it was the duty of the respondents to bring the instructions to the notice of the captain. C Counsel further argued that the conditions of stability in a turret vessel could not be regarded as constituting an unusual danger, in that such a vessel was one of a substantial class of vessels, of which the merits and demerits were known, and of which the respondents had had a prolonged experience, both before and after the loss of the *Clan Ranald*, a ship of similar construction which had turned turtle and sunk in 1910. Among other passages, he referred to the evidence of Captain D Ruthven, who was called at the trial on behalf of the appellants. He was asked: "Would you, if you had been in command of this ship when she was two days out from New York, have emptied numbers 1 and 2 tanks?" His answer is: "I certainly would not have done that; if I had had those instructions I should have filled another one. If I had been long enough on the ship, I might have found out for myself what I found out from the builders." It was said that, as the captain E of the *Clan Gordon* had been in charge of the vessel for more than a year, he might have found out for himself the information contained in the instructions and that it was more safe to rely on the experience of the captain than to fetter him by issuing special instructions. The fact that the captain of a vessel may find out for himself, after a certain period of time, a source of unusual danger, which was within the knowledge of the shipowners, and might have been communicated F directly to him in the first instance, is not sufficient to justify the shipowners in subjecting a cargo to the risk of loss, or to exempt them from liability for not exercising due diligence, if such a loss has been incurred. Evidence of a similar character was given by Thomas Barr, the registered manager of the respondents. He states as follows:

> "Well, the builders have not an actual experience of the vessel, and how their G figures are arrived at we do not know. We do know that our masters and ourselves have the practical experience of the conditions under which these vessels are sailing, and we are rather inclined to take it that the experience which we have of these types put us in a position of being better able to judge whether the ships could carry these cargoes or not."

H

It is not possible to accept evidence of this character as an answer to the allegation that instructions, based on exact calculations of the stability of the vessel, the accuracy of which is not questioned, had not been brought to the notice of the captain. It was further suggested that the instructions were in themselves ambiguous, and more likely to cause difficulty than to give information which would assist the captain. Mr. Camps, a maritime expert, says that he had no I difficulty in understanding the instructions, and that, if you take each paragraph by itself, he thinks that the first paragraph is perfectly clear. Evidence of a similar character is given by Captain Ruthven and Captain M'Intosh, and the three experts called for the respondents—Mr. Wall, Professor Welch, and Dr. Douglas—do not suggest that there is any difficulty in understanding the first paragraph of the instructions. In my opinion, the respondents have failed to establish that the instructions were in themselves of an ambiguous character so that it was prudent not to embarrass their captains by bringing to their notice the

information which they contained. In the result I agree with the conclusions of the Lord Ordinary and Lord Sands that there was a duty on the respondents to bring the instructions to the notice of the captain of the *Clan Gordon*, and that the respondents have failed to prove that they used due diligence. There is no doubt that if there was a duty on the respondents to bring the instructions to the notice of the captain, the vessel was not seaworthy, and that the loss resulted from her unseaworthiness. It was further argued on behalf of the respondents that they were entitled to have their liability limited in accordance with s. 503 of the Merchant Shipping Act, 1894, but, in my opinion, they have failed to show that the loss occurred without their actual fault or privity. The appeal should be allowed with costs here and in the Court of Session, and the judgment of the Lord Ordinary should be restored.

Appeal allowed.

Solicitors: *William A. Crump & Son*, for *J. & J. Ross*, Edinburgh, and *Maclay, Murray & Spens*, Glasgow; *Coward & Hawksley, Sons & Chance*, for *Webster, Will & Co.*, Edinburgh, and *Wright, Johnston & Mackenzie*, Glasgow.

[*Reported by* W. C. Sandford, Esq., *Barrister-at-Law.*]

SALTER *v.* LASK

[Court of Appeal (Bankes, Scrutton and Atkin, L.JJ.), November 1, 1923]

[Reported [1924] 1 K.B. 754; 93 L.J.K.B. 685; 130 L.T. 323; 68 Sol. Jo. 420; 22 L.G.R. 296]

Landlord and Tenant—Possession—Action to recover possession of part of demised premises—Competency—Rent Restrictions Acts—Applicability—Matter not raised by counsel—Duty of judge to consider.

In 1913 the landlord of two dwelling-houses with a workshop or warehouse at the rear demised the whole of the premises to a tenant. In 1922 the tenancy was determined by a notice to quit, and later in that year the landlord brought an action in the county court for possession, not of the whole of the premises demised in 1913, but of one of the houses.

Held: (i) an action for the possession, not of the whole of the demised property, but only of part, was competent; (ii) although neither side had raised in the county court the question of the applicability to the property of the Rent Restrictions Acts, those Acts imposed on the judge a duty which prevented him from making his order for ejectment unless he was satisfied that the order might be made under the Acts, and the case must be remitted to him to consider that matter.

Notes. Followed: *Lefevre* v. *Hirst* (1931), 100 L.J.K.B. 733. Considered: *Smith* v. *Poulter*, [1947] 1 All E.R. 216. Referred to: *Thorne* v. *Smith*, [1947] 1 All E.R. 39.

As to actions for possession, see 23 Halsbury's Laws (3rd Edn.) 708 et seq.; and for cases see 31 Digest (Repl.) 615 et seq.

Appeal from an order of a Divisional Court of the King's Bench Division (McCardie and Salter, JJ.) made on an appeal by a landlord (the plaintiff) against an order of the Whitechapel County Court dismissing an action for possession brought in the county court by the plaintiff against the defendant, the tenant of the premises sought to be recovered. The Divisional Court allowed the landlord's appeal and made an order for possession and mesne profits, and the tenant appealed.

The facts appear in the judgments. A

Phineas Quass (*Ross* with him) for the tenant.
Gilbert Beyfus for the landlord.

BANKES, L.J.—This case raises a number of troublesome points and the conclusion which I have come to and in which my brothers join is that the matter has not been sufficiently investigated, and that it must go back to the county court B judge. I say that without casting the least reflection upon the judge. I think it is plain that he did not direct his mind to the question arising under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, because he thought that the case turned upon another point, which was altogether in the defendant's favour.

The material facts are these. There are two houses, Nos. 3 and 5, Bell Lane, and a workshop or warehouse at the rear, and they were all let in 1913 to the C defendant's husband at a rent of two guineas a week. When the husband went to the war in 1916 his wife was substituted in his place as tenant of the premises. She sublet the workshop or warehouse at the back of the premises to a man named Cohen at a rent of £1 a week, and she sublet 3, Bell Lane to a man named Rich at 19s. a week. The latter afterwards acquired the reversion of the existing tenancies and he assigned that reversion in 1917 to Salter, the plaintiff, so that D Salter now stands in the position of the original lessor. Some time after the notice to quit the whole of the premises had been given to Mrs. Lask the plaintiff granted, in his own name, a lease of the warehouse to Cohen, who was already the tenant. Mrs. Lask died in September, 1922, and her husband became her administrator. The plaintiff claims possession of No. 5, Bell Lane, and not the whole of the premises included in the demise of 1913. When the case was in the Divisional E Court, counsel for the defendant tells us—and I entirely accept his statement—that he intended to fight it for the defendant upon two grounds. One was that, looking at the case from one point of view, the county court judge had no jurisdiction, and from the other point of view, that, if he had jurisdiction, the Rent Restriction Act applied. It is quite plain that counsel mentioned the first point, because the learned judge took a note of it, and I think it is pretty plain from the way in F which his cross-examination of one of the witnesses commenced, that he was starting to elaborate the second point. He has told us, and I think both parties are agreed about this, that the learned judge himself took the point that, inasmuch as the action was brought in ejectment to recover the house, No. 5, Bell Lane, and that house only, it was not maintainable, because if one sues at all in ejectment, one must sue in respect of the whole of the premises comprised in the original letting, G that is to say, Nos. 3 and 5 and the workshop or warehouse in rear. The learned county court judge decided the case in favour of the defendant on that point. There was an appeal to the Divisional Court and that court took the view that the learned judge's view of the law was incorrect and that it was open to a plaintiff in ejectment to sue for part of the premises included in one original letting. Speaking quite generally, I agree with their view because, as Atkin, L.J., has H indicated more than once during the argument, one might take this case as an instance. Assume that the plaintiff, after giving a proper notice to quit, was entitled to recover possession of both the two houses and the workshop, and he had before action commenced actually recovered possession of the workshop and No. 3. There would be nothing in law that would prevent him bringing an action and confining it to No. 5, because, while he has required the assistance of the law I to recover possession of No. 5, he did not require it to recover possession of No. 3 and the workshop, he having already obtained it. I desire to guard myself from saying that there may not be a case where a person who elects to sue for a portion only of the demised premises may not find himself in a great difficulty if he subsequently commences proceedings in ejectment to recover some other portion. I also desire to protect myself against the notion that a person although he may, generally speaking, be entitled to sue in ejectment for a portion of the demised premises, can be allowed to exercise that right so as to defeat either the provisions

of the county court Act as to jurisdiction, or the provisions of the Rent Restriction Act with reference to the obtaining of possession. Subject to those safeguards, I should be prepared to say that, speaking generally, I prefer the view of the law taken by the Divisional Court to that taken by the learned judge.

But that does not dispose of the matter because of the special provisions of the Rent Restriction Act. When the matter was before the Divisional Court objection was taken to any question being raised about the Rent Restriction Act, upon the ground that the point was not taken in the court below. The tenant's answer to that was twofold. He said: "The point was taken, and, even if it was not taken, the provisions of r. 18 under the Rent Restriction Act place a duty upon the learned judge to inquire whether or not these premises come within the protection of the Rent Restriction Act, and I desire to support his judgment in favour of the defendant by showing that the premises do come within the Rent Restriction Act." I think myself that, having regard to the special provisions of r. 18, it is open to the tenant to defend himself in an appeal to the Divisional Court and to this court upon those lines and to say that there was material before the learned judge which ought to have put him upon inquiry whether the case did or did not fall within the Rent Restriction Act. The material which was before the learned judge was this. It is quite true that evidence was given that in 1913 the rent for the whole of the premises was two guineas a week, but there was no evidence given as to the rateable value. Counsel for the landlord says that if the tenant desires to have the benefit of this point he ought to have given some evidence about the rateable value. In a sense that is quite true, but I do not think that one ought to shut the tenant out when one sees that the case proceeded in the court below upon the points raised by the learned judge, and as a result, the evidence was not fully gone into on this question of the Rent Restriction Act. Counsel for the landlord has said that it is idle to send it back, because it is quite plain that when it does go back the learned judge must find that the house does not come within the statute because of the provisions of s. 12 (2) of the Act. That entirely depends upon the evidence and we are not in a position to deal with it; it is a matter for the learned judge. The appeal must be allowed and a new trial ordered.

SCRUTTON, L.J.—I regret that in a subject-matter which is rather small in value there should be all this litigation, but I see no alternative but to order a new trial in this case. Two houses and a workshop or warehouse behind them were let in one demise. That demise was terminated by a notice to quit which covered a number of alternative terms, but the furthest terms have now expired. Then the reversioner brought an action for ejectment in respect of one of the houses. Putting it shortly, the reversioner thought that he had obtained possession of part of the property and had not got the rest, and the county court judge took the view that, just as one cannot split up an action for contract and bring, say for £100, three actions each for a third of the amount, so when all the property has been comprised in one demise, one could not bring separate actions for ejectment for each portion of the property which had been included in one demise. On appeal to the Divisional Court they took the view that that was erroneous and on the best consideration that I can give to the matter, I take the same view. One is not suing under one cause of action and one demise. One says: "There was a demise which has terminated and I am the owner of property a, b, and c, and I want possession of property c. I will deal with property a and b in another manner." Inasmuch as one is suing as owner for a definite property, I do not see any objection to one bringing an action for ejectment in respect of part of the demised property and not at the time taking any other legal steps in respect of any other parts of the property which was originally included in one demise. That agrees with the view taken by the Divisional Court and renders erroneous the ground upon which the county court held that he had no jurisdiction to deal with the property at all.

As a consequence of the county court judge taking that view it was not necessary

for him to consider whether the Rent Restrictions Act applied to the property, and, if it did, whether or not he would make an order for possession. The Divisional Court took the view that as neither side had mentioned the Rent Restrictions Act to the county court judge, nobody was now entitled to say that he ought to have considered them. I do not take that view. I regard the Rent Restrictions Acts as imposing a certain jurisdiction upon the judge and preventing him from making an order for ejectment without having regard to the provisions of the Rent Restrictions Acts. That being so, the matter must go back to the county court judge for a new trial in which he will have to investigate whether or not this property comes within those Acts, and, if it does, whether there are any grounds which either prevent or require him to make an order for possession. We must send the matter back for a re-trial upon those lines.

ATKIN, L.J.—I agree. In respect of the point upon which this case was decided in the county court and the point upon which it was decided in the Divisional Court, which was a different one, I think that the principles laid down by the Divisional Court are correct—that is to say, when a reversioner is suing in ejectment in respect of a tenancy which has determined by effluxion of time or by notice to quit, there is no reason why the person who was the reversioner and who is now entitled in possession, should not sue the former tenant to recover part of that which was the original holding. The county court judge decided the reverse. As a consequence of the county court judge taking that view, it was not necessary for him to consider whether the Rent Restriction Act applied to the property, and, if it did, whether or not he would make an order for possession. The Divisional Court took the view that, as neither side had mentioned the Rent Restrictions Act to the learned judge, nobody was entitled to say upon that that he ought to have considered it. I do not take that view. I regard the Rent Restrictions Act as imposing a certain jurisdiction upon the judge and preventing him from making his order for ejectment unless he is satisfied that the order may properly be made having regard to the grounds stated to be valid by the Rent Restrictions Act. That being so, the matter must go back to the county court judge for a new trial in which he will have to investigate whether or not this property comes within the Rent Restrictions Act, and, if it does, whether there are grounds either to prevent him or require him to make an order for possession. What is the ultimate position if the ex-tenant is still in possession of part of the holding which is not sought to be recovered against him? I think it is unnecessary to determine that matter and I will say nothing further about it. That is a question upon which difficult questions of law might possibly arise.

Then there has to be determined a further question because it appears to me that the tenant is entitled in this court, as he was in the Divisional Court, to raise the question as to the Rent Restrictions Act. To my mind, it was sufficiently raised in the county court, because it is plain that both parties directed evidence in examination and cross-examination to points which could only be relevant under the Rent Restrictions Act. I am quite satisfied that the Rent Restrictions Act is not one of those Acts of which notice has to be given by reason of the rule as to statutory defences. I think the principle of the Act and the effect of r. 18 of the rules made under the Act is to remove such defence entirely from the category of statutory defences. I think it was open to the defendant to raise this point in the Divisional Court. The case must go back to the county court judge for him to determine whether or not the tenant was entitled to resist this claim for the recovery of possession by reason of the Rent Restrictions Act. That would raise many questions—some of them, no doubt, difficult ones—which have been discussed before and as to which I do not propose to say anything because they will have to be determined by the learned judge after ascertaining what the facts really are. There will further be a question as to the jurisdiction of the county court to deal with the matter in case it does not come within the Rent Restrictions Act. For that purpose, the county court judge will have to construe the meaning of s. 59

of the County Courts Act, 1888 [see now County Courts Act, 1934, s. 48 (1), as amended by County Courts Act, 1955, s. 2]. I am not quite clear that that section does, in fact, limit the jurisdiction of the county court judge, and its effect is not to be confined merely to the facilities given to a litigant under the proviso. In dealing with the matter the learned judge will, no doubt, have to consider carefully what is meant by the words limiting his jurisdiction to cases where the [net annual value for rating] shall not exceed the sum of £100. It will have to be determined whether the [net annual value for rating] of these premises sought to be recovered exceeds £100. I do not think that at the present moment we are in a position to express an opinion on the points of law which would be of assistance to the learned county court judge. The matter must be discussed again in its entirety. The result is that the appeal must be allowed and the judgment which was entered by the Divisional Court in favour of the plaintiff must be set aside.

Case remitted.

Solicitors: *L. Silkin*; *Gery & Brooks.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

Re ENGELBACH'S ESTATE. TIBBETTS *v.* ENGELBACH

[CHANCERY DIVISION (Romer, J.), October 31, November 1, 1923]

[Reported [1924] 2 Ch. 348; 93 L.J.Ch. 616; 130 L.T. 401; 68 Sol. Jo. 208]

Insurance—Endowment—Policy money payable to nominee of assured at end of fixed term—Nominee surviving assured and fixed term—Right to policy money—No interest in money conferred on nominee—Assured not trustee for nominee—Policy money part of assured's estate.

By a policy of insurance the insurers undertook to pay £3,000 to the assured's daughter if she should be living on Feb. 3, 1923. The assured died in 1916; the daughter was still living on Feb. 3, 1923.

Held: the mere fact that the policy moneys were expressed to be payable to the daughter did not confer on her any interest at law or in equity in those moneys; nor did the fact that the assured signed the proposal form for the insurance, "E.C.E., for his daughter M.N. aged one month," constitute him a trustee for the daughter; and, therefore, the policy moneys formed part of the estate of the assured.

Notes. Followed: *Re Clay's Policy of Assurance*, *Clay* v. *Earnshaw*, [1937] 2 All E.R. 548; *Re Foster*, *Hudson* v. *Foster*, [1938] 3 All E.R. 357; *Re Sinclair's Life Policy*, [1938] 3 All E.R. 124. Distinguished: *Re Webb*, *Barclay's Bank* v. *Webb*, [1941] 1 All E.R. 321. Referred to: *Royal Exchange Assurance* v. *Hope*, [1927] All E.R.Rep. 67; *Perrin* v. *Dickson* (*Inspector of Taxes*), [1929] All E.R.Rep. 685; *I.R.Comrs.* v. *Clarkson-Webb*, [1933] 1 K.B. 507; *Re Gordon*, *Lloyds Bank and Parratt* v. *Lloyd and Gordon*, [1940] 1 Ch. 851; *Re Stapleton-Bretherton*, *Weld-Blundell* v. *Stapleton-Bretherton*, [1941] 3 All E.R. 5; *Re Schebsman*, *Ex parte Official Receiver Trustee* v. *Cargo Superintendents* (*London*), *Ltd.*, *and Schebsman*, [1943] All E.R. 768.

Endowment insurance, although not life assurance in the strict sense, is within the broad meaning of the term life assurance, and as to position of third parties thereunder, see 22 HALSBURY'S LAWS (3rd Edn.) 286, 287; and for cases see 29 DIGEST 422.

Cases referred to:

(1) *Cleaver* v. *Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147; 61 L.J.Q.B. 128; 66 L.T. 220; 56 J.P. 180; 40 W.R. 230; 8 T.L.R. 139; 36 Sol. Jo. 106, C.A.; 29 Digest 369, *2969*.

(2) *Re Burgess's Policy* (1915), 85 L.J.Ch. 273; 113 L.T. 443; 59 Sol. Jo. 546; 27 Digest (Repl.) 135, *982*.

(3) *Re Policy No. 6402 of the Scottish Equitable Life Assurance Society*, [1902] 1 Ch. 282; 71 L.J.Ch. 189; 85 L.T. 720; 50 W.R. 327; 18 T.L.R. 210; 29 Digest 375, *3007*.

(4) *Dyer* v. *Dyer* (1788), 2 Cox, Eq. Cas. 92; 30 E.R. 42; 25 Digest 511, *78*.

Also referred to in argument:

Re Richardson, Weston v. *Richardson* (1882), 47 L.T. 514; 25 Digest 516, *114*.

Gandy v. *Gandy* (1885), 30 Ch.D. 57; 54 L.J.Ch. 1154; 53 L.T. 306; 1 T.L.R. 520; 33 W.R. 803, C.A.; 12 Digest (Repl.) 49, *274*.

Re Flavell, Murray v. *Flavell* (1883), 25 Ch.D. 89; 53 L.J.Ch. 185; 49 L.T. 690; 32 W.R. 102, C.A.; 12 Digest (Repl.) 49, *267*.

Adjourned Summons to determine the ownership of money paid under an endowment insurance policy.

In 1902 the testator made a proposal to the Norwich Union Life Insurance Society for the issue of a "pure endowment non-forfeitable" policy for £3,000. The policy was duly effected. By it the society undertook to pay to the testator's daughter, who was born on Dec. 31, 1901 (referred to in the policy as "the nominee"), the sum of £3,000 if she should be living on Feb. 3, 1923. The testator died on Mar. 7, 1916. On Feb. 9, 1923, the sum due under the policy was paid, a receipt for it being signed by the daughter. On Feb. 15, 1923, she executed a marriage settlement under the provisions of which the policy moneys were assigned by her to the trustees of the settlement upon trusts therein declared, but, having regard to the question who was entitled to the policy moneys, it was arranged between her and the trustees of the will that those moneys should be paid into the names of the solicitor for the legal personal representatives of the assured and the trustees of her settlement to be held by them until the person entitled to the policy moneys was determined. This summons was thereupon issued by the trustees of the will to determine whether the policy moneys belonged to them as such trustees or to the trustees of the settlement.

P. H. L. Brough (*W. M. Hunt*) for the plaintiffs, the legal personal representatives of the testator.

T. R. Hughes, K.C., and *E. M. Winterbotham* for the daughter and the trustees of her marriage settlement.

J. H. Stamp for the other residuary legatees.

ROMER, J.—A very similar question arose in what has been called the *Maybrick Case* (1), a case which is reported under the name of *Cleaver* v. *Mutual Reserve Fund Life Association* (1). Before considering that case, however, I may say this. The daughter could, of course, successfully claim these moneys if she had at the death of the testator a legal right to them, that is to say, a right at law to recover the moneys from the society, because, although that legal right might have been given to her purely voluntarily by her father, still there would be no resulting trust in favour of the father, seeing that there would be a presumption of advancement. The only other ground upon which the daughter could claim these moneys as against the executors would be that the father in some way constituted himself a trustee for the daughter of the policy and of the moneys payable thereunder.

In *Cleaver* v. *Mutual Reserve Fund Life Association* (1) it appears that a policy had been effected by one James Maybrick on his own life. It provided, in effect, that on the death of James Maybrick the money should be payable to Florence Maybrick, his wife, if then living, and that otherwise it should be payable to his personal representatives, so that the court had to deal there, as I have to deal here, with a policy which provided for the payment of the policy moneys, not to

A the person who effected the policy, but to a third party. The question the court had to decide in that case was whether, inasmuch as the assured, James Maybrick, had been murdered by his wife, the insurance money formed part of the estate of the assured on the ground that the trust, which in that case was expressly imposed upon the policy moneys by the Married Women's Property Act, 1882, could not, in the circumstances, be enforced. The decision, therefore, turned upon the B Married Women's Property Act, 1882, but in the course of their judgments LORD ESHER, M.R., and FRY, L.J., dealt with the case, in the first instance, as though the Married Women's Property Act had no application at all, and they considered what was the real effect at law and in equity of an insurance effected by a man on his own life, that insurance containing a provision that on the death of the assured the money should be paid to somebody other than the assured. LORD ESHER said C ([1892] 1 Q.B. at p. 151):

> "This policy of insurance is in a somewhat peculiar form, which I suppose is of recent invention. It does not state on the face of it with whom it is made, but states that for the considerations therein mentioned the defendants make the insured a member, and promise that on his death the policy money shall be payable to Florence Maybrick his wife, if then living, otherwise to his legal D personal representatives. I will first consider what the legal effect of such a policy would be apart from the Married Women's Property Act, and if no such Act had been passed. The contract is with the husband and with nobody else. The wife is no party to it. Apart from the statute, the right to sue on such a contract would clearly pass to the legal personal representatives of the husband. The promise is one which could only take effect upon his death, E and therefore it must be meant to be enforced by them. The condition on which the money is to become payable is the death of James Maybrick. . . . Apart from the statute, what would be the effect of making the money payable to the wife? It seems to me that as between the executors and the defendants it would have no effect. She is no party to the contract; and I do not think the defendants could have any right to follow the money they were bound to pay F and consider how the executors might apply it. It does not seem to me that, apart from the statute, such a policy could create any trust in favour of the wife."

FRY, L.J., said (ibid. at p. 157):

> "James Maybrick insured his life in the policy in question in the year 1888 . . . G and in the policy itself [his wife] is named as the payee of the policy moneys in the event, which happened, of her surviving her husband. Independently of the Married Women's Property Act, 1882, the effect of this transaction was, in my opinion, to create a contract by the defendants with James Maybrick that the defendants would, in the event which has occurred, pay Florence Maybrick the £2,000 assured; it would be broken by non-payment to her; but H the cause of action resulting from such breach would vest in the executors of the assured, and not in the payee. She was, independently of the statute, a stranger to the contract; it might have been put an end to by the contracting parties without her consent, and the breach of it would have given her no cause of action against anyone."

It follows from that, that in the present case the daughter could not have I enforced this contract in her own name against the insurance company, for she was an absolute stranger to the contract, which could have been put an end to by both of the contracting parties without her assent. It also follows from that decision that the mere fact that the policy moneys are expressed to be paid to somebody other than the assured does not make the assured a trustee of the policy or of the policy moneys for the person so nominated.

I might mention that the *Maybrick Case* (1) was followed in somewhat similar circumstances by EVE, J., in *Re Burgess's Policy* (2). There is, however, a decision of JOYCE, J., in *Re Policy No. 6402 of the Scottish Equitable Life*

Assurance Society (3), which at first sight certainly seems to lend some colour to the argument presented to me on behalf of the daughter here. In that case a policy of insurance had been taken out by A. on his own life "for behoof of B.," and the policy provided that B. should be entitled to receive the policy moneys on A.'s death. It was held that the legal personal representatives of B., who received the moneys on the death of A., were trustees of the policy moneys for the legal personal representatives of A. The actual decision, therefore, is in accordance with the two cases I have already referred to. But the grounds on which JOYCE, J., based his decision were these. He treated B. as the person who had the right at law to enforce the policy and give a receipt for the policy moneys, but held that, she being a stranger to A. and there being no consideration for his so being put into possession of this legal right to enforce the policy, B. would hold the policy moneys when received as trustee for A. in accordance with the doctrine of *Dyer* v. *Dyer* (4). It is said that it was quite unnecessary for JOYCE, J., to consider *Dyer* v. *Dyer* (4) if the argument of counsel for the residuary legatees of the testator in this case is correct, because a very short way out of the difficulty was to say that B. had never obtained any legal interest in the policy or any right to receive the moneys payable thereunder. In point of fact, that point does not appear to have been argued at all, and *Cleaver* v. *Mutual Reserve Fund Life Association* (1) was not even cited. I cannot, therefore, regard that decision as carrying any weight in the determination of the particular point I have to deal with.

Coming, therefore, as I do to the conclusion that the daughter did not acquire any interest at law or in equity in the policy or the policy moneys merely by reason of the fact that the policy moneys are expressed to be payable to her, I still have to consider whether the testator ever constituted himself a trustee for the daughter in some other way. It appears that in the proposal form which the father had to fill up and sign, he inserted opposite the words "Full name and description of the proposer" the words "Edward Coryton Engelbach, for his daughter Mary Noel aged one month," and it is said that by that means he constituted himself a trustee of the moneys payable under the policy. But that point is also, I think, concluded by the authority of *Cleaver* v. *Mutual Reserve Fund Life Association* (1). In the passage in FRY, L.J.'s judgment, part of which I read just now, he says ([1892] 1 Q.B. at p. 157):

> "By the proposal which was made a part of the policy he [Mr. Maybrick] expressed the policy to be effected for the benefit of his wife,"

and he came to the conclusion that, apart from s. 11 of the Married Women's Property Act, 1882, that fact would have constituted Mr. Maybrick a trustee of the policy or the policy moneys for his wife. The only distinction that I can see between that case and the present one is this. In the proposal form, Mr. Engelbach, the father, did not say that he was effecting this policy for the benefit of his daughter, but said that he was making the proposal for his daughter. It is sought from that to draw the inference that the father was, by this proposal form, stating that he was entering into the contract on behalf of his daughter, not merely for her benefit, but was making the whole contract on her behalf. I cannot think that that is the true construction of this proposal form. It appears to me extraordinarily unlikely that a father would purport to enter into such a contract as this as agent for his daughter who was one month old, a contract which involved, if the father and the daughter were to get any benefit out of it, the continuous payment of a premium by the father. I think that the words of the proposal really mean no more in this case than the proposal made in the *Maybrick Case* (1), and that the father entered into this contract in his own name, and on his own behalf, but for the benefit of his daughter. In these circumstances I feel constrained by the authorities to which I have referred to decide against the contention of the daughter, and I must declare that the policy moneys form part of the estate of the father.

Solicitors: *Reynolds & Sons*; *Nash, Field & Co.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

CHILLINGWORTH AND ANOTHER *v.* ESCHE

[Court of Appeal (Sir Ernest Pollock, M.R., Warrington and Sargant, L.JJ.), October 25, 26, 1923]

[Reported [1924] 1 Ch. 97; 93 L.J.Ch. 129; 129 L.T. 808; 40 T.L.R. 23; 68 Sol. Jo. 80]

Sale of Land—Agreement subject to formal contract—"Subject to proper contract to be prepared by vendor's solicitors"—Reference to "agreement" and "agreement for sale" in contemporary documents—No binding agreement—Formal contract agreed by solicitors—Purchasers not bound by solicitors' agreement—Right of purchasers to return of deposit.

By a document, dated July 10, 1922, the plaintiffs "agreed to purchase" certain land from the defendant for £4,800 "subject to a proper contract to be prepared by the vendor's solicitors." The document recited the payment by the plaintiffs to the defendant of a deposit of £240. A receipt for the deposit, dated the same day, referred to the document as an "agreement," and a schedule of chattels the purchase of which formed part of the transaction referred to it as an "agreement for sale." After the solicitors on both sides had agreed on the terms of the contract the plaintiffs, without giving any reason, refused to go on with the matter, and they now claimed a declaration that the document was not a binding agreement for the purchase and sale of the property and the repayment of the deposit.

Held: (i) whether the words "subject to a proper contract to be prepared by the vendor's solicitors" in the document of July 10, 1922, imported a condition that no agreement between the parties should be binding until such a "proper contract" was executed depended on the true construction of the document; on such construction the document was nothing more than a conditional offer and a conditional acceptance, and would only ripen into a contract when a formal document was signed; the reference to the document as an "agreement" in the contemporaneous receipt and schedule could not affect the matter; and, therefore, there was no final agreement between the parties and the plaintiffs were entitled to refuse to complete the purchase; (ii) on the construction of the documents and in the circumstances of the case the plaintiffs were entitled to the return of the deposit; (iii) (per Warrington, L.J.) the plaintiffs' solicitors were not the agents of their clients so as to bind them when they agreed the terms of the contract with the defendant's solicitors.

Notes. Considered: *Eccles* v. *Bryant*, [1947] 2 All E.R. 865. Referred to: *Lockett* v. *Norman-Wright*, [1924] All E.R.Rep. 216; *Keppel* v. *Wheeler and Atkins*, [1926] All E.R.Rep. 207; *Wilson* v. *Balfour* (1929), 45 T.L.R. 625; *May and Butcher, Ltd.* v. *R.*, [1934] 2 K.B. 17, n.; *George Trollope & Sons* v. *Martyn Bros.*, [1934] 2 K.B. 436; *Kahn* v. *Aircraft Industries Corpn., Ltd.*, [1937] 3 All E.R. 476; *Spottiswoode Ballantyne & Co.* v. *Doreen Appliances, Ltd.*, [1942] 1 K.B. 251; *Graham and Scott (Southgate), Ltd.* v. *Oxlade*, [1950] 1 All E.R. 856.

As to an agreement subject to formal contract and recovery of a deposit, see 29 Halsbury's Laws (2nd Edn.) 237–239, 375–381; and for cases see 12 Digest (Repl.) 92 et seq. and 40 Digest (Repl.) 241 et seq. As to the authority of a solicitor to bind his client, see 31 Halsbury's Laws (2nd Edn.) 103 et seq. and cases there cited.

Cases referred to:

(1) *Rossdale* v. *Denny*, [1921] 1 Ch. 57; 90 L.J.Ch. 204; 124 L.T. 294; 37 T.L.R. 45; 65 Sol. Jo. 59, C.A.; 12 Digest (Repl.) 98, *582*.

(2) *Coope* v. *Ridout*, [1920] 2 Ch. 411; affirmed, [1921] 1 Ch. 291; 90 L.J.Ch. 61; 124 L.T. 402; 65 Sol. Jo. 114, C.A.; 12 Digest (Repl.) 97, *576*.

(3) *Von Hatzfeldt-Wildenburg* v. *Alexander*, [1912] 1 Ch. 284; 81 L.J.Ch. 184; sub nom. *Hatzfeldt* v. *Alexander*, 105 L.T. 434; 12 Digest (Repl.) 92, *523*.

(4) *Soper* v. *Arnold* (1889), 14 App. Cas. 429; 59 L.J.Ch. 214; 61 L.T. 702; 38 W.R. 449; 5 T.L.R. 698, H.L.; 40 Digest (Repl.) 242, *2028*.
(5) *Wright* v. *Pocklington* (1923), July 12; unreported.
(6) *Baylis* v. *Bishop of London*, [1913] 1 Ch. 127; 82 L.J.Ch. 61; 107 L.T. 730; 29 T.L.R. 59; 57 Sol. Jo. 96, C.A.; 35 Digest 156, *526*.
(7) *Howe* v. *Smith* (1884), 27 Ch.D. 89; 53 L.J.Ch. 1055; 50 L.T. 573; 48 J.P. 773; 32 W.R. 802, C.A.; 40 Digest (Repl.) 241, *2027*.
(8) *Moeser* v. *Wisker* (1871), L.R. 6 C.P. 120; 40 L.J.C.P. 94; 24 L.T. 134; 19 W.R. 351; 40 Digest (Repl.) 247, *2076*.
(9) *Winn* v. *Bull* (1877), 7 Ch.D. 29; 47 L.J.Ch. 139; 42 J.P. 230; 26 W.R. 230; 12 Digest (Repl.) 94, *544*.
(10) *Palmer* v. *Temple* (1839), 9 Ad. & El. 508; 1 Per. & Dav. 379; 8 L.J.Q.B. 179; 112 E.R. 1304; 40 Digest (Repl.) 244, *2053*.

Also referred to in argument:

Chinnock v. *Marchioness of Ely* (1865), 4 De G.J. & Sm. 638; 6 New Rep. 1; 12 L.T. 251; 29 J.P. 279; 11 Jur.N.S. 329; 13 W.R. 597; 46 E.R. 1066, L.C.; 40 Digest (Repl.) 15, *40*.
Lloyd v. *Nowell*, [1895] 2 Ch. 744; 64 L.J.Ch. 744; 73 L.T. 154; 44 W.R. 43; 13 R. 712; 12 Digest (Repl.) 96, *565*.
Filby v. *Hounsell*, [1896] 2 Ch. 737; 65 L.J.Ch. 852; 75 L.T. 270; 45 W.R. 232; 12 T.L.R. 612; 40 Sol. Jo. 703; 40 Digest (Repl.) 28, *131*.
Fowle v. *Freeman* (1804), 9 Ves. 351; 32 E.R. 638; 40 Digest (Repl.) 36, *191*.
Kennedy v. *Lee* (1817), 3 Mer. 441; 36 E.R. 170, L.C.; 12 Digest (Repl.) 102, *597*.
Thomas v. *Dering* (1837), 1 Keen, 729; 6 L.J.Ch. 267; 1 Jur. 211; 48 E.R. 488; 12 Digest (Repl.) 93, *527*.
Re Parnell, Ex parte Barrell (1875), 10 Ch. App. 512; 44 L.J.Bcy. 138; 33 L.T. 115; 23 W.R. 846, L.JJ.; 40 Digest (Repl.) 245, *2055*.
Thomas v. *Brown* (1876), 1 Q.B.D. 714; 45 L.J.Q.B. 811; 35 L.T. 237; 24 W.R. 821, D.C.; 40 Digest (Repl.) 248, *2087*.
Gosbell v. *Archer* (1835), 2 Ad. & El. 500; 1 Har. & W. 31; 4 Nev. & M.K.B. 485; 4 L.J.K.B. 78; 111 E.R. 193; 40 Digest (Repl.) 248, *2080*.
Ockenden v. *Henly* (1858), E.B. & E. 485; 27 L.J.Q.B. 361; 31 L.T.O.S. 179; 4 Jur.N.S. 999; 120 E.R. 590; 40 Digest (Repl.) 141, *1081*.
North v. *Percival*, [1898] 2 Ch. 128; 67 L.J.Ch. 321; 78 L.T. 615; 46 W.R. 552; 42 Sol. Jo. 431; 40 Digest (Repl.) 129, *994*.
Casson v. *Roberts* (1862), 31 Beav. 613; 1 New Rep. 9; 32 L.J.Ch. 105; 7 L.T. 588; 27 J.P. 73; 8 Jur.N.S. 1199; 11 W.R. 102; 54 E.R. 1277; 40 Digest (Repl.) 248, *2086*.
Rossiter v. *Miller* (1878), 3 App. Cas. 1124; 48 L.J.Ch. 10; 39 L.T. 173; 42 J.P. 804; 26 W.R. 865, H.L.; 40 Digest (Repl.) 29, *135*.
Collins v. *Stimson* (1883), 11 Q.B.D. 142; 52 L.J.Q.B. 440; 48 L.T. 828; 47 J.P. 439; 31 W.R. 920, D.C.; 40 Digest (Repl.) 246, *2071*.
Bilbie v. *Lumley* (1802), 2 East, 469; 102 E.R. 448; 35 Digest 158, *544*.
Baylis v. *Bishop of London*, [1913] 1 Ch. 127; 82 L.J.Ch. 61; 107 L.T. 730; 29 T.L.R. 59; 57 Sol. Jo. 96, C.A.; 35 Digest 156, *526*.

Witness Action by purchasers for a declaration that a purported agreement for the sale of property was not binding on them and for the return of a deposit.

In July, 1922, the defendant, Mr. Thor Olaf Emmanuel Esche, was the owner of nursery gardens at Cheshunt, Herts. On July 10 a document was prepared in the following form:

"We Gilbert Chillingworth and Stanley Richard Cummings of 33 Alwyn Avenue Chiswick and 37 Essex Road Leyton hereby agree to purchase from Thor Olaf Emmanuel Esche of Church Lane Cheshunt Herts for the sum of £4,800 subject to a proper contract to be prepared by the vendor's solicitors all his freehold land and nursery situate on the north side of Cadmore Lane

A Cheshunt Herts. Together with the fifteen glasshouses and all other buildings erections engines and fixed plant thereon including all rolling stock and utensils connected with the business a schedule of which has been prepared and signed by both parties and acknowledge having paid this 10th day of July, 1922, the sum of £240 as deposit and in part payment of the said purchase-money. Completion of purchase to be on the 2nd day of November, 1922, when B possession is to be given. Mr. Esche to leave at least one man in charge of the nursery up to the said day of completion."

This document was signed by Chillingworth and Cummings, and Esche wrote below and signed:

"I Thor Olaf Emmanuel Esche hereby confirm the above sale and acknowledge C receipt of deposit of £240 above mentioned."

A receipt signed by Esche in the following form was annexed to the document:

"Received of Messrs. Chillingworth and Cummings this 10th day of July, 1922, the sum of £240 being deposit and part payment of the sum of £4,800 on sale of my nursery, Cadmore Lane, Cheshunt, as per agreement entered into this 10th day of July, 1922. Balance of purchase-money being £4,560."

D The schedule mentioned in the document was signed by the parties, and was headed:

"Schedule of utensils in trade at Mr. Esche's Nursery, Cadmore Lane, Cheshunt, Herts, under agreement for sale to Messrs. Gilbert Chillingworth and Stanley Richard Cummings dated this 10th day of July, 1922."

E The vendor's solicitors prepared a draft contract in legal form, embodying the terms contained in the document, with other usual clauses as to commencement of title, &c., and submitted it to the purchasers' solicitor, who made certain alterations, especially making party to the contract a company which Chillingworth and Cummings had formed. The vendor refused to accept the company as purchasers, but otherwise accepted the alterations, and his solicitors approved the draft contract F as altered, and the vendor signed the contract in that form. The purchasers' solicitor also expressed his concurrence in the draft as so altered, but the purchasers did not execute the contract. On Oct. 12 the purchasers' solicitor wrote to the vendor's solicitors a letter in these terms:

"I regret to say that my clients do not feel disposed to proceed with the G negotiations in this matter. I should therefore be glad to receive cheque for the deposit."

The purchasers did not give any reason for their refusal to proceed, and, in response to inquiries by the vendor's solicitors, their solicitor stated that no binding agreement had ever been arrived at and his clients were entitled to change their minds, and that he supposed that that was what they had done, and he asked for their H deposit back. The vendor contended that a binding agreement existed, and refused to return the deposit. On Nov. 14 the purchasers issued the writ in this action for a declaration that no binding agreement for the purchase and sale of the property was entered into on July 10 or any other date, and for repayment to them of the £240 paid by them by way of deposit and in part payment of the proposed purchase-money with interest. By the statement of claim the plaintiffs alleged I that the agreement of July 10 was conditional on a proper contract being prepared and signed by both parties, while in his defence the defendant contended that the alleged condition was for his benefit only, and that he was willing to waive it and complete the contract. ASTBURY, J., held that, even assuming that the document of July 10, 1922, was only a conditional agreement, the plaintiffs had made out no case in law for the recovery of the deposit. He refused to make the declaration asked for and dismissed the action. The purchasers appealed.

Luxmoore, K.C., Lionel L. Cohen and *Wynn Parry* for the purchasers.
Micklem, K.C., and *W. F. Webster* for the vendor.

SIR ERNEST POLLOCK, M.R.—The purchasers claim the return of a sum of £240 which they paid to the vendor on the signing of a document, dated July 10, 1922. The vendor contends that the document was a binding contract for the purchase and sale of freehold land and a nursery at Cheshunt, Herts, belonging to him and was a deposit or guarantee that the purchasers would complete the purchase, and as, without assigning any reason, the purchasers refused to complete, the deposit was forfeited, and he is entitled to retain it. It has been said that this case is one of general interest and application in other cases where the words of a document are very similar, but for my own part I do not think that this case can be of wide application, as the decision depends on this particular document and the particular circumstances in which it was signed. It is a narrow point and as I think is covered by the authorities to which I shall refer.

The question we have to consider is whether ASTBURY, J., was right in deciding that the purchasers were not entitled to be repaid the £240. In the first place, it is necessary for this court to make up its mind what is the effect of the agreement of July 10, 1922. Is it or is it not a concluded agreement? Or should it be treated as merely a preliminary document and full effect be given to the words in it "subject to a proper contract being prepared by the vendor's solicitors" with the result that, until a formal contract is signed, the parties are not bound? It is not, I think, necessary to go far back into a number of authorities decided on this point, but one will be sufficient in which the cases decided were carefully considered by RUSSELL, J., and by this court—*Rossdale* v. *Denny* (1). I will, however, first refer to *Coope* v. *Ridout* (2), a very similar case, in which, when it came before this court and the decision of EVE, J., was affirmed, LORD STERNDALE, M.R., referred to the dictum of PARKER, J., in *Von Hatzfeldt-Wildenburg* v. *Alexander* (3). PARKER, J., in that case summed up the problem relating to such a contract as this in the following words ([1912] 1 Ch. at p. 289):

> "It is a question of construction whether the execution of a further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract."

That dictum was referred to with approval by LORD STERNDALE and it has also been approved of in other cases. PARKER, J., there gave a guide to the solution of the difficulty by suggesting that in each case it ought to be considered whether the words contained in such a contract on their proper construction were intended to be a condition or term of the bargain so that it remained merely a conditional and unenforceable contract, or whether it was intended to be merely the expression by the parties of a desire that a more formal contract should be drawn up of the terms of the contract which had in fact been already agreed upon. In *Rossdale* v. *Denny* (1), RUSSELL, J., went through the authorities and accepted the rule laid down by PARKER, J., and RUSSELL, J.'s decision was supported by the Court of Appeal, where LORD STERNDALE again referred to the statement of law made by PARKER, J., in *Von Hatzfeldt-Wildenburg* v. *Alexander* (3) and said that the principle could not be more clearly stated.

Therefore, in both the cases I have referred to, that statement of the law was accepted by this court—that the words "subject to a proper contract" must be considered as either importing a condition or merely expressing a desire that a further formal contract should be drawn up of the transaction already agreed upon. It is clear, I think, in this case that the memorandum of agreement was intended to be made conditional upon the signing of a proper contract to be prepared by the vendor's solicitors. It is not possible to hold that those words are merely an expression of a desire that a further contract should be signed of the terms already agreed upon, but those words are operative to make the whole agreement subject to the signing of a proper contract. I think that the word "proper" must be

given its full meaning and that the intention was that the full conditions should be embodied in a further contract, and, in my opinion, not only until that further contract had been negotiated and the parties were ad idem on it, but not until it was executed, was there any binding contract for the purchase of the property. That point, whether the memorandum of agreement was a binding contract, was not determined by ASTBURY, J., but, this court having concluded that the nature of the agreement is inchoate, it follows that if, at a time before the execution of a further agreement, negotiations were brought to an end, the deposit ought to be repaid to the purchaser.

Counsel for the vendor says that in order to make up one's mind as to the effect of the document of July 10, 1922, one must look at the other documents signed at the same time, and that in those other documents—the receipt and schedule—when reference is made to the memorandum of July 10, 1922, it is referred to as an "agreement for sale" or "agreement," and that, therefore, it must be inferred that the memorandum was intended to be a definite concluded agreement, for that is what they call it. That would be placing those documents, signed on the same day, at much too high a value, as they do not alter or detract from the meaning of the important words in the memorandum "subject to a proper contract being prepared by the vendor's solicitors." YOUNGER, L.J., in the concluding words of his judgment in *Coope* v. *Ridout* (2), said:

> ". . . it is a condition the fulfilment of which involves an agreement to enter into an agreement which in law is of no force until that agreement becomes binding proprio vigore, that is to say, by execution. On either view, therefore, of its meaning the condition for its fulfilment necessitates the execution of the further agreement, referred to before its purpose is achieved, and until that purpose is achieved there is no agreement at all."

Applying that doctrine, I have come to the conclusion that we must hold that until a proper contract had been prepared, concluded, and executed there was no agreement at all. Therefore, I am of opinion that there was no agreement binding between these two parties. Counsel for the purchasers says that the result of such a finding is that the sum paid under the name of a deposit is recoverable on the ground that there never was a contract, and I think that, primâ facie, the deposit is recoverable and ought to be repaid to the plaintiffs. This £240 was paid "as deposit and in part payment of the purchase-money." It is clear that purchase-money may never become payable, so the character of part payment was lost as it never could be fulfilled. But then it was said that it had the character of a deposit, and never lost that character, and, therefore, the vendor was entitled to retain it. As to what is the meaning of "deposit" there is a statement by LORD MACNAGHTEN in *Soper* v. *Arnold* (4) (14 App. Cas. at p. 435).

> "Everybody knows what a deposit is. The purchaser did not want legal advice to tell him that. The deposit serves two purposes—if the purchase is carried out it goes against the purchase-money—but its primary purpose is this: it is a guarantee that the purchaser means business; and if there is a case in which a deposit is rightly and properly forfeited, it is, I think, when a man enters into a contract to buy real property without taking the trouble to consider whether he can pay for it or not."

It is said here that this £240 was a guarantee that the buyers meant business, and as, through their action, business did not result, the deposit should be forfeited, on the ground that the purchasers should have executed the contract tendered to them. It is, however, no part of the business of this court to concern itself with the question why the negotiations in this case came to an end, and still less whether anyone is to blame in the matter, but the duty of the court is to note that, as no contract was entered into, the deposit would primâ facie be returnable. What ground has been put forward for saying that purchasers who were entitled to break off negotiations have lost their deposit. It is said that they could not have seriously entered into those negotiations if they broke them off without reason,

but that is not for us to consider. That they were entitled not to complete the purchase seems clear, and I do not accept the view that the purchasers were paying the deposit as a guarantee or earnest of good faith that they would complete the purchase, because they could have revoked what had, up to that time, been agreed upon at any moment. It seems to me that once negotiations came to an end the rights of the parties were gone, and the purchasers were entitled to receive their money back. Counsel for the vendor suggests that, inasmuch as this deposit is not at the moment a part of the purchase-money, it has some other nature attributable to it, a nature under which the vendor, if circumstances justified him in so doing, was entitled to retain it, but the onus of showing a right in the vendor to retain this £240 falls on the vendor, and I agree with EVE, J., who takes that view in *Wright* v. *Pocklington* (5). The authority for it is to be found in *Baylis* v. *Bishop of London* (6), where HAMILTON, L.J., said ([1913] 1 Ch. at p. 140):

> "The question is whether it is conscientious for the defendant to keep the money, not whether it is fair for the plaintiff to ask to have it back."

In cases of "money had and received" in the old forms of pleadings the claim was really a common law claim for money had and received to the purchaser's use and one of the allegations was that the purchaser had lost the use of the money. I cannot agree with the view that the purchasers were placed in no difficulty by their money being left in the hands of the vendor, while the vendor was under a difficulty by reason of his having made a preliminary agreement, not for the moment binding, to sell the property, and, therefore, could not offer it to anyone else.

The decision now given in this case is not a decision as to what meaning a deposit has in all cases, but is only relevant to the facts of this particular case. In *Howe* v. *Smith* (7) (27 Ch.D. at p. 97) the nature of a deposit was considered and the right of a purchaser to a return of it, and in the judgments of all the lords justices they say definitely, as expressed by BOWEN, L.J., that:

> "The question as to the right of the purchaser to the return of the deposit money must, in each case, be a question of the conditions of the contract. In principle it ought to be so, because, of course, persons may make exactly what bargain they please as to what is to be done with the money deposited. We have to look to the documents to see what bargain was made."

That passage is taken from BOWEN, L.J.'s judgment, but FRY, L.J., says substantially the same thing (ibid. at p. 101). Therefore we have to consider what, in fact, was the effect of these documents, not forgetting the concomitant documents, and ask ourselves whether this deposit was by those documents intended to pass irrevocably to the vendor if the purchasers did not carry out the memorandum. In all the circumstances of this case, I think the deposit is recoverable by the purchasers. There was no provision made in the documents which would justify the vendor declining to return the deposit, though if he had, by appropriate words, made provision for that in the memorandum, such a provision could have been upheld. One word as to the cases cited by counsel for the vendor in support of his contention. No reliance can be placed by him on *Moeser* v. *Wisker* (8), in my judgment, as being in favour of his view, though it may not militate against that view. In that case the plaintiff was entitled to recover his money because of certain clauses which were unreasonable, and it is clear there that there was no ground for suggesting that the deposit was not repayable, but that case has no wider application than its own circumstances. Since ASTBURY, J., gave his decision in the present case, EVE, J., in *Wright* v. *Pocklington* (5) said that, with the greatest respect to the decision of ASTBURY, J., in this case, he did not think that the word "guarantee" with reference to a deposit was the right word to use, and he held that the purchaser was entitled to recover the deposit. I agree with that view, which I think is correct, and I prefer it to that taken by ASTBURY, J., in the case we have to deal with here. The appeal must, therefore, be allowed, and the purchasers are entitled to a declaration that there is no existing contract and to a return of the deposit.

WARRINGTON, L.J.—This is a claim by purchasers to recover their deposit. The case raises two questions. The first is whether the document signed on July 10, 1922, constitutes a binding contract for the sale of the lands in question, and the second is, if it does not, whether the purchasers are entitled to recover their deposit. ASTBURY, J., did not decide the first point. He preferred to assume that the agreement did not constitute a binding contract, and on that assumption he has held that, although there was no binding contract, yet as the purchasers were the persons who had broken off the negotiations they could not recover the deposit. In this court it is necessary for us to deal with both points. The vendor is not willing to accept ASTBURY, J.'s assumption. The important words in the agreement of July 10, 1922, are "subject to a proper contract to be prepared by the vendor's solicitors." It has been decided over and over again that where you have a document relating to the sale and purchase of land framed in these terms, the object and effect of inserting those words, "subject to a proper contract to be prepared by the vendor's solicitors," are to avoid binding the parties to sell and purchase respectively unless and until the contract referred to has been prepared and signed by both parties. The two most recent decisions, both in this court, on that point are *Rossdale* v. *Denny* (1) and *Coope* v. *Ridout* (2). It was admitted by counsel for the vendor that, so far as the actual words are concerned, it was impossible to contend, in the face of those authorities, that the document of July 10, 1922, embodies anything but a conditional offer and conditional acceptance, but he contends that there are in this case certain contemporary documents as well which contain sufficient to compel the court to give those words a construction which, but for them, they would not have. In the first place, he said that the document itself acknowledges the payment of the deposit, but, in my opinion, the payment of the deposit is a neutral fact and helps neither party. It may be paid by way of guarantee that the purchaser will not break off the negotiations without good cause, or it may be paid in anticipation of a binding contract. In any event the mere fact that a deposit has been paid does not help me. Then it was said that in another part of this document and in the contemporaneous documents the parties refer to the agreement as an agreement for sale, but when one knows from the document itself that it is not an agreement for sale, it cannot be made so by its description as such in other documents. It is a compendious form of reference to what will become an agreement for sale when another document has been executed. Therefore, neither the payment of the deposit, nor the reference to the document as an agreement for sale, is sufficient to alter the primâ facie meaning of the document of July 10, 1922.

It has been undoubted ever since the decision, in *Winn* v. *Bull* (9), of SIR GEORGE JESSEL that the words in a document "subject to the preparation and approval of a formal contract" prevented the document being held to be a final agreement of which specific performance could be enforced, and words such as those or the words in this case which are very similar and of the same effect are now often inserted to prevent the document having the effect of a binding contract. In many cases it is important to avoid the disastrous results of entering into open contracts, and I think it would be most mischievous to throw any doubt on the effect of such expressions. But I do not overlook what was said by LORD STERNDALE, M.R., in *Rossdale* v. *Denny* (1) in this court ([1921] 1 Ch. at p. 66):

> "I am far from saying that there may not be an unconditional offer and acceptance of a binding contract although the letters may contain the words 'subject to a formal contract,' but certainly those words do point in the direction of the offer or acceptance being conditional. I do not think it can be put higher than that; I think he is well founded in saying that the general trend of the decisions has been, where those words occurred, to hold that the offer or acceptance was conditional."

I think that too much importance has been given to those words of LORD STERNDALE, and what he meant to say was that the words indicate that there was no

true and binding bargain, but only offer and acceptance which were intended to be conditional. There might be other circumstances which would induce the court not to give them that meaning, but, in the absence of particular circumstances, that was the meaning which should be attributed to them. I think that was the true meaning of what LORD STERNDALE said. I am clearly of opinion that this document of July 10, 1922, was nothing more than a conditional offer and a conditional acceptance, and would only ripen into a contract when a formal document was signed.

The purchasers, in closing the negotiations for the purchase, were legally entitled so to do, but it is said that they could only do so under pain of forfeiture of their deposit. Whether a vendor is entitled to retain a deposit in each case turns upon the construction of the document under which that deposit is made, and the authority for that proposition is to be found in *Howe* v. *Smith* (7), where BOWEN, L.J., said (27 Ch.D. at p. 97):

> "The question as to the right of the purchaser to the return of the deposit must, in each case, be a question of the construction of the contract. In principle it ought to be so, because, of course, persons may make exactly what bargain they please as to what is to be done with the money deposited. We have to look to the documents to see what bargain was made."

Later on he refers to *Palmer* v. *Temple* (10), and quotes this observation from it (9 Ad. & El. at p. 520):

> "The ground on which we rest this opinion is, that in the absence of any specific provision, the question whether the deposit is forfeited, depends upon the intent of the parties to be collected from the whole instrument."

FRY, L.J., uses words to the same effect. Two rival views have been put before us. On behalf of the vendor it is said that the deposit must be taken to be a guarantee for the conduct by the purchasers of the negotiations so as to bring them to their legitimate conclusion—that is, the signing of a proper contract—and that it was intended by insisting on a deposit to prevent the purchaser from breaking off the negotiations for other reasons than the default of the vendor. I find great difficulty in arriving at such a conclusion. If the document were a binding contract there would be no doubt as to the result. In *Soper* v. *Arnold* (4) LORD HERSCHELL said (14 App. Cas. at p. 433):

> "The deposit is given as a security for the performance of the contract. The appellant admittedly cannot recover that deposit if it was through his default that the transaction was not completed."

When LORD MACNAGHTEN describes the nature of a deposit in somewhat more popular language I think he means the same thing. But where, as here, there is no binding contract where the whole matter is left indefinite, it seems impossible to say that the purchasers pay the deposit as a guarantee to carry out the bargain, when, by the document they have entered into, they have not bound themselves to carry out any bargain. Where there is no legal relation, how can one say that the purchasers have not done something, or abstained from doing something, which they ought to have done or abstained from doing? Then it is said that unless the consequence of the payment of a deposit amounts to a guarantee to complete the purchase the payment of it is perfectly futile. I do not agree, because the purchaser, by payment of a deposit, shows that he means business. It is a payment in anticipation of the fulfilment of the bargain if it is concluded. On the other hand, the purchasers contend that this is a deposit in the ordinary sense, and unless the bargain is completed it is returnable, as no purchase-money passes, and it is only of any force if the proper contract is executed. To put it shortly, it is a deposit paid in anticipation of a final contract.

That seems to me to be the true view. The decision of ASTBURY, J., I think, therefore, is wrong and ought to be reversed. There are one or two points raised by counsel for the vendor which I ought to deal with. He relies upon *Moeser* v.

Wisker (8). In my opinion, that is a case which should never have been reported. It was an ex parte application. The purchaser had no opportunity of stating his view. The judges seized on a single fact and decided on that fact. Then counsel says that, because the terms of the written agreement were arrived at and assented to by the solicitors who were agents for the parties, therefore, although the parties had not bound themselves, they were bound by that assent. I think that would be contradictory, and, further, it is not within the authority of solicitors to bind their clients to a contract. The contract was a merely conditional one, and the vendor has not made out his case. Therefore there ought to be judgment for the purchasers whose appeal must be allowed.

SARGANT, L.J.—I am of the same opinion. The first point is: Was there a binding and enforceable contract? That has to be determined by seeing which of the two alternative contentions is to be adopted. On the one hand, were the whole terms ascertained and agreed or was all that was contemplated the mere reduction of these terms into a more formal shape? Or, on the other hand, had the mere heads only of the bargain been ascertained and was it contemplated that a further contract should be executed which should embody certain further terms? As regards this second contention I desire to say one or two words as to the phrase "contract to enter into a contract." This phrase is used by PARKER, J., in his classic judgment in *Von Hatzfeldt-Wildenburg* v. *Alexander* (3), but only, I think, as secondary to his accurate method of stating the alternative. In the strictest sense of the words the court will often enforce a contract to make a contract. The specific performance of a formal agreement of purchase is in fact the enforcement of a contract to make a contract, the ultimate conveyance being often in itself in many respects a contract. The same remarks apply to the specific performance of a clause in a lease giving the lessee an option to purchase the superior interest of the lessor, freehold or leasehold, as the case may be. The true meaning of the phrase is that the court will not enforce a contract to make a second contract part of the terms of which are indeterminate and have yet to be agreed, so that there is not any definite contract at all which can be enforced by the court, but only a contract stipulated for of which the terms are not yet agreed.

Dealing, then, with the question with reference preferably to the test put by PARKER, J., was there here a condition which was unfulfilled? In my judgment, there was. To my mind the words "subject to contract" or "subject to formal contract" have by this time acquired a definite ascertained legal meaning—not quite so definite a meaning perhaps as such expression as f.o.b. or c.i.f. in mercantile transactions, but approaching to that degree of definiteness. The phrase is a perfectly familiar one in the mouths of estate agents and all other persons dealing with land; and I can quite understand a solicitor saying to a client about to negotiate for the sale of his land, "Be sure in order to protect yourself that you introduce into any preliminary contract you may think of making the words 'subject to contract.'" I do not go so far as to say that such a phrase makes the contract containing it necessarily a conditional contract. But they are words appropriate for introducing the condition, and it would require a very strong and exceptional case for this clear primâ facie meaning to be displaced.

On the basis that the contract is conditional, what is the result of the payment of the deposit? One obvious object of that payment was that it should form a deposit in the ordinary sense if and when the contemplated indefinite contract was subsequently signed and exchanged. Is it necessary to assume any additional object, such as that the purchaser was giving a guarantee that he would enter into a reasonable contract? In my judgment, that is not common sense. The parties were not agreeing that they would enter into a reasonable contract, but that they would enter into such a contract, if any, as they might ultimately agree and sign. I look on the whole payment as being sufficiently explained by being considered as an anticipatory payment intended only to fulfil the ordinary purpose of a deposit if and when the contemplated agreement should be arrived at. I see no sufficient

reason for thinking that it was made to secure the intermediate purpose contended for on behalf of the vendor. On that point I prefer the recent decision of EVE, J., in *Wright* v. *Pocklington* (5) to that here appealed from, of ASTBURY, J. It is clear that under the decision in *Coope* v. *Ridout* (2), the vendor might on his side have broken off the negotiations at any time, whether reasonably or not, without incurring any penalty. To my mind, it would be an unreasonable view to adopt of the arrangements between the parties that the purchasers should be in any worse position and only able to break off negotiations on pain of incurring the forfeiture of the deposit.

Appeal allowed.

Solicitors: *Francis T. Jones*; *Barfield & Barfield.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

Re SHAKESPEARE MEMORIAL TRUST. EARL OF LYTTON *v.* ATTORNEY-GENERAL

[CHANCERY DIVISION (P. O. Lawrence, J.), June 29, July 19, 1923]

[Reported [1923] 2 Ch. 389; 92 L.J.Ch. 551; 130 L.T. 56; 39 T.L.R. 610, 676; 67 Sol. Jo. 809]

Charity—Benefit to community—Educational purpose—Production of theatrical plays of high character—Instruction of public in art of acting.

A scheme for a Shakespeare Memorial National Theatre was started in the year 1908, the objects of which were declared to be to keep the plays of Shakespeare in its repertory, to revive whatever else was vital in English classical drama, to prevent plays of great merit from falling into oblivion, to produce new plays and further the development of modern drama, to produce translations of representative work of foreign drama, ancient and modern, and to stimulate the art of acting through the varied opportunities which it would offer to the members of its company.

Held: on the view that the objects of the trust were to produce plays of a high character and instruct the public in the art of acting the trust, on educational grounds, was a charitable trust as being for the benefit of the community.

Charity—"Mixed charity"—Test—Maintenance partly by voluntary subscriptions and partly by income of endowment at material time—Irrelevance of intention to seek subscriptions as well as endowment, and receipt of subscriptions shortly after material date—Charitable Trusts Act, 1853 (16 & 17 *Vict.*, *c.* 137), *s.* 62.

On Mar. 23, 1909, the committee of a charity which had just been set on foot recommended that the charity should not rely only on donations, but should also seek annual subscriptions. On May 8, 1909, a donation of £70,000 was paid to the charity. On May 17 the first annual subscription was received. Thereafter the charity was supported by voluntary annual subscriptions as well as by income from endowment. On the question whether at the time of the payment of the donation of £70,000 the charity was a "mixed charity" and so outside the jurisdiction of the Charity Commissioners,

Held: it was not material that from the outset it was intended that support by way of annual subscriptions should be sought, nor that very shortly after the donation was made subscriptions began to be received; the sole test was whether at the moment when the donation was made the charity was partly

maintained by subscriptions; that was not so; and, therefore, the charity was not a "mixed charity."

Re Child Villiers' Application (1), [1922] 1 Ch. 394, applied.

Notes. Referred to: *Royal Choral Society* v. *I.R.Comrs.*, [1943] 2 All E.R. 101; *Re Levien, Lloyds Bank, Ltd.* v. *Worshipful Co. of Musicians*, [1955] 3 All E.R. 35.

As to charities for educational purposes and "mixed charities," see 4 HALSBURY'S LAWS (3rd Edn.) 218–221, 435–437; and for cases see 8 DIGEST (Repl.) 326–331, 512. For Charitable Trusts Act, 1853, see 2 HALSBURY'S STATUTES (2nd Edn.) 838.

Cases referred to:

(1) *Re Child Villiers' Application, Villiers* v. *A.-G.*, [1922] 1 Ch. 394; 91 L.J.Ch. 473; 126 L.T. 555; 38 T.L.R. 291; 66 Sol. Jo. 266, C.A.; 8 Digest (Repl.) 512, *2392*.

(2) *Income Tax Special Purposes Comrs.* v. *Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 7 T.L.R. 657; 3 Tax Cas. 53, H.L.; 8 Digest (Repl.) 312, *1*.

Also referred to in argument:

Re Verrall, National Trust for Places of Historic Interest or National Beauty v. *A.-G.*, [1916] 1 Ch. 100; 85 L.J.Ch. 115; 113 L.T. 1208; 80 J.P. 89; 60 Sol. Jo. 141; 14 L.G.R. 171; 8 Digest (Repl.) 351, *308*.

Adjourned Summons issued by the plaintiff, the Earl of Lytton, as the sole surviving trustee of the Shakespeare Memorial Trust, to determine whether he had power, on the direction of the general committee of the Shakespeare Memorial National Theatre, to sell certain land at the corner of Gower Street and Keppel Street, London, purchased out of moneys, including a sum of £70,000, comprised in the trust, either with or without the consent of the Charity Commissioners.

In the autumn of 1904 Mr. Richard Badger and Sir Israel Gollancz formed a committee for the organisation of a movement for a Shakespeare memorial in London, and on Feb. 28, 1905, a general committee was constituted at a public meeting held at the Mansion House. For some years before the proposal for a Shakespeare memorial there had been a movement for the foundation of a national theatre out of funds to be supplied by private generosity, with the idea that such a theatre should be transferred to national ownership and by some form of endowment placed above the necessity of constant and immediate profit-making, and in May, 1908, it was resolved to establish a national theatre as a memorial to Shakespeare. At a conference on May 28, 1908, between the committee of the Shakespeare memorial in London and the National Theatre committee, the Shakespeare memorial committee resolved to enlarge their original scheme and to unite with the National Theatre committee on the understanding that the proposed monument should take the form of a Shakespeare memorial theatre. The objects of the Shakespeare Memorial National Theatre were: (i) To keep the plays of Shakespeare in its repertory; (ii) to revive whatever else was vital in English classical drama; (iii) to prevent plays of great merit from falling into oblivion; (iv) to produce new plays and further the development of modern drama; (v) to produce translations or representative work of foreign drama, ancient and modern; (vi) to stimulate the art of acting through the varied opportunities which it would offer to the members of its company. The sum required to build, equip, and endow a national theatre was estimated to amount to about £500,000, to be allotted—(a) Site, £100,000; (b) building, £100,000; (c) stage and equipment, £50,000; and (d) endowment, £250,000. On Mar. 23, 1909, £70,000 was promised by Sir Carl Ferdinand Meyer for the scheme, without any special stipulations as to the particular objects or purposes on which it should be expended. On May 8, 1909, that sum was paid to trustees, of whom the plaintiff was the survivor, and by deed poll, dated May 20, 1909, they undertook to hold the sum in trust for the committee which had been formed for the purpose of the scheme to provide a Shakespeare memorial. On Mar. 23, 1909, a committee which had been appointed

to report on the scheme had recommended that it should be supported by voluntary subscriptions as well as by income from endowments. The first annual subscription was received on May 17, 1909, that was to say, nine days after the donation of £70,000 had been made, and at times there had been as many as one hundred and thirty annual subscriptions, but these had diminished and in 1920 had fallen to the number of twenty-one. Ever since the receipt of the first annual subscriptions the scheme had been supported, not only by the income from endowment, but also by voluntary annual subscriptions. By an indenture dated Feb. 13, 1914, land at the corner of Gower Street and Keppel Street was conveyed in fee simple to the trustees of the declaration of trust deed, dated May 20, 1909, in consideration of a payment by them to the vendors of £50,000. Appeals which had from time to time been made for financial support for the Shakespeare Memorial National Theatre had produced up to the end of the year 1922 the sum of £10,821 16s. 7d.

Owing to the outbreak of war in 1914, after the site had been purchased for the erection of a theatre, no further steps could be taken, and in 1916 the site was granted rent free to the Young Men's Christian Association for the purpose of the erection thereon of Shakespeare huts for the reception and entertainment of soldiers, and was used for that purpose until some months after the termination of the war. It was subsequently let at a rent to the Young Men's Christian Association for the accommodation of Indian students. The increased cost of building and general scarcity of money after the war caused the committee, in December, 1921, to resolve to offer the site for sale, and in April, 1922, an agreement for sale to the Rockefeller Foundation for £52,000 was entered into. In July, 1922, the Solicitor for the Ministry of Health, who was acting on behalf of the Foundation, required the plaintiff as vendor to apply to the Charity Commissioners for their consent to the sale. From the year 1919 the committee had helped to finance certain performances of Shakespearian plays at Stratford-on-Avon, and, in so doing, had expended £12,000. The committee had received in all £80,821 16s. 7d. instead of the £500,000 estimated to be required. The scheme for the erection and endowment of a Shakespeare Memorial National Theatre on the scale originally intended would, it was recognised, have to be greatly modified unless there was a great increase in donations. On the other hand, the committee had always realised that to raise so large a sum as £500,000 for an artistic purpose would inevitably take some years, and the war and the consequent heavy taxation and commercial depression had greatly impeded the scheme. The committee, however, had passed a resolution that they were still desirous of carrying out the original intention of establishing a memorial.

June 27, 1923. The question whether the trust was a charity was argued.

H. F. F. Greenland for the plaintiff, the surviving trustee.

Dighton Pollock for the Attorney-General.

Gavin T. Simonds for the respondent, Sir Israel Gollancz, who represented the general committee of the Shakespeare Memorial, of which committee he was the secretary.

Wilfrid M. Hunt for the executors of Sir Carl Meyer.

P. O. LAWRENCE, J.—I have come to the conclusion that the contention of the Attorney-General is right on both the grounds that he has put forward. In the first place, I think the trust is a charitable trust on educational grounds. The trust, according to my view of the evidence, consists of an educational scheme. It is intended, I think, to raise not only the tone of the drama, but also to instruct in the art of producing plays which will benefit the community. The scheme is clearly designed to spread the influence of Shakespeare and the beauty of his works; but I also think that it falls under the fourth division referred to by LORD MACNAGHTEN in the passage to which counsel for the Attorney-General has referred to in *Income Tax Special Purposes Comrs. v. Pemsel* (2) ([1891] A.C. at p. 583), that is to say, that it is for the benefit of the community. The essence of the scheme seems to me to be for the public benefit: it is to produce plays of a

high character and to instruct the public in the art of acting. I think on both those grounds I am compelled to hold that this trust is a charitable trust, and, further, I hold that the objects of the trust have not failed as there is no evidence to show that it has and no one suggests that it is now hopeless to expect that it can be continued to be carried out. In fact there has been passed a resolution that the work should be carried on.

July 19, 1923.—On the question whether the trust, now decided to be a charity, was a mixed charity at the time of the receipt of the donation of £70,000. If it were, it would be exempt from the jurisdiction of the Charity Commissioners under s. 62 of the Charitable Trusts Act, 1853.

The same counsel appeared and argued.

P. O. LAWRENCE, J.—This summons raises a question whether the consent of the Charity Commissioners is necessary to the sale of certain land belonging to the charity situate at the corner of Gower Street and Keppel Street, in St. Giles, London, which land was purchased out of moneys, including a sum of £70,000, held upon the trusts of a deed poll dated May 20, 1909. The solution of that question depends upon whether the charity is one which at the date when the £70,000 was given to it was maintained partly by voluntary subscriptions and partly by income arising from an endowment. Section 62 of the Charitable Trusts Act, 1853, provides:

> ". . . where any charity is maintained partly by voluntary subscriptions and partly by income arising from any endowment, the powers and provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only, to the exclusion of voluntary subscriptions, and the application thereof; and no donation or bequest unto or in trust for any such charity as last aforesaid, of which no special application or appropriation shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions, shall be subject to the jurisdiction or control of the said Board, or the powers or provisions of this Act; and no portion of any such donation or bequest as last aforesaid, or of any voluntary subscription, which is now or shall or may from time to time be set apart or appropriated and invested by the governing or managing body of the charity, for the purpose of being held and applied or expended for or to some defined and specific object or purpose connected with such charity, in pursuance of any rule or resolution made or adopted by the governing or managing body of such charity, or of any donation or bequest in aid of any fund so set apart or appropriated for any such object or purpose as aforesaid, shall be subject to the jurisdiction or control of the said Board or the powers or provisions of this Act. . . ."

In my judgment, what I have to consider is whether at the date when the £70,000 was given by Sir Carl Meyer this charity was maintained partly by voluntary subscriptions and partly by income arising from an endowment. In order to do that, it is necessary to state shortly how this charity was constituted. It appears that before the year 1908 there were in existence two bodies, a Shakespeare Memorial Committee and a National Theatre Committee. Each of those bodies had been given by way of donation certain sums of money for the carrying out of the objects for which they were formed. The names of those bodies sufficiently indicate those objects. In 1908 it was arranged that a conference should take place between the representatives of each of those two committees with a view to arriving at an amalgamation or some joining together for the purpose of carrying out both the objects in view. Such a conference was held, and as a result an amalgamation of the two bodies took place, and the amalgamated body that was formed is the present charity. That was formed with a view to providing a

national theatre as a memorial to Shakespeare. I have held on a previous occasion that that is a properly constituted charity. An executive committee was appointed by the united general committee and they drew up a scheme and a constitution which is to be found in a handbook which was issued entitled "The proposed Shakespeare Memorial National Theatre." That scheme was sanctioned at a meeting of the general committee held at the Mansion House on Mar. 23, 1909, and at that meeting it was announced that an anonymous donor had contributed £70,000 towards the sum required for the objects of the trust. That announcement was intended to allude to the fact that Sir Carl Meyer had promised that he would give £70,000 towards the objects of the charity. At that date the funds of the charity consisted of those sums or the residue of the sums after deducting the amounts paid out of them, which had been given by way of donation to each of the committees to which I have referred. As regards the Shakespeare Memorial Committee, a Mr. Badger had given £500, Mr. Eno had given £500, and there were other donations. Similarly, as regards the National Theatre Committee, donations had been received. When, what I call, the united charity was formed, those funds were amalgamated and became the funds of the charity, and those were the only funds which the charity had at the date of the meeting of Mar. 23, 1909. On May 8, 1909, Sir Carl Meyer, in pursuance of the promise which he had made in March of that year, gave £70,000 to the charity. At that date the charity was not maintained by any voluntary contribution. No annual subscription had at that date been received, but very shortly afterwards, namely, on May 17, 1909, the first annual subscription came in. It is not clear when the appeal to the public was first made. There is no date on the handbook which is exhibited to the affidavit of Sir Israel Gollancz. It is obvious I think that it must have been somewhere about this time, but whether before or after May 17, 1909, is, I think, doubtful. However, until May 17, 1909, it cannot be said that the charity was maintained partly by voluntary subscriptions and partly by income arising from endowment, because up to that date it had never had any subscriptions at all. On May 20, 1909, the deed poll declaring the trusts of the funds of the charity was executed. From May 17, 1909, down to the present time this charity has been a mixed charity and has been maintained partly by voluntary subscriptions and partly by income arising from endowment. In 1913 the property in question was bought for £50,000 out of the general funds, and it is admitted that a large part of those general funds consisted of the £70,000 given by Sir Carl Meyer.

It has been argued that the donation which Sir Carl Meyer made to the charity was a gift to a charity which from its inception was supported by subscriptions as well as by income from endowment. In support of that contention reliance was placed on the fact that the general committee which was formed as the result of the conference of the two bodies from the first contemplated that the charity should be one which should have annual subscriptions in order to support it. It is said that in that respect the case differs from the charity dealt with in the Court of Appeal in *Re Child Villiers' Application, Villiers* v. *A.-G.* (1). It is perfectly true that the executive committee recommended from the outset that the charity should be one which should not rely merely on donations but should have annual subscriptions. It is also perfectly plain that directly the appeal was issued to the public, if not before, subscriptions began to be paid. It is said that it would be absurd to apply strictly the judgment in *Re Child Villiers' Application, Villiers* v. *A.-G.* (1) to such a case as this where it was never contemplated that the charity should subsist solely on income arising from endowment. Having read the judgment of the Master of the Rolls in that case I think my duty is perfectly plain. It is not material that it was intended that there should be contributions by way of annual subscripions. It is not material that some days after the gift contributions by way of annual subscriptions were made. The sole test, as I understand the decision of the Court of Appeal, is whether at the moment when the gift is made the charity is maintained by voluntary contributions in the shape of annual subscriptions. Applying that test to this case it is quite plain that at that date

the charity was not maintained by voluntary subscriptions within the meaning of s. 62 of the Charitable Trusts Act, 1853, because no voluntary contributions of that kind had ever been received by the charity. I do not think that after that decision that it is competent for this court to hold that because the charity became a mixed charity a short interval after the date when the donation was made or because it was contemplated that it should be a mixed charity this donation is exempt from the jurisdiction of the Charity Commissioners. It is to be observed, moreover, that in *Re Child Villiers' Application, Villiers* v. *A.-G.* (1) it is evident that the charity there was contemplated from the first as a charity which should be from its inception a mixed charity. It is true that in that case the annual subscriptions did not begin to be received until a few months after the donation of the land, but I cannot think that the question of the length of time in a case such as this is in any way material. The learned lords justices in the Court of Appeal have laid it down in plain terms that what must be considered is the state of things existing at the moment when the gift is made. If at that moment the charity is not a mixed charity, then the donation is subject to the jurisdiction of the Charity Commissioners. One can only judge whether at that moment the charity is a mixed charity or not by seeing whether at that moment the charity is in receipt of annual subscriptions. For these reasons I am of opinion that in this case the consent of the Charity Commissioners to the sale of this land is necessary.

Solicitors: *Bircham & Co.*; *Lewis & Lewis*; *The Treasury Solicitor.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

SOUTH EASTERN RAIL. CO. *v.* COOPER

[COURT OF APPEAL (Sir Ernest Pollock, M.R., Warrington and Sargant, L.JJ.), November 9, 12, 13, 19, 1923]

[Reported [1924] 1 Ch. 211; 93 L.J.Ch. 292; 130 L.T. 273; 88 J.P. 37; 22 L.G.R. 109]

Railway—Level crossing—Grant wider than in case of accommodation way—Increased future user—Power of company to make grant.

Where a railway company, acting under s. 68 of the Railways Clauses Consolidation Act, 1845, have made an accommodation way over the railway for the benefit of the owners and occupiers of land adjoining the railway, such owners and occupiers are not entitled to use the level crossing in such a way as substantially to increase the burden of the easement: *Great Western Rail. Co.* v. *Talbot* (1), [1902] 2 Ch. 759; but the circumstances and terms of the grant of a way over the railway may be such that the grant does not fall within s. 68, but forms part of a special bargain, and its terms may be so wide as to admit of a substantially increased use being made of the way in the future. In other words, there may be a grant which imposes a greater burden on the railway company than would be imposed on them by a grant made in satisfaction of their liability under s. 68. Such a grant is not ultra vires the company provided that it is not incompatible with the objects prescribed by the Act under which the company operates.

R. v. *Leake* (*Inhabitants*) (2) (1833), 5 B. & Ad. 469, applied.

Mulliner v. *Midland Rail. Co.* (3) (1879), 11 Ch.D. 611, distinguished.

Notes. Referred to: *Birkdale District Electric Supply Co.* v. *Southport Corpn.*, [1926] A.C. 355; *British Transport Commission* v. *Westmorland County Council*, *British Transport Commission* v. *Worcestershire County Council*, [1957] 2 All E.R. 353.

As to restriction of right of way to purposes existing at date of grant, see 12 HALSBURY'S LAWS (3rd Edn.) 573; and for cases see 19 DIGEST 106 et seq. For Railway Clauses Consolidation Act, 1845, see 19 HALSBURY'S STATUTES (2nd Edn.) 590.

Cases referred to:

(1) *Great Western Rail. Co.* v. *Talbot*, [1902] 2 Ch. 759; 71 L.J.Ch. 835; 87 L.T. 405; 51 W.R. 312; 18 T.L.R. 775, C.A.; 19 Digest 111, *714*.

(2) *R.* v. *Leake* (*Inhabitants*) (1833), 5 B. & Ad. 469; 2 Nev. & M.K.B. 583; 1 Nev. & M.M.C. 544; 110 E.R. 863; 26 Digest 290, *225*.

(3) *Mulliner* v. *Midland Rail. Co.* (1879), 11 Ch.D. 611; 48 L.J.Ch. 258; 40 L.T. 121; 43 J.P. 573; 27 W.R. 330; 19 Digest 24, *97*.

(4) *United Land Co.* v. *Great Eastern Rail. Co.* (1875), 10 Ch. App. 586; 44 L.J.Ch. 685; 33 L.T. 292; 40 J.P. 37; 23 W.R. 896, L.JJ.; 19 Digest 108, *684*.

(5) *White* v. *Grand Hotel, Eastbourne, Ltd.*, [1913] 1 Ch. 113; 82 L.J.Ch. 57; 107 L.T. 695; 57 Sol. Jo. 58, C.A.; affirmed sub nom. *Grand Hotel, Eastbourne, Ltd.* v. *White* (1913), 84 L.J.Ch. 938; 110 L.T. 209; 58 Sol. Jo. 117, H.L.; 19 Digest 114, *738*.

(6) *R.* v. *Brown* (1867), L.R. 2 Q.B. 630; 36 L.J.Q.B. 322; 16 L.T. 827; 32 J.P. 54; 15 W.R. 988; sub nom. *R.* v. *Midland etc. Rail. Co., Ex parte Brown*, 8 B. & S. 456; 38 Digest 292, *239*.

(7) *Taff Vale Co.* v. *Gordon Canning*, [1909] 2 Ch. 48; 78 L.J.Ch. 492; 100 L.T. 845; 19 Digest 114, *743*.

(8) *Hay* v. *City of Glasgow Union Rail. Co.* (1874), 1 R. (Ct. of Sess.) 1191; 11 Sc.L.R. 700; 38 Digest 277, *h*.

(9) *Grand Junction Canal Co.* v. *Petty* (1888), 21 Q.B. 273; 57 L.J.Q.B. 572; 59 L.T. 767; 52 J.P. 692; 36 W.R. 795, C.A.; 26 Digest 290, *226*.

(10) *Re Gonty and Manchester, Sheffield and Lincolnshire Rail. Co.*, [1896] 2 Q.B. 439; 65 L.J.Q.B. 625; 75 L.T. 239; 45 W.R. 83; 12 T.L.R. 617, 620; 40 Sol. Jo. 715, C.A.; 19 Digest 24, *98*.

(11) *South Eastern Rail. Co.* v. *Associated Portland Cement Manufacturers* (1900), *Ltd.*, [1910] 1 Ch. 12; 79 L.J.Ch. 150; 101 L.T. 865; 74 J.P. 21; 26 T.L.R. 61; 54 Sol. Jo. 80, C.A.; 19 Digest 26, *112*.

(12) *Great Central Rail. Co.* v. *Balby-with-Hexthorpe U.D.C.*, *A.-G.* v. *Great Central Rail. Co.*, [1912] 2 Ch. 110; 81 L.J.Ch. 596; 106 L.T. 413; 76 J.P. 205; 28 T.L.R. 268; 56 Sol. Jo. 343; 10 L.G.R. 687; 26 Digest 292, *240*.

(13) *Great Western Rail. Co.* v. *Solihull R.D.C.* (1902), 86 L.T. 852; 66 J.P. 772; 18 T.L.R. 707, C.A.; 26 Digest 290, *227*.

(14) *Staffordshire and Worcestershire Canal Co.* v. *Birmingham Canal Co.* (1865), 11 L.T. 647; 11 Jur.N.S. 71; 13 W.R. 358; L.JJ.; affirmed sub nom. *Staffordshire and Worcestershire Canal Navigation Proprietors* v. *Birmingham Canal Navigations Proprietors* (1866), L.R. 1 H.L. 254; 35 L.J.Ch. 757, H.L.; 38 Digest 403, *948*.

Also referred to in argument:

A.-G. v. *London and South Western Rail. Co.* (1905), 69 J.P. 110; 21 T.L.R. 220; 3 L.G.R. 1327; 26 Digest 292, *239*.

Foster v. *London, Chatham and Dover Rail. Co.*, [1895] 1 Q.B. 711; 64 L.J.Q.B. 65; 71 L.T. 855; 43 W.R. 116; 11 T.L.R. 89; 39 Sol. Jo. 95; 14 R. 27, C.A.; 42 Digest 723, *1420*.

Great Northern Rail. Co. v. *M'Alister*, [1897] 1 I.R. 587; 38 Digest 285, *p*.

Greenwich Board of Works v. *Maudslay* (1870), L.R. 5 Q.B. 397; 39 L.J.Q.B. 205; 23 L.T. 121; 35 J.P. 8; 18 W.R. 948; 26 Digest 292, *236*.

Harris v. *Flower* (1904), 74 L.J.Ch. 127; 91 L.T. 816; 21 T.L.R. 13, C.A.; 19 Digest 110, *702*.

Midland Rail. Co. v. *Gribble*, [1895] 2 Ch. 827; 64 L.J.Ch. 826; 73 L.T. 270; 44 W.R. 133; 12 R. 513, C.A.; 19 Digest 81, *490*.

Witness Action.

In 1836 the South Eastern Railway Co. obtained an Act for the making of a railway from the London and Croydon Railway to Dover. That Act contained a large number of sections dealing with specific matters which were necessary for the purpose of declaring the rights of the railway company and the owners of the land through which the railway was to pass, sections which ultimately became unnecessary when the Railway Clauses Consolidation Act was passed in 1845. In 1844 the South Eastern Railway Co. obtained powers under an Act of that year to make a line from a point near Ashford to the city of Canterbury and the towns of Ramsgate and Margate, and to join the Canterbury and Whitstable Railway. That Act was supplementary, and gave increased powers over a different and added area, to the South Eastern Railway Co.; but the clauses dealing with the specific matters contained in the original Act of 1836 were to be deemed to be incorporated in the later Act of 1844. The defendant's predecessors in title were the owners of land which lay outside the city of Canterbury, between Canterbury and a village called Sturry, and were adjacent to a road called the Broadoak Road. For the purpose of building the railway under the Act of 1844 (that is to say, the section from Canterbury which passed through Sturry) it became necessary to take a portion of the land which belonged to the defendant's predecessors in title, and to divert the Broadoak Road to a point further south, with the result that the access of the defendant's predecessors in title to the Broadoak Road was shut off. To acquire this land for carrying out the purposes of the railway, it became necessary to make an agreement with the defendant's predecessors in title, and to purchase a certain portion of land belonging to them. It also became necessary for a substituted road to be provided in place of the Broadoak Road which had originally gone further north, and the rights of the defendant's predecessors in title to access to that road had also to be met. The railway company negotiated for the sale of a portion of the land, and entered into an agreement, dated Feb. 22, 1845, whereby they were to purchase certain lands and hereditaments at a price of £1,107. That agreement also secured that the defendant's predecessors should not ask for more than one crossing on the level of the railway in field No. 41 in the parish of St. Stephen. The conveyance was dated Sept. 21, 1847, and under it certain land, indicated in the map attached to it, was conveyed to the railway company, and there was in the conveyance a reference to the fact that:

> "The pieces or parcels of land hereinafter particularly mentioned and intended to be hereby conveyed, and the fee simple thereof [were to be] free from land tax, quit rents, and all incumbrances (except a right of way or crossing over the pieces of land intended to be thereby conveyed parts of the pieces numbered 38 and 41 in the deposited plans hereinafter referred to, and which right of way is intended to be granted to the said John Melhuish, Robert Alexander Gray, and David Browning Major and their heirs as such trustees as aforesaid by an indenture bearing even date with and intended to be executed immediately after the execution of these presents)."

On the same day, and immediately afterwards, there was a grant of the level crossing over the railway at a specified point marked on the map attached to the indenture, the grant being in these terms—that in pursuance and performance of the agreement of Feb. 22, 1845, and in consideration of the premises the railway company

> "do hereby grant unto the said John Melhuish, Robert Alexander Gray, and David Browning Major, their heirs and assigns, a right of roadway and passage for themselves their agents, servants, and work people on foot or on horseback and with carts, carriages, horses, and other animals or otherwise from time to time and at all times hereafter (subject nevertheless to the by-laws of the said company, for the time being in force, relating to the use of level crossings on the branch railway from Canterbury to Ramsgate and Margate in the said county of Kent) to pass and re-pass over and across the said two pieces or

parcels of land situate in the parish of St. Stephen aforesaid, the ground plan whereof is delineated and distinguished as aforesaid in the said map drawn in the margin."

It was further provided that the owners were to have a right of roadway "for the commodious use of the same crossing and the safe occupation of the lands thereto adjoining," and they were not in any way to be cut down or interfered with by the railway. At the time when the railway was built and the access was granted in pursuance of that grant the defendant's predecessor's used their land mainly for agricultural purposes. There was some evidence that at that time there was a sandpit on their land, but it was not clear whether the roadway, or the purposes for which the defendant's predecessors wanted access to the Broadoak Road, was anything more than what might be called agricultural purposes, using those words, not in a narrow sense, but as connoting all the purposes for which it would be necessary to have carts passing and re-passing when the land was used for agriculture. At the time when the present action was begun it had been found useful and profitable to make use of the sandpits which lay upon the land of the present defendant, he having now come into possession of the land, and in connection with the user of those sandpits, a number of carts passed and re-passed over the crossing, a number considerably in excess of those which passed before the sandpit was used when the user of the land was solely for agricultural purposes. The railway company claimed that this user was in excess of the rights which the defendant possessed under the grant of Sept. 21, 1847, and, accordingly, on Jan. 6, 1921, they issued the writ in the present action claiming a declaration that the right of way or level crossing granted was an accommodation right of way or crossing for agricultural purposes only and that the defendant is not entitled to exercise the right or easement aforesaid for any purpose other than agricultural purposes or otherwise in such manner as substantially to increase the burden of the said easement by altering or enlarging its character, nature or extent as enjoyed at the date of the construction of the said branch railway. The company also claims an injunction restraining the defendant, his servants, workmen and other agents from in any way using the land in excess of the way in which it was used for agricultural purposes at the time when the grant was given in 1847. ROMER, J., delivered judgment in favour of the company, holding that the right granted to the defendant was granted merely as an accommodation work in pursuance of the provision of s. 73 of the Act of 1836, and that the defendant was not entitled to use this way so as substantially to increase the burden of the easement by altering or enlarging its character, nature, or extent as enjoyed at the time of the Canterbury, Ramsgate, and Margate Branch Railway. The defendant appealed.

Hughes, K.C., and *S. Duncan* for the defendant.

Maugham, K.C., *Manning*, K.C., and *Cleveland Stevens* for the plaintiffs.

SIR ERNEST POLLOCK, M.R., stated the facts and continued: It is to be observed that the grant to which I have referred contains the statement that it is made "subject, nevertheless, to the byelaws of the said company for the time being in force relating to the use of level crossings on a branch railway." But that really is, I think it may be said, the only limitation upon the very wide words which are contained in the grant, and those wide words, if they were to be interpreted, would I think, be held, in accordance with two recent decisions, to prevent the plaintiffs from restricting the user to what might be called mere accommodation purposes, or succeeding in the claim that they have made. The two cases to which I refer are those of the *United Land Co.* v. *Great Eastern Rail. Co.* (4) and the later case of *White* v. *Grand Hotel, Eastbourne, Ltd.* (5). On the other hand, if the true view was that this grant was merely a grant of what might be called accommodation access (that is to say, a grant made and granted under s. 73 of the Act of 1836, and to be treated in law as equivalent to having been made as an accommodation way under s. 68 of the Railway Clauses Consolidation Act, 1845), then different

considerations would apply because it has been decided in a number of cases that where an accommodation way only has been granted it cannot be enlarged for subsequent purposes, so increasing the user not contemplated at the time when the grant was originally made. Illustrations of that view may be found in *Great Western Rail. Co.* v. *Talbot* (1), in *R.* v. *Brown* (6), and in *Taff Vale Co.* v. *Gordon Canning* (7), where the decision is given, and *United Land Co.* v. *Great Eastern Rail. Co.* (4) is distinguished, and *Great Western Rail. Co.* v. *Talbot* (1) is followed. In this grant special words were introduced, which provided that the grant of the roadway should be subject to the byelaws of the company, and it is, perhaps, an important matter of remark that those words are introduced, because if the grant had been made under s. 73 of the Act of 1836 it would have been unnecessary for the railway company to take in the indenture those specific powers as to their byelaws, for the reason that s. 73, which provides that the company should make, inter alia, ways across the railway for the use of the owners or occupiers of the lands through which the railway passed, also provides that no works to be made thereunder are to be made in a manner in which the same would prevent or obstruct the working or using of the said railway. If I may use the analogy made even clearer by s. 68 of the Act of 1845 (which contains a proviso that the company shall not be required to make accommodation works in such manner as would prevent or obstruct the working or using of the railway) it appears quite clear that if the accommodation way which is to be granted is to be treated as being made under s. 68 of the Act of 1845 (or in this case under s. 73 of the Act of 1836) those accommodation works would connote a right on the part of the railway company to make such rules and regulations, or such byelaws for the working of the roadway so granted, as would prevent interruption or difficulty arising in the working of the railway.

Three points were taken on behalf of the railway company in answer to the argument addressed to us for the defence which dwelt upon the wide terms of the grant and emphasised the fact that specific limitation was introduced as to the byelaws, showing (so ran the argument) that in this case the works were not accommodation works, but were works which were granted as part of the terms on which the railway overcame a serious difficulty that was in their way, where they had to interfere, not only with the rights of the public by altering the public highway and removing it further south, but also with the important and particular right of landowners adjacent to that highway. The three points that were taken on behalf of the railway were these. First of all it was said: A greater burden is now imposed upon the railway than was imposed by the easement as originally granted or intended. On this I think it is clear that a larger user is now made of the easement than (so far as the evidence goes) was habitually imposed when the land was in the hands of the defendant's predecessors in title. The second question which was suggested was: Is the grant limited to the user at the time it was granted in 1847? It was said on behalf of the defendant that the words are wide and general and fall within the two decisions that I have already cited, namely, *United Land Co.* v. *Great Eastern Rail. Co.* (4) and *White* v. *Grand Hotel, Eastbourne, Ltd.* (5). But the railway company says that it was a grant of accommodation works only so as to fall within the decisions of *Great Western Rail. Co.* v. *Talbot* (1) and *Taff Vale Rail. Co.* v. *Gordon Canning* (7). But the landowner's land was adjacent to the whole of the railway, and, having regard to the terms of the grant and to the circumstances surrounding the problem which beset the railway company at the time, I cannot, for my part, hold that this was a mere accommodation work under s. 73 of the Act of 1836 or in the nature of a work under s. 68 of the Act of 1845. *Hay* v. *City of Glasgow Union Rail. Co.* (8) may be usefully looked at upon this point, because there the rights of the plaintiff were held to be good on the ground that what the railway company was bound to supply him with was a substituted road equally convenient as the former road, or as near thereto as the circumstances would allow. In other words, it shows that there are cases in which the test of the accommodation road cannot be applied, and that

there may well be grants which impose a greater burden upon the railway company than would be imposed upon them by grants made in the satisfaction of their liability under s. 68 of the Railways Clauses Act, 1845. Moreover, as I have already said, the byelaws which are mentioned in the grant need not have been inserted, if the grant of this right of way had been made under s. 73 of the Act of 1836. A

The second point which was taken was that we ought to look at the agreement of Feb. 2, 1845, as in some measure, I will not say overriding, but at any rate enabling us to construe the grant which was made in September, 1847. This point is one which seems to have impressed the learned judge in the court below, but for my part I am very doubtful whether or not that agreement can be looked at for any purposes at all because after the conveyance and the grant had been made I should have thought that all its purpose was exhausted. It is important to observe, too, that this agreement is not set out or recited in either the conveyance or the grant as being what might be called the fount and origin of the powers or property which is being conveyed in the two subsequent documents. Still more, when one comes to look at the actual document itself it appears to be the common printed form of agreement which was entered into between the parties in order to bring the matter up and get an assent. The actual terms which were finally carried out must, in my opinion, be found in the documents which carry that out, and certainly not in a document which was entered into for a different purpose, and not for the purpose of overriding the rights of the parties as granted in subsequent documents. Therefore, upon the second point I come to the conclusion that the grant is not limited to the user at the time it was originally granted, or for the purposes which were then contemplated in 1847. B C D E

The third point that was taken was that, if the grant was of the wider nature which I have held that it is, it was ultra vires on the part of the railway company to make any such grant. The chief authority which is cited as justifying that proposition is *Mulliner* v. *Midland Rail. Co.* (3). That was a case which was decided by Sir George Jessel, M.R., and it has been the authority to which those who have argued the question of ultra vires on the part of the railway company have constantly clung. It is a case, in my opinion, which is of a very special character. It must be read in the light of the fact that what Sir George Jessel was dealing with was a right under an archway on which a station had been built by the railway company, and he said (11 Ch.D. at p. 621): F

> "It is quite plain, therefore, that the land cannot be treated as land not required for the purpose of the railway. It is an integral part of the station." G

For that reason he held that it could not be treated as superfluous land falling within the section which enabled the railway company to dispose of superfluous land. That case has been constantly commented upon in a series of cases. It was decided in 1879. In 1888, in *Grand Junction Canal Co.* v. *Petty* (9), observations were made upon it by Lord Esher, M.R., Lindley, L.J., and Lopes, L.J. Lord Esher says this (21 Q.B.D. at p. 275): H

> "I do not think that the late Master of the Rolls in deciding *Mulliner* v. *Midland Rail. Co.* (3) meant to decide anything in contravention of what was decided in *R.* v. *Leake* (*Inhabitants*) (2). On the contrary it seems to me that what he decided was quite in accordance with that case, but I think that he was of opinion that the facts of the case with which he was dealing pointed to a different conclusion of fact from that on which the decision in *R.* v. *Leake* (*Inhabitants*) (2) was founded." I

Observations in the same sense were made by Lindley, L.J., who says (21 Q.B.D. at p. 277):

> "I do not think that case governs this, because there is no evidence to that effect in the present case."

Then he says that the Master of the Rolls in *Mulliner's Case* (3)

"was clearly of opinion . . . that the existence of such right of way was inconsistent with the statutory purposes for which the company had purchased and required the land."

Lopes, L.J., says words to the same effect. That case was subsequently commented upon in *Re Gonty and Manchester, Sheffield and Lincolnshire Rail. Co.* (10) by A. L. Smith, L.J., Rigby, L.J., and Swinfen Eady, J., and in *South Eastern Rail. Co.* v. *Associated Portland Cement Manufacturers, Ltd.* (11); and by Joyce, J., in *Great Central Rail. Co.* v. *Balby-with-Hexthorpe U.D.C.* (12). The result is that I cannot hold that *Mulliner* v. *Midland Rail. Co.* (3) governs the present case. It seems to me to be impossible to hold that the action of the railway company, in making the grant of Sept. 21, 1847, was ultra vires. The cases to which we have been referred all acquiesce in the view that *R.* v. *Leake* (*Inhabitants*) (2) is still good law. The principle stated is this:

"If the land were vested by Act of Parliament in commissioners, so that they were thereby bound to use it for some special purpose, incompatible with its public use as a highway, I should have thought that such trustees would have been incapable in point of law, to make a dedication of it; but if such use by the public be not incompatible with the objects prescribed by the Act, then I think it clear that the commissioners have that power."

That authority has been upheld in all the cases to which I have referred, and it, therefore, seems to me to be impossible to say that *Mulliner* v. *Midland Rail. Co.* (3) had overruled *R.* v. *Leake* (*Inhabitants*) (2), and that where it is compatible with the use of a railway for the company to make a wide grant of a right of way, subject to directions to be contained in byelaws, it cannot be said that such a grant is ultra vires the railway company. The cases which I have cited all establish that such a grant, when it is not incompatible with the uses of the railway, can be made. *Great Western Rail. Co.* v. *Solihull R.D.C.* (13) was an example of where a grant would be inconsistent with the user for public purposes, and it was held, therefore, that any such grant would be ultra vires. Where it is not incompatible with the user for public purposes there seems to be, and there is, no reason why the grant should not be made. Therefore it seems to me that the point of ultra vires fails. The grant that has been made is a wide one: it is not a grant made for accommodation purposes only, and for the reasons which I have given it appears to me that the plaintiffs have not established their claim to restrict the purposes for which this right of way can be used, and that the judgment in the action ought to be entered for the defendants. The appeal, therefore, will be allowed with costs.

WARRINGTON, L.J.—Under a deed of grant executed in 1847 by the plaintiffs, the South Eastern Railway Co., the defendant is entitled to a right of way on the level over the plaintiff's railway at a point between Canterbury and Sturry on the Margate branch. By the order appealed from it is declared that

"the defendant is not entitled to use this way so as substantially to increase the burden of the easement by altering or enlarging its character, nature, or extent as enjoyed at the time of the construction of the Canterbury, Ramsgate, and Margate Branch Railway."

The defendant appeals, contending that the way granted is one for all purposes, and that he is entitled to use it for the purposes for which he now desires to do so, without reference to those for which it was used at the time of the construction of the line. It is admitted that if the way was merely granted in pursuance of the statutory obligation as to making passages for the accommodation of severed lands, the judgment of the judge is correct, and the first point, therefore, upon which the defendant attacks the judgment is as to the nature of the way. On this he contends that the way was not an accommodation work, but was an ordinary right of way granted on the occasion of the conveyance, and in fulfilment of a special

bargain made a term of the acquisition by the company of the land required for the railway. A

The defendant's predecessors were the owners of land through which, prior to the construction of the railway, there ran a high road from Canterbury to Sturry, and they had access to this road from land lying to the north of it. They were entitled to the soil of the road where it intersected their land. The plaintiffs proposed to take a strip of this land including the site of the road, the latter being diverted and reconstructed south of the land in question. The line, therefore, when made would cut off the land to the north of it both from the road and from the other land owned by the same persons. The important point was that it would cut off the land to the north, from the road. In these circumstances, it was agreed, as appears by the recital in the conveyance, in these terms, reading it as shortly as I can, that B C

> "Whereas under the powers of the Act the company have contracted with the vendor for the purchase of pieces or parcels of land hereinafter particularly mentioned and intended to be hereby conveyed and the fee simple thereof in possession free from land tax, quit rents, and all incumbrances (except a right of way or crossing over the pieces of land intended to be hereby conveyed parts of the pieces numbered 38 and 41 in the deposited plans hereinafter referred to and which right of way is intended to be granted to the vendors by an indenture bearing even date with, and intended to be executed immediately after the execution of these presents) . . . for the price of £1,107,"

D

which price was to include compensation for all consequential damage by severance or otherwise. The conveyance itself simply conveyed the land including the site of the road to be diverted and the site of the way to be granted. The grant of the right of way was contemporaneous and was in these terms: E

> "Do hereby grant unto [the vendors, their heirs and assigns] a right of way and passage for themselves, their agents, servants, and workpeople on foot or on horseback and with carts, carriages, horses, and other animals, or otherwise from time to time and at all times hereafter (subject nevertheless to the byelaws of the said company for the time being in force relating to the use of level crossings on the branch railway from Canterbury to Ramsgate and Margate in the said County of Kent) to pass and re-pass over and across the said two pieces or parcels of land . . . the ground plan whereof is delineated and distinguished as aforesaid in the said map drawn in the margin of these presents and which are parts of the fields or inclosures in the same parish of St. Stephen numbered 38 and 41 in the plans and book of reference of the said branch railway deposited in the office of the clerk of the peace for the said county of Kent in the direction and within the limits defined by the dotted lines in the said map."

F G

There is no question that if this were a grant of a way by one person to another, the grantee would be entitled to use it for any purpose without reference to the purposes for which the dominant tenement was used at the date of the grant, and notwithstanding that the burden on the servient tenement was thereby increased: see *White* v. *Grand Hotel, Eastbourne, Ltd.* (5). But it is contended, and the judge has held, that, on the true construction of the documents, and in view of the facts that the railway was built under statutory powers and that by the statute provision was made for access, this access was provided under those powers and must be limited accordingly. As to the facts of user, there is no doubt that the recent use has much increased the burden. In 1847 the land was mainly pasture, and used as such, and the traffic was quite small. The defendant has been digging sand and gravel, and carrying on a trade therein, and there is now a considerable number of carts daily crossing the railway in both directions. H I

In construing the deed, regard must, I think, be had, not only to the actual terms of the statute and the deeds, but to the circumstances in which the transactions were carried out. Here were people who had land with free access to the

high road (which before the railway was made was on their own land on both sides), the railway was to be made on their land, and the road on their land diverted and reconstructed, with the net result that they would be deprived, not merely of communication between different parts of their land, but between the land and the road. Plainly, the user that they might make of any access to the road that they might at any time enjoy, would not be measured by the conditions or use of their land in 1847, but would extend to any lawful user. In those circumstances I consider the documents. The first of these documents is the Act of 1836, the company's special Act, under which a railway was constructed, and that special Act contained a section relating to what are commonly called accommodation works, which are now provided for by s. 68 of the Railway Clauses Consolidation Act, 1845. The section was in these terms, which again I will read as shortly as I can. The company were to make and from time to time maintain

> "such and so many convenient gates in, upon, and adjoining the said railway, and such and so many bridges, arches, hollows, culverts, fences, ditches, drains, and passages over, under, or by the side of or leading to or from the said railway, of such dimensions and in such manner as two or more justices of the peace, acting within their jurisdiction, shall, upon the application of the owner or occupier of any lands, judge necessary and appoint (in case there shall be any dispute about the same) *for the use of the owners or occupiers of the respective lands through which such railway shall be made, and for the commodious use and occupation of the lands on either side of the said railway, or for protecting the said land from trespass*,"

and that the company were to maintain the works so made. I call particular attention to those words upon which I have laid some emphasis (italicised), because they point to works for connecting simply two parts of the severed land and have no reference to a work meant for the purpose of connecting a part of those severed lands with a highway to the use in which highway the owners of that land were previously entitled. They are simply for connecting two parts of severed land. Really the object of the way granted is not so much to give communication between severed parts of the vendor's land as is the proper function of an accommodation work, as to afford access from the land on the north to the diverted road; and it is from the latter that access is obtained to the land on the south of the railway. It seems to me, therefore, that the proper conclusion from the documents and the surrounding circumstances is that the parties did intend to give something more than a mere accommodation work, and to preserve the right of access to the road in as ample a manner as they might have had it if the railway had not been made. In other words, that the grant ought to be construed as an ordinary grant of a right of way in general terms, with the result referred to above.

The learned judge, feeling himself unable to form a definite view on the construction of the grant itself—an inability which I do not share—has made use of the preliminary agreement of 1845 to assist him in deciding on the construction. With all respect to him, he was not, in my opinion, entitled to look at this document for such a purpose. The agreement ultimately arrived at is stated in the conveyance, and the preliminary agreement is irrelevant; but in good truth that agreement when looked at affords no assistance, as it merely limits the vendors to one crossing in a particular field and settles none of the details necessary to be fixed before the crossings would be made. Moreover, the agreement purports to be signed by the agent for a gentleman described as owner, who, it appears from the recitals in the conveyance, had no interest in the land, but was merely the husband of an equitable tenant for life for her separate use, and there is nothing to show under what authority, if any, of the real owners, his agent appended his signature.

But it is stated that if the grant is to be construed, as I think it ought to be, then, to the extent to which it confers greater rights than those which would have been enjoyed under an accommodation work, its execution would be ultra vires

the company, and they would not be bound by it. The result of the authorities, I think, is, not that a statutory company has no power to grant any easement unless expressly or impliedly authorised so to do by its constituent statute, but that its inability in this respect is confined to the granting of easements the enjoyment of which is incompatible with, or inconsistent with, the employment of their land for the statutory purposes for which it was acquired. For example, in *Staffordshire and Worcestershire Canal Co.* v. *Birmingham Canal Co.* (14), it was held that the canal company could not bind itself so as to deal with surplus water flowing down a series of locks in such a way as to prevent it from conducting the business of its canal in the most efficient and prudent manner. In the same way, it was held in *Great Western Rail. Co.* v. *Solihull R.D.C.* (13) that a canal company could not dedicate a public right of way over the banks of one of its feeding reservoirs on its being proved that the use of such a right would or might involve serious risk to the stability of the reservoir and the possible destruction of or serious injury to the canal itself, without, at all events, the expenditure of large sums of money which would be expended not so much for the purpose of the company as for the maintenance of the highway. In *Mulliner* v. *Midland Rail. Co.* (3) the Master of the Rolls held that to grant a right of way through an arch forming part of the substructure of a station and required by the company for the storage of goods in connection with their traffic was ultra vires. The use of the way would have entirely prevented the company from devoting the arch to the purpose for which it was required. All those cases merely supply examples of circumstances which, in the opinion of the court, rendered the grant of the easement in question ultra vires, as being inconsistent with the employment of their land for the statutory purpose. On the other hand, there are a number of cases which support the general proposition I have stated above and afford examples of easements which were not inconsistent with the public purposes for which the company in question was incorporated and acquired its property and were held to have been effectually granted. Thus, in *R.* v. *Leake* (*Inhabitants*) (2), the dedication by statutory commissioners of a public way over the banks of a drain constructed by the commissioners was supported. In that case PARKE, J., said (4 B. & Ad. at p. 478):

> "If the land were vested by Act of Parliament in commissioners so that they were thereby bound to use it for some special purpose incompatible with its public use as a highway, I should have thought that such trustees would have been incapable, in point of law, to make a dedication of it; but if such use by the public be not incompatible with the objects prescribed by the Act, then I think it clear that the commissioners have that power. The mere circumstance of their not being beneficial owners cannot preclude them from giving the public this right."

In *Grand Junction Canal Co.* v. *Petty* (9) it was held that a canal company had effectually dedicated a public footway along the towpath of their canal. In both these cases the general principle mentioned above was affirmed and acted upon. On the same principle, in *Re Gonty and Manchester, Sheffield and Lincolnshire Rail. Co.* (10), the grant of a private right of way through one of the arches of a viaduct carrying the company's railway was upheld. *Great Western Rail. Co.* v. *Talbot* (1) and *Taff Vale Rail. Co.* v. *Gordon Canning* (7) were cases of accommodation works, and therefore, on the construction I place on the grant, have no application.

There is, in fact, no decision against the validity of a grant of an easement not an accommodation work in the proper sense, except in cases where its enjoyment was found to be inconsistent with the performance by the grantor company of its statutory duties. There is in *Mulliner* v. *Midland Rail. Co.* (3) a dictum of the Master of the Rolls which appears to have been much misunderstood. It is in these terms (11 Ch.D. at p. 623):

"Therefore, there is nothing at all new or remarkable in the fact that the railway company has only these restricted and limited rights. It appears to me quite impossible that the railway company could have a right either to sell, grant, or dispose of this land, or of any easement or right of way over it, except for the purposes of their Act, that is to say, with a view to the traffic of their railway. This being my opinion, it would dispose of the plaintiff's case on the ground of the general law being against him."

That has been taken, especially in argument, to be a statement by the Master of the Rolls that a railway company or other statutory company has no power to grant any easement or right of way over its land without reference to the question whether or not such grant would be incompatible with or inconsistent with the use by the railway of the land which they have acquired. But when it is looked at it makes no such statement. It is merely that they have no power to grant any easement or right of way over the land which was in question in that case; and the land in that case was, as I have already pointed out, part of the substructure of a station, and the actual bit of land that the roadway would have traversed was required by the company as storage for goods. It is clear, when one looks at it, that that statement was made by the learned judge in reference to the facts of that case, and must not be extended further. If it were extended further, it would, in my opinion, be inconsistent with the judgments to which I have referred in *R.* v. *Leake* (*Inhabitants*) (2), *Grand Junction Canal Co.* v. *Petty* (9), and *Re Gonty and Manchester, Sheffield, and Lincolnshire Rail. Co.* (10).

I now turn to consider in the present case the question of fact whether the exercise of such a general right of way as, in my opinion, was granted by the railway company, would be inconsistent with the performance of its statutory duty of running trains with safety along the section of their line crossed by the defendants' level crossing. That a level crossing in itself is not open to such an objection is shown by the fact that such a crossing is one of the works which may be provided for accommodation under the provisions of the Act of 1836, and the Railways Clauses Consolidation Act. Another fact which it is important to remember in dealing with this question is that in the grant itself the way is made subject to the byelaws relating to level crossings on this section of the line, and the company, therefore, have power to impose reasonable restrictions on its use, with a view to ensuring the safety of their trains and of the persons using the way across the line. I cannot think that the fact that the company may have to take, at some expense to themselves, certain special measures, such as the provision of a man to control the user of the crossing at dangerous times, or of additional signals or such like, can render the user of the way to the extent to which the defendant has used it and claims the right to use it inconsistent with the running of the trains with necessary safety. It was unnecessary for the learned judge to deal with, and in fact he did not consider, this question, owing to his having arrived, on the construction of the grant, at the conclusion that the crossing was a mere accommodation work, but he recognised the general principle applicable to ordinary grants of a right of way as it is expressed above. On the whole, I am of opinion that the appeal ought to be allowed and judgment pronounced for the defendant with costs here and below.

SARGANT, L.J.—I too feel compelled to differ from the very careful judgment of ROMER, J. The matter was argued before the learned judge, and his judgment was founded, too, exclusively upon the view that the obligations resting upon the company were merely those under s. 73 of the Company's Special Act, which corresponds with s. 68 of the Railways Clauses Act, 1845, and prescribes the accommodation works that have to be constructed and maintained by the company. It appears to me, upon considering the peculiar situation of the lands of the then owner and the nature of the interference that was being caused by the works of the company, that it was the obligations under s. 71 of the company's General Act, corresponding with s. 53 of the Railway Clauses Act [which provided for the

substitution of a road in place of one interfered with], that had mainly to be considered, and that probably formed the principal element in determining what the then owner was entitled to require. The lands of the then owner abutted on the highway from Canterbury to Sturry, both on the north and on the south. On the south the access of the lands to the highway was not cut off by the authorised works, but on the north the frontage of the lands to the highway was completely taken, and the only means of approaching the highway from these lands was by a long detour to the east, which arrived at the highway on the north side of the Broadoak level crossing, and, even then, was at a substantially greater distance from Canterbury. Further, this detour would have involved the construction and maintenance of a private road, and could only be made use of so long as the owner's land to the east remained in his hands, or he should reserve a right of way thereon. In these circumstances, there was strong ground for thinking that, unless some substituted agreement should be made, the owner might have insisted on having his existing rights of access to the highway substantially preserved by having a substituted public road made on the north of the railway, which would have involved two public level crossings, the one to the west and the other to the east: see *Hay* v. *City of Glasgow Union Rail. Co.* (8). On the other hand, if once the access of the northern lands to the highway, or any substituted highway, could be provided for, the necessity for any accommodation works in the ordinary sense would be gone. The owner, getting on the highway, either from his northern or his southern lands, could reach the southern or the northern lands, as the case might be, by means of the highway. As illustrating this, it may be pointed out that, although the level crossing, roughly indicated on the plan, is shown as extending into the lands on the south (possibly because a small dyke might have to be provided with a bridge), the level crossing as actually constructed runs south-east instead of south, and affords access to the highway only. In this state of things, I see no reason for giving to the actual words of the grant of the easement in question any meaning short of their natural meaning, namely, a full and complete right of way for all purposes, a right of way analogous to, and as valuable as, that which the owner already had over the highway on which his northern land abutted. If this is the true construction, *White* v. *Grand Hotel, Eastbourne, Ltd.* (5) shows, if authority were needed, that the right is not limited by any consideration as to the purposes for which the lands on the north were being used at the date of the grant. Further, I think that the reasoning in *United Land Co.* v. *Great Eastern Rail. Co.* (4) is applicable here mutatis mutandis.

Reference has been made to the terms of an antecedent agreement between the South Eastern Railway Co. and the husband of one of the parties interested. Even if all the parties had concurred in this agreement, I do not think that its language could be referred to. In accordance with the recognised practice of conveyancers, this agreement is not recited or definitely referred to. There is merely a reference to the fact that the parties have agreed, it may be verbally or otherwise. The object and effect of this form of recital are to get rid of any obligations subsisting prior to the final document; and to make that document the sole record and measure of the rights of the parties to it.

I have still to deal with the contention that, if the construction of the document is that which I have arrived at, the grant of an unlimited right of way was ultra vires the company. This contention is much weakened by the consideration that this grant was one of the terms on which the company originally took the property, and seems to me inconsistent with the decision in the *United Land Co.'s Case* (4). Further, if the right granted was, in fact, granted in lieu or satisfaction of a claim to have a public level crossing, or, indeed, two public level crossings, over the railway, the result is that, so far from granting more than they ought, the railway company have escaped with a far slighter burden than they might have had to carry, and it would be odd if such a transaction should be held outside their powers. Lastly, the words providing that the right shall be exercised subject to any byelaws as to level crossings which the company might hereafter make, seem

to me expressly and effectively designed to prevent the grant unduly hampering the operations of the company, while also pointing to a construction of the document more consistent with a general grant than with a limited grant in respect of mere accommodation works.

Solicitors: *Burnie & Coleman*, for *Mercer, Baker & Bowen*, Canterbury; *William Bishop.*

[*Reported by* J. L. DENISON, ESQ., *Barrister-at-Law.*]

ATTORNEY-GENERAL *v.* NATIONAL PROVINCIAL AND UNION BANK OF ENGLAND AND OTHERS

[HOUSE OF LORDS (Viscount Cave, L.C., Viscount Haldane, Viscount Finlay, Lord Atkinson and Lord Sumner), December 17, 1923]

[Reported [1924] A.C. 262; 93 L.J.Ch. 231; 131 L.T. 34; 40 T.L.R. 191; 68 Sol. Jo. 235]

Charity—Benefit to community—"Patriotic purposes or objects"—Uncertainty.

A testator declared a trust of a share of his residuary estate to devote and apply the same "for such patriotic purposes or objects and such charitable institution or institutions or charitable object or objects in the British Empire as my trustees may in their absolute discretion select in such shares and proportions as they shall think proper."

Held: an object was not necessarily charitable because it was patriotic; whether or not a purpose was patriotic was a matter of opinion, and so the expression "patriotic purposes" was vague and uncertain; and, therefore, the gift was not a valid charitable bequest.

Decision of Court of Appeal, [1923] 1 Ch. 258, affirmed.

Notes. Considered: *Re Grove-Grady, Plowden* v. *Lawrence*, [1929] All E.R.Rep. 158. Explained: *Re Smith, Public Trustee* v. *Smith*, [1931] All E.R.Rep. 617. Considered: *Bonar Law Memorial Trust* v. *I.R.Comrs.* (1933), 49 T.L.R. 220; *Tribune Press, Lahore (Trustees)* v. *Income Tax Comr., Punjab, Lahore*, [1939] 3 All E.R. 469; *Williams' Trusts Trustee* v. *I.R.Comrs.*, [1947] 1 All E.R. 513. Applied: *Re Hopkinson, Lloyds Bank, Ltd.* v. *Baker*, [1949] 1 All E.R. 346; *Re Strakosch, Temperley* v. *A.-G.*, [1949] 2 All E.R. 6. Referred to: *Verge* v. *Somerville*, [1924] All E.R.Rep. 121; *I.R.Comrs.* v. *Roberts Marine Mansions Trustees* (1927), 43 T.L.R. 270; *General Medical Council* v. *I.R.Comrs., English Branch Council of General Medical Council* v. *Same*, [1928] All E.R.Rep. 252; *I.R.Comrs.* v. *Yorkshire Agricultural Society*, [1928] 1 K.B. 611; *Keren Kayemeth Le Jisroel, Ltd.* v. *I.R.Comrs.* (1931), 47 T.L.R. 298; *Peterborough Royal Foxhound Show Society* v. *I.R. Comrs.*, [1936] 1 All E.R. 813; *Roll of Voluntary Workers Trustees* v. *I.R.Comrs.* (1941), 24 Tax Cas. 320; *Chichester Diocesan Fund and Board of Finance (Inc.)* v. *Simpson*, [1944] 2 All E.R. 60; *Lord Nuffield* v. *I.R.Comrs., Goodenough* v. *I.R.Comrs.* (1946), 175 L.T. 465; *National Anti-Vivisection Society* v. *I.R.Comrs.*, [1947] 2 All E.R. 217; *Baddeley* v. *I.R.Comrs.*, [1953] 2 All E.R. 233.

As to charitable purposes, see 4 HALSBURY'S LAWS (3rd Edn.) 213 et seq; and for cases see 8 DIGEST (Repl.) 312 et seq.

Cases referred to:

(1) *Income Tax Special Purposes Comrs.* v. *Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 7 T.L.R. 657; 3 Tax Cas. 53, H.L.; 8 Digest (Repl.) 312, *1.*

(2) *Re Macduff, Macduff* v. *Macduff*, [1896] 2 Ch. 451; 65 L.J.Ch. 700; 74 L.T. 706; 45 W.R. 154; 12 T.L.R. 452; 40 Sol. Jo. 651, C.A.; 8 Digest (Repl.) 395, *879*.

(3) *Blair* v. *Duncan*, [1902] A.C. 37; 71 L.J.P.C. 22; 86 L.T. 157; 50 W.R. 369; 18 T.L.R. 194, H.L.; 8 Digest (Repl.) 394, *865*.

(4) *Houston* v. *Burns*, [1918] A.C. 337; 87 L.J.P.C. 99; 118 L.T. 462; 34 T.L.R. 219, H.L.; 8 Digest (Repl.) 396, *889*.

Also referred to in argument:

Bowman v. *Secular Society, Ltd.*, [1917] A.C. 406; 86 L.J.Ch. 568; 117 L.T. 161; 33 T.L.R. 376; 61 Sol. Jo. 478, H.L.; 8 Digest (Repl.) 359, *378*.

Morice v. *Bishop of Durham* (1805), 10 Ves. 522; 32 E.R. 947, L.C.; 8 Digest (Repl.) 390, *836*.

Re Cranston, Webb v. *Oldfield*, [1898] 1 I.R. 431; 8 Digest (Repl.) 352 **131*.

Appeal from an order of the Court of Appeal (Lord Sterndale, M.R., Warrington and Younger, L.JJ.) affirming an order of Russell, J.

The question, raised on a summons taken out by the trustees of the will of Henry Greenwood Tetley, was whether the provision in the will to the effect that the trustees should devote and apply one-fifth of the testator's residuary estate "for such patriotic purposes or objects and such charitable institution or institutions or charitable object or objects in the British Empire as my trustees may in their absolute discretion select in such shares and proportions as they shall think proper" was a valid charitable bequest. Russell, J., and the Court of Appeal held that it was not. The Attorney-General appealed on the ground that the word "patriotic," when used to qualify the purpose or object to which trust money was to be applied, indicated a purpose or object which was necessarily for the benefit or advantage of the country or community and for the public good, and, therefore, marked the purpose or object as being in point of law charitable; the collocation of the words in the will was such that the words "such patriotic purposes or objects and such charitable institution or institutions or charitable object or objects" must be read conjunctively and not disjunctively; the whole fund was well given to purposes all of which were charitable; and if all the purposes to which the fund was given were not charitable the fund ought to be apportioned between those purposes which were charitable and those which were not charitable.

Maugham, K.C., and *Dighton Pollock* (the *Attorney-General, Sir Douglas Hogg*), for the appellant.

Courthope Wilson, K.C., and *G. T. Simonds*, for the next-of-kin, and *Ashworth James*, for the trustees, were not called on to argue.

VISCOUNT CAVE, L.C.—I cannot bring myself to entertain any doubt as to the correctness of the decision in the Court of Appeal.

The question raised in these proceedings is whether a trust declared by the testator, Henry Greenwood Tetley, of one-fifth part of his residuary estate is or is not void for uncertainty. That trust was declared in these terms:

> "Upon trust as to one-fifth thereof to devote and apply the same for patriotic purposes or objects and such charitable institution or institutions or charitable object or objects in the British Empire as my trustees may in their absolute discretion select in such shares and proportions as they shall think proper."

The general rule is clear that if one is making a will, one must declare one's wishes, and not leave it in wide and uncertain terms to someone else to make a will for one. Special treatment is meted out to a gift for charitable purposes, and in that case the courts have recognised that it is open to a testator who declares a charitable purpose to leave it to his trustees to select the particular charities for whose benefit his fund is to be applied. But that does not apply to cases which do not come within the description of charity. Therefore, the whole contest in this case has been to bring this trust within the description of a charitable trust. That object has been pursued in two ways. First, it is said that one ought to read the words

of the trust conjunctively, that is to say, that one is to read this as a trust for purposes which are both charitable and patriotic, such purposes to be selected by the trustees. Like the judge of first instance, and the judges in the Court of Appeal, I am totally unable to read the trust in that way. It appears to me plain that the testator has, as Russell, J., said, given to his trustees four categories out of which they may select the objects of his benevolence. They may be either patriotic purposes, or patriotic objects, or charitable institutions or charitable objects; they may make a selection of objects from any one or more of those four categories. In short, the words are to be read, not conjunctively, but disjunctively. Therefore, that argument cannot prevail.

The second point which was made is this. It is said that "patriotic purposes" are necessarily charitable purposes, because they come within the fourth of the categories into which Lord Macnaghten, in the well-known case of *Income Tax Special Purposes Comrs.* v. *Pemsel* (1), divided charities. He said ([1891] A.C. at p. 583):

> " 'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."

It is said that "patriotic purposes . . . in the British Empire" means purposes directed to the public welfare of the British Empire, and so the trust falls within the fourth division of "trusts beneficial to the community not falling under any other of the preceding heads." It has been pointed out more than once, and particularly in *Re Macduff*, *Macduff* v. *Macduff* (2), that Lord Macnaghten did not mean that all trusts for purposes beneficial to the community are charitable, but that there are certain charitable trusts which fall within that category; and, accordingly, to argue that because a trust is for a purpose beneficial to the community, it is therefore a charitable trust, is to turn his sentence round, and to give it a different meaning. So here it is not enough to say that the trust in question is for public purposes beneficial to the community, or for the public welfare; you must also show that it is a charitable trust.

I am not able to say that this is a charitable trust. The expression "patriotic purpose" is vague and uncertain. Whether a purpose is patriotic or not is a matter of opinion; it depends to a great extent upon the state of mind of the person who uses the expression. An object which appears to some persons patriotic may legitimately appear to others not to fall within that description; and there is no fixed rule by which a court can determine whether a particular purpose is or is not patriotic. Further, it is not difficult to conceive purposes which would appear patriotic to most persons, but are clearly not charitable within the legal meaning of that term. It seems to me, therefore, that the expression "patriotic purposes" is one which cannot be said to bring the trust within the category of charitable trust. The point is, I think, practically covered by two well-known decisions in this House. The first is *Blair* v. *Duncan* (3), in which the words were "charitable or public purposes," and the second is *Houston* v. *Burns* (4), in which the words were "public, benevolent, or charitable purposes." In both those cases the trusts were held to be uncertain and void, and for the same reasons I hold the view that the trust in this case is also void. I move your Lordships that the appeal be dismissed.

VISCOUNT HALDANE.—I am of the same opinion. There are reasons of importance why the term "charitable" should be restrained in its meaning. In the first place, when a gift is established as being for a charitable purpose, the rule against perpetuities does not apply, and, therefore, it would have the effect of exempting an indefinite amount of property in the country from the operation of a salutary rule if a restricted meaning were not given to the word "charitable." In the second place, there is a consideration, which is, in one sense, more important, because it applies to Scotland, where the rule against perpetuities does not

exist. Your Lordships are aware that when there can be collected from a document a general intention by the person who made it to give his property for charitable purposes, although the particular charity named may be impossible, or may have failed, the court of administration will apply the doctrine which is called the "cy-près doctrine," and recognising that there is a general intention to set aside a class of gift as being of a charitable kind, will mould the trust defined cy-près, so as to make it come within the scope of the general intention. That, I believe, is the law of Scotland as well as the law of England; and it is important because it means that, in the case of this particular kind of gift, namely, a charitable gift, one may deviate from the letter of the testator's intention as long as one keeps within its spirit. These two considerations make me think that it is of great importance that we should not extend rashly the meaning of the word "charitable" in this connection. It certainly is narrower than the word "benevolent," although it is easier to say what it is not than what it is. That was not contested at the Bar. Is it narrower than the word "patriotic"? Because if "patriotic" is something outside charity, then I can find no legal ground for treating patriotic gifts as entitled to the special advantages which the law accords to charitable gifts. As has been pointed out by the Lord Chancellor, LORD MACNAGHTEN'S observation in the *Pemsel* Case (1), which was a mere classification of categories of charities, has been turned round. He cannot be taken to have intended to say that anything which belonged to the more general or public character of the fourth class enumerated could be the subject of a good gift, if it did not, in some sense, come within the general category of charity.

LORD ROBERTSON, in his judgment in *Blair* v. *Duncan* (3), pointed out instances of gifts which undoubtedly were patriotic, but not, in his opinion, charitable, and the reasons which he gave there, and he was very exact in his use of language, seem to me to be of importance. I should be very sorry to have to define with precision what "charitable" is without hearing an elaborate argument, but what does not come under "charitable" is, I think, usually fairly plain. Between a patriotic intention and a charitable intention there is a distinction not only in language, but in substance. In the case of a gift for charitable purposes there is a desire to profit people who would not be profited without your gift; that is the dominant motive. In the case of a gift for patriotic purposes there is a desire to fulfil one dominant purpose, which is to benefit the cause of the country to which you belong. Those are two different heads of intention, differing, perhaps, not in such a way that they never overlap, but in such fashion as to distinguish the one class from the other. In the present case these considerations, in my opinion, dispose of the appeal, because the gift is "for such patriotic purposes or objects and such charitable institution or institutions or charitable object or objects in the British Empire as my trustees may in their absolute discretion select in such shares and proportions as they shall think proper." These two alternatives are disjoined; they are real alternatives, and if they exclude each other to any extent, then the gift must fail, because a man cannot disinherit his heirs by giving away his property unless he really gives it away; he cannot leave it to someone else to make a will for him, nor can he leave it to his trustees to give it for purposes which are to be completely in their discretion, unless these purposes are so indicated as in some sense to confer on a class of beneficiary an interest. In this case the testator might have done so. If he had confined himself to charities, there would have been a general indication of class for the benefit of which the court would administer, even if only cy-près; but if the trustees have an alternative in their complete discretion, which is to take a property which is not vested in them beneficially, nor in any charitable class exclusively, but is given to the trustees with a discretion to hand it over to some not described patriotic object, then you have not got that divesting out of the testator of his interest which is essential to constitute a testamentary disposition. The testamentary disposition in this case, therefore, fails because of uncertainty. I find myself at one with the judgment of the court below, and I concur in the motion that the appeal should be dismissed.

VISCOUNT FINLAY.—I am of the same opinion. It appears to me quite clear that an object is not necessarily charitable because it is patriotic. It certainly is not so in the popular sense in which language of that kind is used, and I think it equally clear that it is not so in the legal sense in which the word "charitable" is used. In the case of this particular will, it is perfectly clear that the two terms are not used as meaning the same thing, because the words are "to devote and apply the same for such patriotic purposes or objects and such charitable institution or institutions or charitable object or objects in the British Empire as my trustees may in their absolute discretion select in such shares and proportions as they shall think proper." The very wording of the clause shows that patriotic purposes were not necessarily, in the eye of the testator, charitable purposes. The word "patriotic" is too vague. For reasons which have a root in the history of the English law, special immunities are extended to charitable gifts, which do not apply to gifts of other kinds, and I do not think that it can be properly contended that gifts for a patriotic purpose are intended to share in these immunities.

LORD ATKINSON and **LORD SUMNER** concurred.

Appeal dismissed.

Solicitors: *Treasury Solicitor*; *Patersons, Snow & Co.*; *Pearce & Sons.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

PHILLIPS *v.* BRITANNIA HYGIENIC LAUNDRY CO., LTD., AND OTHERS

[COURT OF APPEAL (Bankes, Atkin and Young, L.JJ.), May 14, 15, 1923]

[Reported [1923] 2 K.B. 832; 93 L.J.K.B. 5; 129 L.T. 777; 39 T.L.R. 530; 68 Sol. Jo. 102; 21 L.G.R. 709]

Statutory Duty—Breach—Competence of civil action at suit of injured person—Intention of statute—Construction of statute as a whole—Effect of statutory remedy for breach.

When a statute imposes a duty of commission or omission on an individual the question whether a person aggrieved by a breach of the duty has a right of action depends on whether the statute intended that a duty should be owed to the individual aggrieved as well as to the State or whether the duty was a public duty only. That depends on the construction of the statute as a whole, and the circumstances in which it was made and to which it relates. One of the matters to be taken into consideration is whether the statute on the face of it contains a reference to a remedy for the breach of it. If so, it would primâ facie be the only remedy, but that is not conclusive. One must still look to the intention of the legislature to be derived from the words used, and one may come to the conclusion that, although the statute creates a duty and imposes a penalty for the breach of that duty, it may still intend that the duty should be owed to individuals. The question is not to be determined solely by the test whether or not the person aggrieved can fall within some special class of the community, or whether he is some designated individual. The duty imposed may be of such paramount importance that it is owed to every member of the public.

By reg. 6 of the Motor Cars (Use and Construction) Order, 1904, made under the (now repealed) Locomotives on Highways Act, 1896: "The motor car and all the fittings thereof shall be in such a condition as not to cause, or to be likely to cause, danger to any person on the motor car or on the highway."

As a result of the defendants using a motor vehicle on the highway in breach of reg. 6 that vehicle was in collision with a van belonging to the plaintiff and damaged it. The defective condition of the defendants' vehicle was not due to any negligence on their part, but resulted from the negligence of repairers to whom the defendants had sent the vehicle for overhaul. In an action by the plaintiff in which he sought to recover in respect of the damage to the van on the ground of a breach of statutory duty on the part of the defendants the court were of opinion that some of the obligations imposed by other provisions of the regulations were more concerned with the maintenance of the highway and its use by a vehicle in conjunction with other traffic than with the protection of the public. One penalty was imposed for the breach of any one of the regulations.

Held: on a true construction of the Act and the regulations the legislature had not intended to impose on the owners of vehicles an absolute obligation to make them roadworthy in all events so as to render them liable at the suit of an injured person for damage done through the breach of reg. 6 in the absence of proof of negligence.

Notes. Considered: *London Armoury Co.* v. *Ever Ready Co.* (*Great Britain*), *Ltd.*, [1941] 1 All E.R. 364. Applied: *Badham* v. *Lambs, Ltd.*, [1945] 2 All E.R. 242. Considered: *Clark* v. *Brims*, [1947] 1 All E.R. 242. Applied: *A.-G.* v. *St. Ives R.D.C.*, [1953] 3 All E.R. 371. Referred to: *Britannia Hygienic Laundry Co.* v. *Thornycroft* (1925), 94 L.J.K.B. 858; *Gayler and Pope* v. *Davies*, [1924] 2 K.B. 75; *Herschtal* v. *Steward and Ardern, Ltd.*, [1939] 4 All E.R. 123.

As to liability for breach of statutory duty, see 31 Halsbury's Laws (2nd Edn.) 532, 533, 554, 555; and for cases see 42 Digest 725, 726.

Cases referred to:

(1) *Dawson & Co.* v. *Bingley U.D.C.*, [1911] 2 K.B. 149; 80 L.J.K.B. 842; 104 L.T. 659; 75 J.P. 289; 27 T.L.R. 308; 55 Sol. Jo. 346; 9 L.G.R. 502, C.A.; 42 Digest 753, *1772*.

(2) *Passmore* v. *Oswaldtwistle U.D.C.*, [1898] A.C. 387; 67 L.J.Q.B. 635; 78 L.T. 569; 62 J.P. 628; 14 T.L.R. 368, H.L.; 42 Digest 752, *1758*.

(3) *Doe d. Bishop of Rochester* v. *Bridges* (1831), 1 B. & Ad. 847; 9 L.J.O.S.K.B. 113; 109 E.R. 1001; 42 Digest 750, *1737*.

(4) *Groves* v. *Lord Wimborne*, [1898] 2 Q.B. 402; 67 L.J.Q.B. 862; 79 L.T. 284; 47 W.R. 87, C.A.; 42 Digest 759, *1858*.

(5) *Britannic Merthyr Coal Co., Ltd.* v. *David*, [1910] A.C. 74; 79 L.J.K.B. 153; 101 L.T. 833; 28 T.L.R. 164; 54 Sol. Jo. 151, H.L.; 34 Digest 741, *1170*.

(6) *Gorris* v. *Scott* (1874), L.R. 9 Exch. 125; L.J.Ex. 92; 30 L.T. 431; 22 W.R. 575; 2 Asp.M.L.C. 282, Ex. Ch.; 42 Digest 759, *1853*.

(7) *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (1877), 2 Ex.D. 441; 46 L.J.Ex. 775; 36 L.T. 761; 42 J.P. 183; 25 W.R. 794, C.A.; 42 Digest 759, *1850*.

Also referred to in argument:

Sadler v. *South Staffordshire and Birmingham District Steam Tramways Co.* (1889), 23 Q.B.D. 17; 58 L.J.Q.B. 421; 53 J.P. 694; 37 W.R. 582, C.A.; 43 Digest 435, *617*.

Couch v. *Steel* (1854), 3 E. & B. 402; 2 C.L.R. 940; 23 L.J.Q.B. 121; 22 L.T.O.S. 271; 18 Jur. 515; 2 W.R. 170; 118 E.R. 1193; 42 Digest 750, *1739a*.

Tarry v. *Ashton* (1876), 1 Q.B.D. 314; 45 L.J.Q.B. 260; 34 L.T. 97; 40 J.P. 439; sub nom. *Terry* v. *Ashton*, 24 W.R. 581; 26 Digest 433, *1519*.

Mullis v. *Hubbard*, [1903] 2 Ch. 431; 72 L.J.Ch. 593; 88 L.T. 661; 67 J.P. 281; 51 W.R. 571; 1 L.G.R. 769; 26 Digest 559, *2542*.

Stevens v. *Evans* (1761), 2 Burr. 1152; 1 Wm. Bli. 284; 97 E.R. 761; 42 Digest 750, *1737*.

Stevens v. *Jeacocke* (1848), 11 Q.B. 731; 17 L.J.Q.B. 163; 11 L.T.O.S. 101; 12 Jur. 477; 116 E.R. 647; 42 Digest 750, *1739*.

Appeal from an order of the Divisional Court (BAILHACHE and MCCARDIE, JJ.), reported [1923] 1 K.B. 539.

The action was brought by the plaintiff for damages for the negligence of the defendants' servant causing damage to the plaintiff's motor van. On July 16, 1922, the plaintiff's motor van was in the Camberwell New Road, London. The defendants were the owners of a motor lorry and on that day it was being driven by the defendants' servant in the Camberwell New Road. An axle of the defendants' lorry suddenly broke in two, a wheel came off, ran along the road and hit and damaged the plaintiff's motor van. The defendants had had this motor lorry for some time before the day of the accident. A few weeks before the accident they sent the motor lorry to a firm, who were the makers of it, for complete overhaul and repair. The firm in question examined the motor lorry and effected various repairs, they replaced one worn-out axle and re-threaded and annealed the other axle which was seen to be defective. They considered that a second new axle was unnecessary. The motor lorry was returned to the defendants about two days before the accident. No restriction had been put by the defendants on the work to be done on the motor lorry by the repairers. The defendants believed, when they received the motor lorry back from the repairers, that it had been put into a safe and proper condition. The county court judge held that the defendants were not negligent, but that the repairers were negligent in not having replaced the defective axle with a new one and he gave judgment for the plaintiff for £17 10s. The Divisional Court held, reversing the decision of the county court judge, that mere proof of a breach of reg. 6 of the Motor Car Regulations was not sufficient to entitle the plaintiff to succeed, and the plaintiff's claim failed on all grounds in the absence of proof of negligence on the defendants' part.

By s. 6 (1) of the Locomotives on Highways Act, 1896 [repealed by the Road Traffic Act, 1930] :

> "The Local Government Board may make regulations with respect to the use of light locomotives on highways, and their construction, and the conditions under which they may be used. . . . Section 7 : A breach of any . . . regulation made under this Act . . . may, on summary conviction, be punished by a fine not exceeding £10."

The Motor Cars (Use and Construction) Order, 1904, provided that no person should cause or permit a motor car to be used on any highway, or drive or have charge of a motor car when so used, unless the conditions thereinafter set forth were satisfied. Those conditions related, inter alia, to the width of the car, the construction of the tyres, the efficiency of the brakes, and the lamps to be carried. By reg. 6 :

> "The motor car and all the fittings thereof shall be in such a condition as not to cause, or to be likely to cause, danger to any person on the motor car or on any highway."

Harney, K.C., *Martin O'Connor* and *J. P. Rutherford* for the plaintiff.
Doughty, for the defendants, was not called upon to argue.

BANKES, L.J.—This is an appeal from a decision of the Divisional Court reversing the judgment of the county court judge in an action brought by the plaintiff to recover damages for injury to a motor van caused by collision with a motor lorry of the defendants, which resulted from the axle of the defendants' vehicle breaking. The action in the county court was founded upon an alleged breach of a statutory provision contained in the Motor Cars (Use and Construction) Order, 1904, and, alternatively, on the alleged negligence of the defendants. The county court judge absolved the defendants from negligence either as to the management of the motor lorry or as regards the state of its axle, but he found negligence on the part of the firm of repairers to whom the motor lorry had been sent for purposes of repair in not having executed the repairs efficiently. He, accordingly, gave judgment for the plaintiff upon the ground that the lorry was not in the

condition required by cl. 6 of art. II of the order. On an appeal by the defendants the Divisional Court reversed this decision. The plaintiff appeals to this court.

I agree with the conclusion of the Divisional Court, and will state my own reasons shortly for doing so. The point which has been raised is no doubt an important one, because if the judgment of the county court judge were to stand it would have very far-reaching consequences. However, there is only one point to be considered, and that is governed by well-established rules, and when those rules are applied to the facts of the present case it is abundantly clear that the Divisional Court came to the right conclusion. The only substantial point raised on behalf of the appellant was that, having regard to the terms of the Motor Cars (Use and Construction) Order, 1904, he had a statutory right of action for a breach of its conditions. In reference to such a claim there are two well-established rules. The first is applicable to a case where the statute which created the obligation provided no remedy for a breach of the same, and the second relates to a case where the statute not only creates the obligation but also provides a remedy for the breach. As regards the first I will refer to what was said by KENNEDY, L.J., in *Dawson & Co.* v. *Bingley U.D.C.* (1) in these words ([1911] 2 K.B. at p. 159):

> "Now, the general rule as to the remedy of a person who has been injured by the infringement of a statutory right or the breach of a statutory obligation for his benefit is clear. Where the statute has not in express terms given a remedy, the remedy which by law is properly applicable to the right or the obligation follows as an incident. The law is, I think, correctly stated in ADDISON ON TORTS (8th Edn.), p. 104, referring to COMYN'S DIGEST:
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> > 'In every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law.' (Com. Dig. Action upon Statute F.)
>
> Accordingly, where the statute is silent as to the remedy, the legislature is to be taken as intending the ordinary result, and the proper remedy for breach of the statute is an action for damages, and, in a proper case, for an injunction."

In such a case it may be material to consider whether the right conferred or the act prohibited is for the benefit of a particular class of persons or is intended to apply to the public generally. As to the second class where the statute does provide a remedy, I think the words of LORD HALSBURY in *Passmore* v. *Oswaldtwistle U.D.C.* (2) are applicable. He there says ([1898] A.C. at p. 394):

> "The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law. I think LORD TENTERDEN accurately states that principle in the case of *Doe d. Bishop of Rochester* v. *Bridges* (3). He says (1 B. & Ad. at p. 859):
>
> > 'Where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner.' "

In the same case LORD MACNAGHTEN said ([1898] A.C. at p. 397):

> "Whether the general rule is to prevail, or an exception to the general rule is to be admitted, must depend on the scope and language of the Act which creates the obligation and on considerations of policy and convenience."

In the case we are now considering the statute both creates the obligation and provides a remedy for non-compliance with it, and the question is whether in view of the scope and language of the Act, this is to be regarded as an exception to the general rule, or whether the remedy provided is the only remedy. The order of the Local Government Board relied on was made under s. 6 of the Locomotives

on Highways Act, 1896 [repealed by Road Traffic Act, 1930], which provided that the Local Government Board might make regulations with respect to the use of light locomotives on highways, their construction, and the conditions under which they might be used. Section 7 of the Act provides that a breach of any byelaw or regulation made under the Act, or of any provision of the Act, may, on summary conviction, be punished by a fine not exceeding £10. It is clear that the statute does provide a remedy. It is, therefore, necessary to consider what is the scope and language of the statute and of the regulations made thereunder. The language employed by the Act includes the "use of light locomotives," their "construction," and "conditions under which they may be used"; and the scope of the statute is to provide for a matter, namely, the rights and obligations of persons using the highway, with which the common law has been concerned for many years, and for which it has, by rules and regulations controlling it, provided sufficient protection. It is under this Act that the order in question was made. That order, which is headed "Motor Cars (Use and Construction) Order, 1904," is divided into a number of sections or articles, five in all. The provision relied on is to be found in art. II, which provides that:

> "No person shall cause or permit a motor car to be used on any highway, or shall drive or have charge of a motor car when so used unless the conditions hereinafter set forth are satisfied."

Then follow the conditions upon which a motor car may be used on any highway. They are contained in seven clauses. It is plain from a consideration of these clauses that they were introduced, not to protect persons using the highway, but to protect the surface of the highway itself, as is shown by the provisions as to the width of the wheels and the weight of the motor car. Provisions such as these were not inserted for the benefit or safety of the public, but for the safety of the road itself. If the plaintiff's contention is to prevail, everyone injured by a motor car which does not comply with the regulations has a cause of action. There is no reason for differentiating between those who are injured as a result of a breach and those who are injured in fact irrespectively of the breach of the regulations. Take, for example, the provisions as to lamps in cl. 7, which says:

> "The lamp is to be carried attached to the motor car in pursuance of s. 7 of the Act of 1896, shall be so constructed and placed as to exhibit, during the period between one hour after sunset and one hour before sunrise, a white light visible within a reasonable distance in the direction towards which the motor car is proceeding or is intended to proceed, and to exhibit a red light so visible in the reverse direction."

There are also other provisions as regards lights. It seems to me that if the contention of the plaintiff is to prevail, it must prevail as to the regulations as a whole, and I can see no reason for selecting one particular regulation for the benefit of a class who may be able to enforce it by civil action, and another one such as the one about the lamps, which must have been made for the benefit of persons passing in front of a car. Can it have been the intention of the legislature that a foot passenger crossing the highway in front of a motor car should have a statutory right of action if injured although there was no negligence on the part of the driver, merely because there was no red light on the rear of the car? This regulation as to the rear lamp may concern the safety of the car itself, or it may be a very wise police regulation in the case of one car overtaking another, but it seems to me to be impossible to say that the scope and object of the regulation can have been to give to an individual injured by a car a right of action for damages with respect to the provision which can have had no effect upon the injury of which he complains.

The matter, I think, might not be so clear if cl. 6 stood by itself. That clause, which is the relevant one in this case, provides that:

> "The motor car and all the fittings thereof shall be in such a condition as not to cause, or be likely to cause, danger to any person on the motor car or on any highway."

We have not here to consider the case of a person injured on the highway. The injury was done to the plaintiff's van, and the plaintiff, as a member of the public, claims a right of action as being a member of a class for whose benefit cl. 6 was enacted. He contends that the public using the highway is the class so favoured. I do not agree. In my view, the public using the highway is not a class; it is the public itself and not a class of the public. I think this clause does not apply to individual members or sections of the public, but to the public generally, and it is included in a batch of regulations for breach of which it cannot have been intended that a person aggrieved should have a civil remedy by way of action in addition to the more appropriate statutory remedy already provided. In my opinion, the plaintiff has failed to show that this case is an exception to the general rule. The appeal, therefore, fails and must be dismissed.

ATKIN, L.J.—I am of the same opinion. This is an important and a difficult question. I was much impressed by the argument of counsel for the plaintiff when dealing with these regulations, because there can be little doubt that the scope of the regulations was to promote the safety of the public using the highway. The question is whether they were intended to be enforced only by the special penalty attached to them in the Act. I conceive the rule to be that when a statute imposes a duty of commission or omission upon an individual, the question whether a person aggrieved by a breach of the duty has a right of action depends upon the intention of the statute. Was it intended that a duty should be owed to the individual aggrieved as well as to the State, or is it a public duty only? That depends upon the construction of the statute as a whole, and the circumstances in which it was made and to which it relates. One of the matters to be taken into consideration is this: Does the statute on the face of it contain a reference to a remedy for the breach of it? If so, it would, primâ facie, be the only remedy, but that is not conclusive. One must still look to the intention of the legislature to be derived from the words used, and one may come to the conclusion that, although the statute creates a duty and imposes a penalty for the breach of that duty, it may still intend that the duty should be owed to individuals. Instances of this are *Groves* v. *Lord Wimborne* (4) and *Britannic Merthyr Coal Co.* v. *David* (5). To my mind, and on this point I differ from McCardie, J., the question is not to be determined solely by the test whether or not the person aggrieved can fall within some special class of the community, or whether he is some designated individual. It would, I think, be strange if it were so. The duty imposed may be of such paramount importance that it is owed to every member of the public. It would be strange if a less important duty which is owed to a section of the public may be enforced by an action, while a more important duty which is owed to the public at large cannot be so enforced. The right of action does not depend upon whether a statutory enactment or prohibition is proclaimed for the benefit of the public as a whole or for the benefit of a particular class. It may well be enforced by an individual who cannot be otherwise specified than as a member of the public who passed along the highway. Therefore I think McCardie, J., is applying too narrow a test when he says ([1923] 1 K.B. at p. 547):

> "In my view, the Motor Car Acts and regulations were not enacted for the benefit of any particular class of folk. They are provisions for the benefit of the whole public, whether pedestrians or vehicle users, whether aliens or British citizens, and whether working or walking or standing upon the highway."

In stating the argument of the defendant in *Gorris* v. *Scott* (6), Kelly, C.B., refers to the obligation imposed upon railway companies by s. 47 of the Railways Clauses Consolidation Act, 1845, to erect gates across public carriage roads crossed by the railway on the level and to keep the gates closed except when the crossing is being actually and properly used, under the penalty of 40s. for every default. It has never been doubted that if a member of the public crossing the railway were injured by the railway company's breach of duty, either in not erecting a gate

A or in not keeping it closed, he would have a right of action. Therefore, the question is whether these regulations, having regard to the circumstances in which they were made and to which they relate, were intended to impose a duty, which is a public duty, or whether they were intended also to impose a duty, enforceable by an individual aggrieved. Upon the whole, I have come to the conclusion that it was not intended to impose a duty enforceable by individuals aggrieved, but only B a public duty, the sole remedy for breach of which is the remedy provided by way of a fine. The regulations impose obligations of varying degrees of importance; some of them are more concerned with the maintenance of the highway than with the protection of the public. Yet there is one penalty imposed for the breach of any one of them. Upon the whole, I think the true inference is that the legislature did not permit the Department which had been empowered to make regulations for C the use and construction of motor vehicles to impose new duties in favour of individuals and new causes of action for breach of them. That seems to me to be the more reasonable conclusion when it is realised that the obligations of those who bring vehicles upon highways have been already well provided for and regulated by the common law. It is not likely that the legislature intended by these regulations to impose upon the owners of vehicles an absolute obligation to make D them roadworthy in all events, even in the absence of negligence. For these reasons I am of opinion that the conclusion arrived at by the Divisional Court was correct, and that the appeal should therefore be dismissed.

YOUNGER, L.J.—In view of the illuminating and exhaustive judgments of the Divisional Court I find my task to be a light one. I am in complete agreement E with those judgments and those just delivered by the other members of the court. Many points were argued in the Divisional Court and were dealt with by McCARDIE, J., in his judgment. Most of them have been ventilated in this court, but the only one which has caused me any difficulty has been fully dealt with by BANKES and ATKIN, L.JJ. In the result, I am satisfied that this is a case in which a mere breach by the defendants of reg. 6 does not give any cause of action to the plaintiff. F It is true that the regulation has been broken. It is also true that the plaintiff has suffered damages by reason of the breach of the statutory duty imposed upon the defendants, not, so far as this action is concerned, to himself personally, but to his own motor vehicle. Yet although the regulation in terms indicates that the framers of it had in view the possibility of injury resulting to persons using the highway like the plaintiff did, nevertheless I have arrived at the conclusion, upon G a survey of the whole Act and the regulations made thereunder, that, in the words of LORD CAIRNS in *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (7) (2 Ex.D. at p. 446):

> "It was no part of the scheme of this Act to create any duty which was to become the subject of an action at the suit of individuals, to create any right in individuals with a power of enforcing that right by action."

H I agree, therefore, that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *J. Nixon Watts & Co.*; *Lewis Barnes & Co.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

A

MERSEY DOCKS AND HARBOUR BOARD *v.* PROCTER

[House of Lords (Viscount Cave, L.C., Lord Shaw, Lord Sumner, Lord Buckmaster, Lord Carson), February 1, 2, March 13, 1923]

[Reported [1923] A.C. 253; 92 L.J.K.B. 479; 129 L.T. 34; 39 T.L.R. 275; 67 Sol. Jo. 400; 16 Asp.M.L.C. 123] B

Negligence—Invitee—Workman employed by contractor on ship in dock—Duty of dock company—Workman straying from place where permitted to be.

A workman employed by engineering contractors on board a ship lying in a dock belonging to the appellants left the ship for the purpose of going to the latrine. There was a dense fog at the time and he never returned to his work. C Two days later his body was recovered from a floating dock near which it was not necessary for him to go to reach the latrine. In an action brought by the widow against the appellants under the Fatal Accidents Act, 1846, claiming damages upon the ground that her husband's death had been caused by the appellants' negligence,

Held (Lord Shaw and Lord Buckmaster dissenting): it being common D ground that the workman was an invitee since the appellants admitted ships to their docks and that involved the admission also of persons whom shipowners or their contractors engaged to work on ships, the appellants owed him a duty to take reasonable care to protect him from any unusual danger which they knew or ought to have known and was not known to or reasonably expected by him, but they were not bound to give him absolute protection in whatever E part of their premises he might be found, for he was not then acting in compliance with their invitation; in the present case the danger zone was far removed from the way permitted to the workman to enable him to reach the latrine, and the appellants were not under a duty to protect him from the danger; and, therefore, the action by the widow must fail.

Per Lord Sumner: At the time of the accident the workman was where he F had no business to be, and his position at best was that of a licensee.

Court of Appeal—Jurisdiction—Review of finding of fact—Case tried by judge without jury—Duty of Court of Appeal to draw its own inference from facts proved or admitted.

Per Viscount Cave, L.C.: The procedure on an appeal from a judge sitting without a jury is not governed by the rules applicable to a motion for a new G trial after a verdict of a jury. In such a case it is the duty of the Court of Appeal to make up its own mind, not disregarding the judgment appealed from, and giving special weight to that judgment in cases where the credibility of the witnesses comes into question, but with full liberty to draw its own inference from the facts proved or admitted and to decide accordingly.

Notes. The distinction between the duty owed by an occupier of premises to H an invitee and that which he owed to a licensee was abolished by the Occupiers' Liability Act, 1957 (37 Halsbury's Statutes (2nd Edn.) 832), which, by s. 2 (1), prescribed a "common duty of care" which is owed by an occupier to all his visitors. By s. 1 (2) the persons to be treated as "visitors" are the persons "who would at common law be treated as invitees or licensees." In the present case the workman, although in no contractual relation to the appellant, would be within I the term "visitor" in the Act. It is submitted that the negation of the appellants' liability owing to the workman straying from the permitted way would also apply to an occupier's common duty of care under the Act if a "visitor" acted in such a manner.

Considered: *Coleshill* v. *Manchester Corpn.*, [1928] 1 K.B. 776; *Gilmour* v. *Belfast Harbour Comrs.* (1933), 150 L.T. 63; *Pitt* v. *Jackson*, [1939] 1 All E.R. 129; *Jacobs* v. *L.C.C.*, [1950] 1 All E.R. 737. Referred to: *Gould* v. *McAuliffe*, [1941] 1 All E.R. 515; *Haseldine* v. *Dan & Sons, Ltd.*, [1941] 3 All E.R. 156;

Duncan v. *Cammell Laird & Co.*, *Craven* v. *Cammell Laird & Co.*, *Duncan* v. *Wailes Dove Bitumastic, Ltd.*, *Craven* v. *Wailes Dove Bitumastic, Ltd.*, [1943] 2 All E.R. 621; *Caseley* v. *Bristol Corpn.*, [1944] 1 All E.R. 14; *Greene* v. *Chelsea Borough Council*, [1954] 2 All E.R. 318; *Hawkins* v. *Coulsdon and Purley U.D.C.*, [1954] 1 All E.R. 97.

As to an occupier's duty to visitors, see 28 HALSBURY'S LAWS (3rd Edn.) 40 et seq.; and for cases see 36 DIGEST (Repl.) 45 et seq. As to the jurisdiction of the Court of Appeal, see 9 HALSBURY'S LAWS (3rd Edn.) 417; and for cases see 16 DIGEST 183, 184, and DIGEST (PRACTICE) 782 et seq.

Cases referred to:

(1) *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704; 67 L.J.Ch. 402; 78 L.T. 540, C.A.; Digest Practice 771, *3360*.

(2) *Montgomerie & Co., Ltd.* v. *Wallace-James*, [1904] A.C. 73; 73 L.J.P.C. 25; 90 L.T. 1, H.L.; Digest Practice 770, *3354*.

(3) *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274; Har. & Ruth. 243; 35 L.J.C.P. 184; 14 L.T. 484; 12 Jur.N.S. 432; 14 W.R. 586; affirmed (1867), L.R. 2 C.P. 311; 36 L.J.C.P. 181; 16 L.T. 293, Ex. Ch.; 36 Digest (Repl.) 46, *246*.

(4) *Walker* v. *Midland Rail. Co.* (1886), 55 L.T. 489; 51 J.P. 116; 2 T.L.R. 450, H.L.; 29 Digest 9, *118*.

(5) *Hardcastle* v. *South Yorkshire Railway and River Dun Co.* (1859), 4 H. & N. 67; 28 L.J.Ex. 139; 32 L.T.O.S. 297; 23 J.P. 183; 5 Jur.N.S. 150; 7 W.R. 326; 157 E.R. 761; 36 Digest (Repl.) 312, *597*.

(6) *Wakelin* v. *London and South Western Rail. Co.* (1886), 12 App. Cas. 41; 56 L.J.Q.B. 229; 55 L.T. 709; 51 J.P. 404; 35 W.R. 141; 3 T.L.R. 233, H.L.; 36 Digest (Repl.) 130, *667*.

(7) *Norman* v. *Great Western Rail. Co.*, [1915] 1 K.B. 584; 84 L.J.K.B. 598; 112 L.T. 266; 31 T.L.R. 53, C.A.; 38 Digest 352, *580*.

(8) *Thatcher* v. *Great Western Rail. Co.* (1893), 10 T.L.R. 13, C.A.; 36 Digest (Repl.) 65, *353*.

(9) *Holmes* v. *North Eastern Rail. Co.* (1869), L.R. 4 Exch. 254; 38 L.J.Ex. 161; 20 L.T. 616; 17 W.R. 800; affirmed (1871), L.R. 6 Exch. 123, Ex. Ch.; 36 Digest (Repl.) 49, *257*.

(10) *Smith* v. *London and St. Katharine Docks Co.* (1868), L.R. 3 C.P. 326; 37 L.J.C.P. 217; 18 L.T. 403; 16 W.R. 728; 3 Mar.L.C. 66; 36 Digest (Repl.) 48, *253*.

(11) *Thomas* v. *Quartermaine* (1887), 18 Q.B.D. 685; 56 L.J.Q.B. 340; 57 L.T. 537; 51 J.P. 516; 35 W.R. 555; 3 T.L.R. 495, C.A.; 36 Digest (Repl.) 7, *11*.

(12) *Gallagher* v. *Humphrey* (1862), 6 L.T. 684; 27 J.P. 5; 10 W.R. 664; 36 Digest (Repl.) 66, *357*.

(13) *Carshalton U.D.C.* v. *Burrage*, [1911] 2 Ch. 133; 80 L.J.Ch. 500; 104 L.T. 306; 75 J.P. 250; 27 T.L.R. 280; 9 L.G.R. 1037; 7 Digest 294, *204*.

(14) *Latham* v. *Richard Johnson & Nephew, Ltd.*, [1913] 1 K.B. 398; 82 L.J.K.B. 258; 108 L.T. 4; 77 J.P. 137; 29 T.L.R. 124; 57 Sol. Jo. 127, C.A.; 36 Digest (Repl.) 49, *262*.

(15) *Cooke* v. *Midland and Great Western Railway of Ireland*, [1909] A.C. 229; 78 L.J.P.C. 76; 100 L.T. 626; 25 T.L.R. 375; 53 Sol. Jo. 319, H.L.; 36 Digest (Repl.) 118, *590*.

Also referred to in argument:

Kerr (or Lendrum) v. *Ayr Steam Shipping Co., Ltd.*, [1915] A.C. 217; 84 L.J.P.C. 1; 111 L.T. 875; 30 T.L.R. 664; 58 Sol. Jo. 737; 7 B.W.C.C. 801, H.L.; 34 Digest 333, *2706*.

Wilkinson v. *Fairrie* (1862), 1 H. & C. 633; 32 L.J.Ex. 73; 7 L.T. 599; 9 Jur.N.S. 280; 158 E.R. 1038; 36 Digest (Repl.) 12, *39*.

Bolch v. *Smith* (1862), 7 H. & N. 736; 31 L.J.Ex. 201; 8 Jur.N.S. 197; 10 W.R. 387; 158 E.R. 666; sub nom. *Bolett* v. *Smith*, 6 L.T. 158; 36 Digest (Repl.) 66, *358*.

Smith v. *South Eastern Rail. Co.*, [1896] 1 Q.B. 178; 65 L.J.Q.B. 219; 73 L.T. 614; 60 J.P. 148; 44 W.R. 291; 12 T.L.R. 67; 40 Sol. Jo. 96, C.A.; 36 Digest (Repl.) 132, *679*. A

Corby v. *Hill* (1858), 4 C.B.N.S. 556; 27 L.J.C.P. 318; 31 L.T.O.S. 181; 22 J.P. 386; 4 Jur.N.S. 512; 6 W.R. 575; 140 E.R. 1209; 36 Digest (Repl.) 67, *370*.

Dickson v. *J. Q. Scott, Ltd.* (1914), 30 T.L.R. 256; 7 B.W.C.C. 1007, C.A.; 36 Digest (Repl.) 65, *354*. B

Gautret v. *Egerton*, *Jones* v. *Egerton* (1867), L.R. 2 C.P. 371; 36 L.J.C.P. 191; 15 W.R. 638; sub nom. *Gantret* v. *Egerton*, *Jones* v. *Egerton*, 16 L.T. 17; 36 Digest (Repl.) 47, *247*.

Binks v. *South Yorkshire Railway and River Dun Co.* (1862), 3 B. & S. 244; 32 L.J.Q.B. 26; 122 E.R. 92; sub nom. *Bincks* v. *South Yorkshire Railway and River Dun Co.*, 1 New Rep. 50; 7 L.T. 350; 27 J.P. 180; 11 W.R. 66; 7 Digest 287, *159*. C

Dominion Trust Co. v. *New York Life Insurance Co.*, [1919] A.C. 254; 88 L.J.P.C. 30; 119 L.T. 748, P.C.; Digest Practice 770, *3355*.

Appeal from an order of the Court of Appeal reversing a decision of BRANSON, J., at the trial of the action. D

The appellants were the owners of the Birkenhead Docks, which included two large floating docks called the East and West Floats. On Dec. 9, 1920, the respondent's husband, Albert Procter, who was a boilermaker, was working on board a ship then lying in the East Float. There was a dense fog during the whole of that day. At about 4.50 p.m. Procter left the ship, saying that he was going E to the latrine, and it was understood that he would then return to his work. He was never again seen alive. Two days later his body was found in the West Float. The respondent brought the present action against the appellants under the Fatal Accidents Act, 1846, claiming damages on the ground that her husband's death had been caused by the appellants' negligence in that they had failed to see that the quay was properly fenced or guarded. The action was tried by BRANSON, J., F without a jury, and, after hearing the evidence for the plaintiff, he dismissed the action, stating that he was not satisfied that the omission to have a chain placed in position in the particular spot was negligence, and, further, that he was not satisfied that, even if the chain had been there, the accident might not have happened. On appeal, the Court of Appeal (BANKES and WARRINGTON, L.JJ., ATKIN, J., dissenting) held that the plaintiff had proved negligence on the part of G the defendants, which had caused the death. They, therefore, set aside the judgment of BRANSON, J., and ordered a new trial. The defendants appealed.

Greaves-Lord, *K.C.*, *Singleton*, *K.C.*, and *D. J. Milner Heling* for the appellants. *Merriman*, *K.C.*, *Madden*, *K.C.*, and *J. W. Morris* for the respondent.

The House took time for consideration. H

Mar. 13. The following opinions were read.

VISCOUNT CAVE, L.C.—This is an appeal from an order of the Court of Appeal setting aside a judgment of BRANSON, J., and ordering a new trial. The appellants are the owners of the Birkenhead Docks, which include two large floating docks called the East and West Floats. On Dec. 9, 1920, the respondent's husband I Albert Procter, who was a boilermaker, was working for an engineering contractor on board the steamship *City of Genoa*, then lying in the East Float. There was a dense fog during the whole of that day. At about 4.50 p.m. on that day Procter left the *City of Genoa*, saying that he was going to the latrine, and it was understood that he would then return to his work. He was never again seen alive. On the following day his cap was found in the West Float between the bows of two ferry-boats which were moored near the north-east corner of that float, and on the next day his body was found at or about the same place. His watch had stopped

A at five minutes past five o'clock. The following further facts should be stated. Procter's way from his ship to the latrine lay southward across a piece of ground separating the East and West Floats, and over a bridge at the southern end called the "Duke Street Bridge," the latrine being just on the other side of the bridge. This piece of ground measured about 85 yards from east to west, and about 50 yards from north to south. It was bounded on the east and west respectively by the B two floats, and on the south by the waterway connecting them and the bridge over it. It was traversed from north to south, and slightly to the eastward of the centre of the ground, by two double lines of rails leading to and over the bridge, the rails being laid flush with the ground in granite setts, and the ground on each side of the setts being rough ground. It was said, and was not denied, that the site of the railway was used as a public highway from Seacombe to Birkenhead, and it C was lighted by lamps, which were alight on the evening in question. Round three sides of this piece of ground where it was bounded by the two floats and the waterway between them, and at a distance of about 12 ft. from the dockside, there was a line of stanchions placed at intervals of about 15 ft. from one another, and chains were provided to hook on to these stanchions and hang between them. Whether the chains were intended for the protection of pedestrians or only for the safety D of wheeled traffic using the area of ground, is not stated; but the latter appears the more probable reason. The chains were often taken down for the purpose of affording access to the quay; but persons employed about the docks had instructions to see that the guard chains were in position and to replace any which happened to be out of position. The chain directly opposite to the place where Procter's body was found had been detached for some days, apparently for the convenience of E some men who were at work on some alterations to the quay, and was curled round the stanchion, so that access to the dock from the area of land was uninterrupted at that point. Some heaps of gravel and other obstructions lay near to, but not directly in front of, the opening. The edge of the West Float was parallel to and about 45 yards distant from the paved way and lines of rails.

Upon the above facts the respondent, the widow of Albert Procter, brought an F action against the appellants under the Fatal Accidents Act, 1846, claiming damages on the ground that her husband's death had been caused by the appellants' negligence. The negligence alleged was that the quay was not fenced or guarded at the place where the deceased walked into the dock, and that no warning had been given to the deceased of the existence of this unfenced or unguarded part of the quay, which was, in its then condition, in the nature of a trap, the existence G of which was known to the defendants and their servants and unknown to the deceased. These allegations were traversed by the defendants, who also pleaded contributory negligence on the part of the deceased man. The action was tried by BRANSON, J., without a jury; and after hearing the evidence for the plaintiff he dismissed the action, stating that he was not satisfied that the omission to have the chain placed in position in the particular spot was negligence, and, further, H that he was not satisfied that, even had the chain been there, the accident might not have happened. On appeal, the Court of Appeal by a majority (BANKES and WARRINGTON, L.JJ., ATKIN, L.J., dissenting) held that the plaintiff had proved negligence on the part of the defendants which had caused the death, and, accordingly, set aside the judgment of BRANSON, J., and ordered a new trial. Hence the present appeal.

I It was contended on behalf of the appellants that the finding of BRANSON, J., being a finding of a trial judge on a question of fact, should not have been disturbed by the Court of Appeal. In my opinion, there is no ground for such a contention. The duty of a court hearing an appeal from the decision of a judge without a jury was clearly defined by LINDLEY, M.R., in *Coghlan* v. *Cumberland* (1), and by LORD HALSBURY in *Montgomerie & Co.* v. *Wallace-James* (2), and is no longer in doubt. The procedure on an appeal from a judge sitting without a jury is not governed by the rules applicable to a motion for a new trial after a verdict of a jury. In such a case it is the duty of the Court of Appeal to make up its own mind, not

disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of the witnesses comes into question, but with full liberty to draw its own inference from the facts proved or admitted and to decide accordingly. In the present case there is no question of the credibility of witnesses. The material facts, so far as they are known, are undisputed; and the Court of Appeal was at liberty and, indeed, was bound to draw its own inference from them.

The respondent's case is rested on the well-established principle that where a landowner invites or induces a person to go upon his land, not as a bare licensee but for some purpose in which both have an interest, he must make reasonable provision for that person's safety. This rule was clearly stated in the judgment of WILLES, J., in *Indermaur* v. *Dames* (3), where that learned judge summed up the law as follows:

> "The class to which the customer belongs includes persons who go, not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied. And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact."

In the present case it is not disputed that the deceased man came within the class described by WILLES, J. He came upon the dock property and passed to and from the vessel where he was engaged upon the business which concerned both the dock company and himself; and he was entitled, subject to using reasonable care on his part, to expect that the dock company should use reasonable care to protect him from any unusual danger known to the company and not known to or reasonably to be expected by him.

If so, the questions of fact which arise or may arise are three, namely: (i) Were the appellants guilty of negligence or want of reasonable care for the safety of the deceased? (ii) If so, was their negligence or want of care the cause of his death? (iii) Was there any contributory negligence or want of reasonable care on his part for his own safety? In dealing with the first question it is important to bear in mind the exact nature of the appellants' duty to the deceased. It was not to give him absolute protection in whatever part of the appellants' premises he might be found, but only to use reasonable care for his safety while he was upon their land and acting in compliance with their invitation; and this duty must be limited, as LORD SELBORNE pointed out in *Walker* v. *Midland Rail. Co.* (4) (55 L.T. at p. 490), to those places to which he might reasonably be expected to go in the belief, reasonably entertained, that he was entitled or invited to do so. If this test is applied, it appears to me that there was no breach of duty on the part of the appellants. The deceased was not invited or entitled to go to the quayside of the West Float; he had no business there, and it was nearly fifty yards away from his proper route to and from his ship. Nor could the dock company be expected to foresee that he would wander so far from his way, even in a fog, and to provide for his safety in so doing. If it be the fact that he lost all sense of direction in the fog and, missing the rails and lamps which would have guided him to the bridge, and not seeing any of the obstacles lying about the area of ground or even the stanchions on each side of the space from which the chain had been removed, walked straight through this narrow opening into the dock, this was an extraordinary mischance which no one could be expected to foretell or provide for; and I do not think that the failure of the company to do so argues any want of reason-

able care on their part. It is said that whatever may be the case in other dockyards, where the docks are generally left unfenced, the fact that in this case the area over which the deceased had to pass was in fact protected by chains, makes a difference, and, accordingly, that he was entitled to expect that the chains would remain up, and the "trap" cases are referred to. In my opinion, the principle of those decisions has no application to this case. When a person is invited or licensed to pass by a particular way, and the landowner without warning to him does something which makes it dangerous for him to use that way, liability may no doubt be incurred. But this is because the use of the permitted way itself is subjected to an unknown and unexpected danger; and where, as here, the danger zone is far removed from the permitted way, the same considerations do not apply. To say that a landowner who permits an element of danger to exist in a place to which he neither invites nor expects a person to go thereby sets a trap for that person, would appear to me to be a strange use of language. In *Hardcastle* v. *South Yorkshire Railway and River Dun Co.* (5), where a man had wandered from a highway and had fallen into a reservoir on the same land, the court held the owner of the land not liable; and POLLOCK, C.B., made the following observations (4 H. & N. at p. 74):

> "When an excavation is made adjoining to a public way, so that a person walking upon it might, by making a false step, or being affected with sudden giddiness, or, in the case of a horse or carriage way, might, by the sudden starting of a horse, be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences; but when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to us to be different. We do not see where the liability is to stop. A man getting off a road on a dark night and losing his way may wander to any extent, and if the question be for the jury no one would tell whether he was liable for the consequences of his act upon his own land or not."

It is true that these observations had reference to a public way, but the reasoning appears to me to apply equally to a way which a person is invited or permitted to use.

The result is that, in my opinion, no negligence on the part of the company was proved; and if so, the other questions do not arise. But I think it right to add that, even if negligence by the company be assumed, I do not consider it proved that their negligence was the cause of the accident. No doubt it is a probable surmise that the deceased man lost his way in the fog, and, unhappily missing all the signs which would have shown him his mistake, and either not knowing of or not remembering the gap in the chains, walked straight through it into the dock. The court, however, does not deal with surmises but with proofs; and the known facts are equally consistent with the view that, knowing that he had left the line of rails and lamps and had got on soft ground, he failed to take reasonable pains to regain a place of safety and so lost his life by his own imprudence, or with the view that, knowing of the gap in the chains (which he must have seen twice a day at least for several days before the accident), he purposely passed through it intending to speak to someone on the ferry boats and stumbled into the dock. Of course, neither of these hypotheses is proved, but neither is excluded by the evidence; and it is for the plaintiff, who alleges that loss has been caused by the defendant's fault, to establish that case beyond reasonable doubt.

Upon this point *Wakelin* v. *London and South Western Rail. Co.* (6) is directly in point. In that case a widow sued a railway company under the Fatal Accidents Act for damages for negligence causing her husband's death; and it was proved that the dead body of the man was found on the railway line near a level crossing not guarded by a watchman, and that the man had been killed at night by a train which carried the usual head lights, but did not whistle or otherwise give warning of its approach. On these facts this House, affirming the Court of Appeal, held

that, assuming (but without deciding) that there was negligence on the part of the company, there was no evidence to connect the negligence with the accident, and accordingly that there was no evidence to go to the jury. LORD HALSBURY, L.C., stated the principle as follows: A

> "It is incumbent upon the plaintiff in this case to establish by proof that her husband's death has been caused by some negligence of the defendants, some negligent act, or some negligent omission, to which the injury complained of in this case, the death of the husband, is attributable. That is the fact to be proved. If that fact is not proved the plaintiff fails, and if in the absence of direct proof the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendants, the plaintiff fails, for the very simple reason that the plaintiff is bound to establish the affirmative of the proposition: Ei qui affirmat non ei qui negat incumbit probatio." B C

Similar expressions are to be found in the judgments of the Court of Appeal in *Norman* v. *Great Western Rail. Co.* (7), and I think that they apply with great force to the present case. It is impossible not to feel compassion for the respondent in her loss; but she has undertaken to prove that the appellants are responsible for it, and, in my opinion, she has failed to do so. This being so, I am compelled to hold that this appeal should succeed, and I move your Lordships that the order of the Court of Appeal be set aside and the order of BRANSON, J., restored; but, as the respondent has been a great sufferer, and in view of the differences of opinion in the Court of Appeal and (as I understand) in this House, I would propose to your Lordships that there should be no costs of the proceedings in the Court of Appeal or in this House. D E

LORD SHAW.—I am so satisfied with the judgments pronounced in this case by BANKES and WARRINGTON, L.JJ., that I could be well content to adopt these opinions without presuming to add anything thereto. In view, however, of the difference of view in your Lordships' House, I may be permitted as briefly as possible to put the case in my own way. F

The action is founded upon negligence, and negligence must be proved. It is raised by the widow of a boilermaker, who met his death in the circumstances described, and whose position on the dockside was that of an invitee. He was in the service of engineering contractors on board the steamship *City of Genoa*, then lying in the East Float of Birkenhead, one of the appellants' docks. He had been for some weeks engaged on that job, and he had the right, of course, to reach it from Birkenhead, proceeding over a promontory in the form of a parallelogram which was surrounded on three sides by water. The accident occurred during his working hours, which lasted till 7.30 in the evening. He left the ship to proceed to a latrine, the workmen not being permitted to use the latrine accommodation on board. While so proceeding, he went over the dockside and was drowned. He entered a shed and made his exit from the door of that for five or six yards by the aid of lamplight. His correct course was to have sheered to the left at an angle of about seventy-five degrees. The night, however, was very dark and there was a fog so thick as to prevent one even seeing one's own hand. Such lamps as there were shed only light to a distance of five or six yards; the rest of the parallelogram was shrouded in fog. G H

To approach the question of negligence it is necessary to consider what was the duty of the defendants, the dock board, with regard to that piece of ground. That they had a duty, and were properly conscious of that, is, I think, beyond question. The three sides, in so far as these abutted on the water, were protected by posts with chains slung between them. As the square was used in part as a thoroughfare both for pedestrian and vehicular traffic, this precaution taken by the board is not to be wondered at. I should not be prepared, however, without further argument to affirm that the board were bound to fence that square. The open face of docks in such neighbourhoods is familiar to all inhabitants. It may, of course, be, that I

A a square of this description, having to be crossed and re-crossed by men working on ships under repair in all weathers and by day and night, involved as a necessity that precaution which the board properly took. But, as I say, it is not necessary to pronounce in this case upon that in the abstract. The case that comes before the House is a different and very distinct case, namely, that of a square open on three sides to a water danger and fenced therefrom as a matter of general pre-
B caution, but negligently left unfenced in circumstances of extreme and exceptional peril. In my opinion, the leaving of a part of the fencing open was in itself the creation of a danger of a very serious kind. In a dark and foggy night a passenger across the square reaching the chain is by that guided to the point of safety when he can cross the bridge. To remove the guidance and to leave a gap through which the passenger may step on to and over the dockside into deep water and be drowned
C is a negligent omission for which the dock board is responsible. A satisfactory feature of this case is that the appellants seem thoroughly to have realised that fact themselves. Their prescriptions by regulation appear in these proceedings. On the subject of keeping the guard chains in order the dock board state in answer to interrogatories:

D "There are no special precautions taken by the board's officials in foggy weather beyond seeing, as far as is reasonably possible, that the guard chains are all in position."

In response to a question whether there are any regulations or instructions issued by the appellants in reference to the protection of the quay in foggy weather, the answer is:

E "The guard chains and stanchions at the north-east corner of the West Float on Dec. 9 last were under the control of the pier master in charge. There are no written regulations defining whose duty it is to remove and replace guard chains. If the chains are removed by anyone it is his duty to replace them, or to see that they are replaced. Further, the officials of the Harbour Master's Department and the police have instructions to see, as far as prac-
F ticable, that the guard chains are in position and to replace any which happen to be out of position."

Then there are certain entries which come near to the circumstances of the present case. A circular from the harbour master, dated Jan. 26, 1912, is printed. It is as follows:

G "Guard chains.—The board having recently settled a claim for personal injuries, etc., caused through the breaking of a guard chain upon which a man was sitting and which had been tied up temporarily with a piece of cord, I have to direct that strict attention be given to the following instructions on the subject of guard chains generally: (1) The working-dockman must examine daily all guard chains and afterwards record in the shed book particulars of any guard chains broken or otherwise out of order. (2) In the event of guard
H chains or hooks being found broken, immediately send word to the foreman scuttler, who will have repairs effected without delay, and report the matter to me in due course."

Still further, and almost directly bearing upon the issue of the present appeal, there is a copy of the head constable's order:

I "It seems that there is some misunderstanding about the duty of the police in the matter of the guard chains at the docks. Although it is not their duty to go round their beats for the purpose of putting them up, it certainly is their duty to put up any chain which they may find down without necessity when there is the least chance that its being left down is a source of danger."

It appears to me to be demonstrated by these citations that the appellants, having placed chains in position, were alive to the peril of not keeping them in position, and were anxious to recognise as a matter of duty the replacement of the chains whenever a particular purpose of removal was ended and to a report of accurate

replacement being made and of all being in order. I do not, accordingly, have any difficulty in finding that a violation of these orders involves negligence, nor is there any doubt in the present case as to such a violation having occurred. One of the chains was removed, it was wrapped round the adjoining post, and knotted; the gap thus left was left for days, the knotted chain beginning to rust. All that is clearly proved; the orders and precautions on the regulations and orders had been violated. I think this clearly points to negligence. I think that ATKIN, L.J., who dissented, was right when he said:

> "Whether or no it is their duty to have some means of protection, I think that their legal duty is altered when once they do take upon themselves the position of protecting the approach to the water, because under those circumstances they do allow a person who knows the position to rely upon that protection being there in the circumstances in which it ought usually to be there."

In my opinion, these propositions are sound in law.

This induces me to refer at this stage to a notable circumstance in connection with the judgments of the court below. BRANSON, J., and, I also gather, ATKIN, L.J., are not satisfied that Procter walked through the gap referred to and so met his death. I do not gather that there is any difference of opinion among your Lordships on this point. His cap, and afterwards his body, were found in the water immediately opposite the gap. There is no suggestion that he got to the dockside by any other access or that there was any current in the water which would have made his body drift to the point where it was found. Of course, it follows, however, that if a judge holds it not to be sufficiently proved that the deceased went through the gap, the rest of the case suggesting negligence is mere surplusage. I incline to the opinion that if the learned judges, to whom I have referred, had been satisfied, as your Lordships are, they might not have come to the opinion which they reached, and in any event it is pretty clear that BRANSON, J., would not, as he did, have stopped the case at the end of the plaintiff's evidence. An outstanding feature of the case is the precautions demanded even under the rules of the dock for seeing that the chains were up, but if the learned judge was not satisfied that the deceased passed where a chain was down, then from that point of view he need have gone no further. The whole of this case, unfortunately, is thus subject to that judicial mischance. Had the case proceeded to its natural termination and the dock authorities had been asked to explain the rule, the necessity for it, the history of the absence of chains when they should have been there, and so on, no doubt the position of this gap which turned it into a trap might have been most completely verified. All that we have is that the dock board was scrupulous as to having the chains always up because of one previous accident which is put on record. How many more accidents there were caused by the condition of the chains, we do not know, or whether there were any. But the whole of that inquiry has been excluded mainly, though not entirely, because the judge who tried the case saw no necessary connection between the gap and the death. In these circumstances I incline to the opinion that it would be a complete failure of the law to reach a remedy for a wrong or to ascertain whether a wrong was committed to keep back the case from full investigation.

A legal problem of complexity, however, remains, namely, that, assuming that Procter, the deceased man, was an invitee, did the duty of the board extend to that particular man? Although keeping on to the square he had proceeded in the fog and darkness off his route. When he did so, it is urged, he lost the status of a person to whom the dock board owed a duty and his rights were not those of an invitee, but at the most that of a bare licensee, if so much. The refinements of distinctions between these categories are notorious and one general rule as laid down by ESHER, M.R., may be said to apply to both. In *Thatcher* v. *Great Western Rail. Co.* (8), LORD ESHER puts it thus:

A "If a person was on the premises of another with that other's consent, the latter had a duty to take reasonable care not to act in such a way as to cause personal injury to the former."

That would apply to both categories. In *Holmes* v. *North Eastern Rail. Co.* (9), the discrimination between the position of a licensee from a person present on certain premises to whom the occupant has a duty to take care, is thus expressed B by CLEASBY, B.:

"as soon as you introduce the element of business, which has its exigencies and its necessities, all idea of mere voluntariness vanishes."

And so in *Smith* v. *London and St. Katharine Docks Co.* (10), the company was held liable, they being the owners of the docks, who provided access to vessels by C means of gangways over. To quote BOVILL, C.J.:

"The gangway being placed there as the means of access to all persons having business on board the ship, it amounts to an invitation to persons having business on board the ship to go upon it."

In my opinion (i) the appellants were bound to provide a reasonably safe access D and exit across the square of land in question for workmen employed at the docks; (ii) the workmen so employed were entitled to consider the square fenced by posts and swing chains and may be taken to have known or properly assumed that this was so; and (iii) the removal of the chains constituted a trap into which, unfortunately, the deceased was led and so met his death.

It is now necessary to see exactly what the deceased did. Having emerged from E the shed adjoining the ship where he was working, he advanced a few paces by the light of a lamp and then sheered to the left. All this was right, but instead of sheering at an angle of 75 degrees and walking on admitting no impediment and being safe, he sheered only at an angle of 45 degrees and walked on and met no impediment and was drowned. BRANSON, J., thinks that:

"Now that shows that all the surroundings and the approaches to this place F where the chain was down were, one might say, almost completely guarded by the obstructions which were put there. The opening which was left was a small one, and, so far as the evidence goes, there is no evidence to show that those persons who had the authority of the board on the spot had any reason to expect that anybody would come along blundering in among those dumps of material in such a way as to cause the chains being down to constitute any G risk that anybody would come to mischief."

This in no way represents the true state of matters with regard to the unchained gap. It appears clearly from the evidence, to use the language employed by the witness Forsyth: "You could walk straight from Hall Shed to where the body was found without meeting any incumbrance whatever." Had the chain been on he would not have been drowned; he would have been guided to safety. He was not H guilty of contributory negligence; that is not suggested. The ambit, accordingly, in my opinion, of the responsibility in such cases extends on the part of the dock commission to all invitees legitimately on the ground: "as soon as you introduce the element of business which has all its exigencies and necessities." The route from the ship, all on dock ground, in this case seems to be entirely the opposite of that put by BOWEN, L.J., in *Thomas* v. *Quartermaine* (11) (18 Q.B.D. at p. 697): I

"where the danger is one incident to a perfectly lawful use of his own premises, neither contrary to statute nor common law, where the danger is visible and the risk appreciated, and where the injured person, knowing and appreciating both risk and danger, voluntarily encounters them, there is, in the absence of further acts of omission or commission, no evidence of negligence on the part of the occupier at all."

The circumstances of the present case are that the danger was not visible; that the risk was not appreciated; that the injured person did not know or appreciate

either and did not voluntarily encounter either; that there was no absence of act of omission, but that on the contrary it was a further act of omission, the permitting the chain to remain removed, that constituted the negligence and caused the death.

I cannot refrain, in connection with the general doctrine of liability involved in such a case as the present, from showing how far the law has gone, even in regard to bare licensees. In *Gallagher* v. *Humphrey* (12), COCKBURN, C.J., says:

> "A person who merely gives permission to pass and re-pass along his close is not bound to do more than allow the enjoyment of such permissive right under the circumstances in which the way exists; he is not bound, for instance, if the way passes along the side of a dangerous ditch or along the edge of a precipice, to fence off the ditch or precipice. The grantee must use the permission as the thing exists. It is a different question, however, where negligence on the part of the person granting the permission is superadded. It cannot be that, having granted permission to use a way subject to existing dangers, he is to be allowed to do any further act to endanger the safety of the person using the way. The plaintiff took the permission to use the way subject to a certain amount of risk and danger; but the case assumes a different aspect when the negligence of the defendant—for the negligence of his servants is his—is added to that risk and danger."

The latter portion of this passage, which may be held as applying not only to invitees but even to licensees, seems clearly a point to liability in such a case as the present. This authority, coupled with *Indermaur* v. *Dames* (3), and numerous other authorities (their number in this branch of the law is legion) appear to me amply to confirm the judgment of the majority learned judges of the Court of Appeal. I cannot doubt that any other decision will be accompanied with practical danger in results, and I highly deprecate what, in my humble opinion, would be the mischance to which I have referred, in which the learned judge, having stopped the case and given a decision, had in an important element in deciding on such a course, taken a mistaken view of one of the fundamental facts of the case. In my view that mischance should be rectified, and the case should be fully tried.

LORD SUMNER.—It is common ground that the deceased, while at work on the *City of Genoa*, was an "invitee" of the dock board, for, as undertakers, the board desires and is bound to admit ships to the docks, and that involves the admission also of persons whom the shipowners or their contractors engage to work upon the ships. It is also common ground that the expression "while at work" involves a certain margin and includes going to and coming from the ship for the purposes of the employment, and also going to and coming from the latrines, provided by the board for such persons. This is common sense and, not having been in dispute, calls for no further comment. It may be, however, that the use of the public highway, which crosses the dock property, is no part of this invitation, but that the workman, even when using it for the purposes above mentioned, does so merely as one of the public. The point need not be decided. I think the very idea of an invitation to come upon the board's premises, considering their character and extent, connotes some local limit within them. A free range over the whole estate is not given to every invited workman. The respondent, recognising this, suggested two forms of limitation—the first, that the line of the stanchions and chains formed that limit; the second, that the limit varied according as the day was clear or foggy. As to the first, there is no evidence that the stanchions and chains were put up with any such purpose and, as a fact, I am sure they were not. As to the second, it amounts to this, that a man, who can see where he is going, enjoys the rights of an invitee within modest boundaries; but a man, who cannot, carries them with him as far as the limits of his actual error. Both suggestions are ingenious, but they are suggestions ad hoc. There is no decision to support them. The observations of NEVILLE, J., in *Carshalton U.D.C.* v. *Burrage* (13), are the nearest that I can find, but they are directed to s. 30 of the Public Health

Acts Amendment Act, 1907, while, in general, what is said in the *Hardcastle Case* (5) (4 H. & N. at p. 74) is much to the contrary.

The leading distinction between an invitee and a licensee is that, in the case of the former, invitor and invitee have a common interest, while, in the latter, licensor and licensee have none. The common interest here is that ships in the docks should, when necessary, be able to employ boilermakers on board of them. In the other case, the licensee has an individual interest in being allowed to pass, while the licensor, the leave being gratuitous, has no interest in the matter at all, so long as the licensee does not get into trouble or into mischief. I cannot see what common interest between the board and the deceased is involved in his expatiating at will over the open ground between the East and West Floats. He was indeed at liberty to cross it to Gee's Dining Room, but we know that he was not going there and never did go there. The common interest involved in his being able to do his work in comfort, extended to his visiting the latrine, but he was not visiting the latrine on this occasion, though he was probably trying to do so. He was actually going where he had no business to go at the time of the accident, though his mistake was alike innocent and accidental. How can a workman extend the board's liabilities, indicated by this term "invitation," by making a mistake of his own and getting lost in a fog? What legal reason can there be for the board's inviting him to go somewhere in a fog where he does not want to go at all, and would certainly not be invited to go in clear weather, and where, moreover, the board has no interest or desire to invite him at any time? There is none: the suggestion is a mere impulse of compassion. There is no question here of nuisance to a highway or of a specific obligation, general or particular, to erect and maintain fences. The place where the deceased's body was found was in no sense adjoining the highway. No statutory obligation to erect or maintain the stanchions and chains was referred to, and they may have been erected for many other purposes than that of preventing people from falling into the water in the dark: see the elaborate survey of the cases by FARWELL, L.J., in *Latham* v. *Richard Johnson & Nephew, Ltd.* (14).

If, then, the deceased's position was at best that of a licensee, what duty did the board owe to him? What is charged against the board is a pure act of omission, namely, an omission to put up the chain. What the plaintiff must show is a duty towards her late husband to put it up or keep it up and an injury to him caused by the omission. To say that the board provided chains and made regulations, under which this chain ought to have been put up, and omitted to have it replaced, in circumstances involving danger to the deceased, constitutes no cause of action by English law, unless a duty to the deceased can be made out upon grounds of law, and not a mere failure to do what would have made things safer if done. A licensee takes premises, which he is merely permitted to enter, just as he finds them. The one exception to this is that, as it is put shortly, the occupier must not lay a trap for him or expose him to danger not obvious not to be expected there in the circumstances. If the danger is obvious, the licensee must look out for himself: if it is one to be expected, he must expect it and take his own precautions; if he will walk blindfold, he walks at his peril, even though he is blindfolded by the action of the elements. As usual in cases of duties of care, the reasonable man is the standard on both sides. The licensor must act with reasonable diligence to prevent his premises from misleading or entrapping a licensee, who on his side uses reasonable judgment and conduct in circumstances that can be reasonably foreseen. The licensee is to take reasonable care of himself and cannot call a thing a trap, the existence of which a reasonable man would have expected or suspected, so as to guard himself from falling into it.

What were the facts? The deceased was a sober, experienced workman in the prime of life, not shown to have been unobservant or lacking in self-possession. He was an inhabitant of Birkenhead constantly employed within the area of the docks, and he had actually been in regular employment on the *City of Genoa* for the previous fortnight. On leaving the shed to go, as he said, to the latrine, he

found himself in a dense fog after dark. A fog I take to be the typical case of a fortuitous but expected hazard, in which everyone must, and knows that he must, walk warily. Especially is this so when, as the man knew, the water of the dock lay within from 100 ft. to 300 ft. on three sides of him. As his fellow-workmen say, one must then be very careful; as they say also, the way to the bridge, for which he had to make, could be found by noting the run of the railway lines underfoot, the character of the paving, and the sound made by footsteps upon it. Within 30 ft. or 40 ft. of the shed door the deceased must have crossed eight, if not twelve rails, but, instead of following the line of them, he crossed the special paving of the railroad tracks and the marginal paving beyond and got on to rough macadamised ground. He must also have got away from the lamps, which, if he had followed the rails, would at short intervals have become visible. It seems to me that a reasonable man, so circumstanced, could not have failed to know, before he had got halfway to the West Float, that he was lost in the near neighbourhood of deep water.

In these circumstances what did it behove him to do as a reasonable man, and by what reasonable course on his part is the board entitled to have the measure of its duty fixed? This is not a question of charging the deceased personally with contributory negligence. The question is: What was to be expected in such circumstances by the deceased, on the one hand, and by the dock board, on the other. It behoved the deceased at once to take stock of his position. I say nothing of the possibility of calling out to find out the direction of persons on the roadway or of trying back to strike the rails, which he had so recently left. I think that he should have said to himself that the quays, which were steep-to and had deep water against them, were a pressing danger to a man who could not see where they were. True there were the posts and chains, but he must have known, as his mates knew, that they were often let down, and, indeed, are made detachable for that very purpose, and that, having been let down by stevedores and others not in the board's employment, as well as, though less frequently, by the board's own servants, it is in the ordinary course of human nature that they should often be left as they lie and not be replaced until one of the board's servants finds time to put them up again. As WILLES, J., observes, a trap means something like a fraud. Now, though the board may have represented that when the chains were taken down they would be replaced as soon as possible, it never represented by word or deed that the chains would not be down at any time or at all, or that they actually were in position at the time in question. It is not to the point to say that the deceased had a right under the regulations (if, indeed, he knew anything about them) to contend that the chains ought to be replaced at once, for a licensee cannot be heard to say that an actual danger, of which he knows, is a danger that is concealed from him because it arises from somebody's neglect of his duty. Omnia præsumuntur rite esse acta has no application here. Neither is this a case of a person who has an absolute right of user seeking his remedy for the infringement of it by another who has neglected to observe his duty not to infringe. If the gap may probably be there and the wanderer knows it, the knowledge is none the less knowledge, because there ought not to be any gap at all. On the other hand, the possibility that a man could fortuitously make his way through such an entanglement of obstructions without being brought up by the fullest warning, seems to me so remote a contingency that I much doubt if any practical man of whatever class would have expected the board's servants to be on their guard against it if the accident which resulted in this case had not been a fatal one.

Concealed dangers, as the term shows, are relative to the knowledge and the capacity of the person who suffers by them, and in this matter he must use his knowledge and his good sense reasonably and must act accordingly: see per LORD ATKINSON in *Cooke* v. *Midland and Great Western Railway of Ireland* (15) ([1909] A.C. at p. 238). What must the deceased be taken to have known? He was no child. He knew that the fog prevented him from using the sense of sight for his protection. From his senses of feeling and of hearing he had the means of knowing

that he had got beyond the road to the bridge. He knew that the chains were his only protection from the water, towards which he might quite probably be going, and he knew that they were sometimes properly put down and sometimes were left down, though improperly. If he did not know what work was going on at the quay and the West Float, he knew that chains might be down in connection with any ships that might be lying there: if he did, he knew that they might be down in connection with the construction work that was actually going on, as indeed proved to be the case. If, knowing the risk, he elected to go on and chance it, volenti non fit injuria. He might have elected to try back. It is said that the effect of fog is so bewildering that one loses all sense of direction. I rather think that varies a good deal with the man, the fog, and the nature of the ground, but let it be so; he might still have advanced step by step, feeling the ground before him with his foot before committing himself beyond the power of recall. The ground near the line of chains was littered with materials of various kinds, and, if we are to infer what is probable from evidence of what is certain, we ought to infer that the deceased more probably struck upon some of these obstructions than that he somehow cleared them all, and, if he did so, he ought reasonably to have inferred either that he was getting near the line of chains, supposing that he knew what work was going on, or, supposing that he did not, then that he had got on to ground in a condition wholly unusual and strange, and had better sit down and wait or shout for direction than go striding on, confident that, wherever he was and wherever he went, there would be a chain in position to keep him safe. Evidence was given to show that this chain had been down for some days. This rather goes to increase the probability that a prudent workman would not rely on a chain always remaining in position or always being promptly replaced, but, for the rest, I think it is irrelevant in the circumstances of this case. If the board is liable, it is liable because the chain was not up at the time when the deceased approached the edge of the quay. The board is none the more liable to his widow because the chain was not up when he was not there, and none the more, whether the omission to put it up was long or short.

My conclusion is that there was no trap, because in the deceased's place a reasonable man would have known that, such as it was, the danger was one to be reckoned with. That the odds were against the deceased's hitting off the precise gap in the line of chains no more helps the respondent than it does the appellants. The danger was one of which a reasonable man had expectation or notice sufficient to have enabled him to avoid any evil consequences arising from it. I do not think it necessary to go through the cases, for the principle involved is familiar and only the application is contentious, but I think LORD SELBORNE's reasoning in *Walker's Case* (4) strongly supports the above conclusions. I would like to add that, if I have not dwelt on the melancholy circumstances of this accident, it is not that I am not sincerely sorry for the widow or that I mean in any way to blame the deceased, but merely that, in a question of law, which is not without its difficulties, I only find myself embarrassed by considerations distressing in themselves, which every lawyer knows to be logically irrelevant. BRANSON, J., was not satisfied that the deceased met his death because the chain was down. We need not consider whether this conclusion should be left undisturbed. I agree that the question is open to review, nor should I go further than to say that, if the learned trial judge declared that the plaintiff's evidence did not satisfy him of a conclusion essential to be proved by the plaintiff, I should give earnest consideration to his doubt before adopting an opposite conclusion. I think, however, that in justice to him it is worth while to recall how little we actually know in this case, as distinguished from what we may conjecture. The deceased told two men that he was going to the latrine; why he did so I cannot imagine, since it was none of their business. He was lost in the fog, and was not seen alive again. Whether he had any further purpose; whether he relieved himself in the darkness on finding that he had missed his way, and then went on for some unknown, though not impossible, reason of his own; whether he passed through the gap unconscious of

being in the line of the chains at all, or was near enough to either stanchion to know where he had got to, but proceeded, thinking that he had now got his bearings again; whether he fell into the water in trying to follow the line of stone paving along the quay edge, or because he had no idea how near the water was; whether he ever caught sight of either of the lamps, which would lie near his route, if he went straight from the shed door to the quay—these and many other such things are beyond our knowledge. I doubt if one view of any one of them is really more probable than another. It is not a case of the accident speaking for itself. The chains are about 12 ft. from the water's edge. The gap in the chains and fall into the water, at least 12 ft.—four or five strides—beyond it, have to be casually connected by just inference from the plaintiff's evidence, and, for my part, I am not surprised that the learned judge was not satisfied that this connection was made out. I should allow the appeal.

LORD BUCKMASTER.—I am unable to agree with the view expressed by BRANSON, J., and by ATKIN, L.J., that it is a pure conjecture as to the way in which Albert Procter met his death on Dec. 9, 1920. I think the circumstances established by the evidence are sufficient to warrant the reasonable inference that the disaster arose by his walking across the quay for a perfectly legitimate purpose, missing his way in the fog, and passing through the gap where the chains were down that fenced the quay from the water. Upon this view the Court of Appeal are unanimous that liability would be established, and the question is whether the appellants have succeeded in showing that they were wrong. I do not think they have. I refer, for the purpose of this opinion, to the statement made by LORD SELBORNE in *Walker* v. *Midland Rail. Co.* (4). It is the nearest case in point, and the guiding principle laid down must be accepted. In that case, as in this, the accident occurred to a man lawfully upon the premises by invitation. In that case, a guest at an hotel in search of a lavatory at night entered a room and fell down the well of a service lift. LORD SELBORNE stated the duty of the hotel proprietors in these words:

> "The duty must, I think, be limited to those places in to which guests may reasonably be supposed to be likely to go, in the belief, reasonably entertained, that they are entitled or invited to do so."

In the present instance there was a dense fog. The distance from the shed to the place where Procter fell into the water is in a straight line about 85 yards, and away from the place to which he was going. The difficulty that this case presents is in determining what are the limits of the area where a man might reasonably be expected to be in such a spot as this quay during a dense fog. It is impossible to reconstruct in the light all that may happen in the darkness. I recognise that Procter must have crossed the rails and that if these were once crossed on the western side he was off his track, but in a fog every sense is obscured, and I find it difficult to believe that a man must necessarily have known that he crossed the rails at the point opposite the shed, or, even if he did, that it was easy for him to get back, or that it was unreasonable to expect, in the circumstances, that he might wander where he did. In these cases it must always be a matter of degree. Had the quay been narrower so that the water was nearer to the railway, there would, I apprehend, be little doubt of the liability of the defendants. The actual distance does not seem to me so great as to affect their liability. The matter is one of considerable difficulty, but I should have answered the question put by LORD SELBORNE in favour of the respondent, and I am fortified in this opinion by the knowledge that that also is the view of the members of the Court of Appeal.

LORD CARSON.—I am of opinion that this appeal should be allowed. The principle of law applicable is clearly laid down by LORD SELBORNE in *Walker* v. *Midland Rail. Co.* (4) already referred to.

> "This is not a question of any act done by the respondents—it is one of alleged neglect or default—wrongful neglect or default there could not be unless a duty

A which was not performed was previously owing by the respondents towards the plaintiff's husband or towards persons in the same situation in respect of the place when the accident happened."

In the present case I can find no such duty. It was not contended that the defendants were under any obligation to erect or maintain fences round the dock, but it is argued that having erected the stanchions and the chains the absence of the B chain in this particular place constituted an unusual danger and was quoad the deceased something in the nature of a trap. In other words, as I understand the argument, it amounts to this, that the deceased, being employed on a ship lying in the East Float at Birkenhead, finding himself involved in a fog and losing his way, was reasonably entitled to assume, and did assume, that the chains everywhere attached to the stanchions would be in their proper places, and that he C could, therefore, proceed to wander over the locus in quo with the expectation of finding such chains as a protection from falling into the water. As regards the appellants, on the other hand, the question I think is: Ought they reasonably to have anticipated that a man or men working in the East Dock, as the deceased was, might, if a fog arose, take the risk of wandering over the promontory under a reasonable belief that he or they could rely upon the chains affording him or them D protection? I so entirely agree with LORD SUMNER in his analysis of the facts so far as we know them, and of the tests to be applied in forming a judgment on the question of reasonableness, that I think it is unnecessary for me to attempt to recapitulate them. In the words of the noble Lord:

"My conclusion is that there was no trap because in the deceased's place a E reasonable man would have known that, such as it was, the danger was one to be reckoned with."

I should like also to express my concurrence with the views expressed by ATKIN, L.J., on the finding of BRANSON, J., that he was not satisfied that the deceased met his death because the chain was down. I do not doubt that this House has the right to find the fact proved which the learned judge thought was not proved, F but in a case such as this, where so little is proved and so much is left to conjecture, I cannot but think that the conclusion of the judge was justified and reasonable, and I should certainly be very slow to reverse it unless I had a very clear conviction in my own mind, which I have not, that the fact was satisfactorily proved.

Appeal allowed.

G Solicitors: *Rawle, Johnstone & Co.*, for *W. C. Thorne*, Liverpool; *Helder, Roberts, Giles & Co.*, for *John A. Behn*, Liverpool.

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

A

R. *v.* ELECTRICITY COMMISSIONERS. Ex parte LONDON ELECTRICITY JOINT COMMITTEE CO.

[COURT OF APPEAL (Bankes, Atkin and Younger, L.JJ.), July 9, 10, 11, 12, 27, 1923] B

[Reported [1924] 1 K.B. 171; 93 L.J.K.B. 390; 130 L.T. 164; 88 J.P. 13; 39 T.L.R. 715; 68 Sol. Jo. 188; 21 L.G.R. 719]

Prohibition—Certiorari—Statutory body bound to act judicially—Decision subject to approval by Parliament—Grant of prohibition when clear that excess of jurisdiction will result. C

Prohibition and certiorari will lie to prevent a body which cannot be described as a court in any ordinary sense acting in excess of its legal jurisdiction if it has legal authority to determine questions affecting the rights of subjects and in so doing must act judicially. Prohibition will lie as soon as it is established that such a body is exceeding its jurisdiction by entertaining matters which would result in its final decision being subject to be brought up and quashed D on certiorari. A proceeding is capable of being a judicial proceeding subject to prohibition or certiorari although the final decision reached therein is embodied in an order which cannot come into operation until it has been approved, with or without modification, by each House of Parliament. In such circumstances the grant of prohibition or certiorari to prevent excess of jurisdiction by the body making the order is not a usurpation of the functions of Parliament. E

Notes. Electricity undertakings were nationalised by the Electricity Act, 1947, the provisions of which superseded those of the Electricity (Supply) Act, 1919. For these Acts, see 8 HALSBURY'S STATUTES (2nd Edn.) 891, 1001.

The prerogative writs of prohibition and certiorari were abolished by the Administration of Justice (Miscellaneous Provisions) Act, 1938, orders of prohibition and certiorari being substituted for the writs. F

Considered: *A.-G.* v. *London and Home Counties Joint Electricity Authority*, [1920] 1 Ch. 513. Applied: *R.* v. *Church Assembly Legislative Committee and Church Assembly, Ex parte Haynes Smith*, [1927] All E.R.Rep. 696; *R.* v. *Minister of Health, Ex parte Davis*, [1929] 1 K.B. 619; *R.* v. *North Worcestershire Assessment Committee, Ex parte Hadley*, [1929] 2 K.B. 397. Considered: *R.* v. *Hendon R.D.C., Ex parte Chorley*, [1933] All E.R.Rep. 20; *R.* v. *St. Edmundsbury and Ipswich Diocese Chancellor, Ex parte White*, [1947] 2 All E.R. 170; *R.* v. *Manchester Legal Aid Committee, Ex parte R. A. Brand & Co.*, [1952] 1 All E.R. 480; *R.* v. *Metropolitan Police Comr., Ex parte Parker*, [1953] 2 All E.R. 717. Referred: *R.* v. *Electricity Comrs., Ex parte Yorkshire Electric Power Co.* (1927), 91 J.P. 191; *Shell Co. of Australia, Ltd.* v. *Federal Comr. of Taxation*, [1930] All E.R.Rep. 671; *R.* v. *L.C.C., Ex parte Entertainments Protection Association, Ltd.*, [1931] 2 K.B. 215; *R.* v. *Webster, Ex parte Marshall* (1931), 95 J.P. 226; *R.* v. *Milk Marketing Board, Ex parte North* (1934), 50 T.L.R. 559; *Errington* v. *Minister of Health*, [1934] All E.R.Rep. 154; *Estate & Trust Agencies (1927), Ltd.* v. *Singapore Improvement Trust*, [1937] 3 All E.R. 324; *R.* v. *Boycott, Ex parte Keasley*, [1939] 2 All E.R. 626; *Racecourse Betting Control Board* v. *Secretary for Air*, [1944] 1 All E.R. 60; *Nakkuda Ali* v. *Jayaratne*, [1951] A.C. 66; *R.* v. *Northumberland Compensation Appeal Tribunal, Ex parte Shaw*, [1952] 1 All E.R. 122; *R.* v. *Disputes Committee of the National Joint Council for the Craft of Dental Technicians, Ex parte Neate*, *R.* v. *Same*, [1953] 1 All E.R. 327; *Ex parte Fry*, [1954] 2 All E.R. 118; *Rice* v. *Stamp Duties Comr.*, [1954] A.C. 216. G H I

As to prohibition and certiorari, see 11 HALSBURY'S LAWS (3rd Edn.) 52–84, 113–145; and for cases see 16 DIGEST 372 et seq.

Cases referred to:

(1) *Byerley* v. *Windus* (1826), 5 B. & C. 1; 7 Dow. & Ry.K.B. 564; 4 L.J.O.S.K.B. 102; 108 E.R. 1; 16 Digest 384, *2221.*

(2) *Darby* v. *Cosens* (1787), 1 Term. Rep. 552; 99 E.R. 1247; 16 Digest 384, *2220.*

(3) *French* v. *Trask* (1808), 10 East. 348; 103 E.R. 807; 16 Digest 386, *2254.*

(4) *Patent Agents Institute* v. *Lockwood*, [1894] A.C. 347; 63 L.J.P.C. 74; 71 L.T. 205; 10 T.L.R. 527; 6 R. 219, H.L.; 42 Digest 751, *1755.*

(5) *Re Clifford and O'Sullivan*, [1921] 2 A.C. 570; 90 L.J.P.C. 244; 126 L.T. 97; 37 T.L.R. 988; 65 Sol. Jo. 792; 27 Cox, C.C. 120, H.L.; 16 Digest 388, *2287.*

(6) *R.* v. *Glamorganshire* (*Inhabitants*) (1700), 12 Mod. Rep. 403; 1 Ld. Raym. 580; sub nom. *Cardiffe Bridge Case*, 1 Salk. 146; 91 E.R. 135; sub nom. *R.* v. ———, 1 Com. 86; 16 Digest 401, *2458.*

(7) *Re Ystradgunlais Tithe Commutation* (1844), 8 Q.B. 32; 13 L.J.Q.B. 287; 115 E.R. 785; 7 Digest 267, *20.*

(8) *Re Appledore Tithe Commutation* (1845), 8 Q.B. 139; 17 L.J.Q.B. 59.

(9) *Chabot* v. *Lord Morpeth* (1848), 15 Q.B. 446; 117 E.R. 528; sub nom. *Re Chabot*, 17 L.J.Q.B. 336; 12 Jur. 1023; sub nom. *Chabot* v. *Woods, Forests, etc., Comrs.*, 11 L.T.O.S. 287; 16 Digest 389, *2312.*

(10) *R.* v. *Clerkenwell General Comrs. of Taxes*, [1901] 2 K.B. 879; 70 L.J.K.B. 1010; 85 L.T. 503; 65 J.P. 724; 17 T.L.R. 744, C.A.; 16 Digest 375, *2132.*

(11) *Re Hall* (1888), 21 Q.B.D. 137; 57 L.J.Q.B. 494; 59 L.T. 37; 36 W.R. 892, D.C.; 16 Digest 389, *2310.*

(12) *R.* v. *Board of Trade*, *R.* v. *Light Railways Comrs.*, [1915] 3 K.B. 536; 84 L.J.K.B. 2043; 113 L.T. 711; 79 J.P. 531; 31 T.L.R. 493; 13 L.G.R. 832, C.A.

(13) *Board of Education* v. *Rice*, [1911] A.C. 179, H.L.; 80 L.J.K.B. 796; 104 L.T. 689; 75 J.P. 393; 27 T.L.R. 378; 55 Sol. Jo. 440; 9 L.G.R. 652, H.L.; 19 Digest 602, *290.*

(14) *R.* v. *L.C.C.*, [1893] 2 Q.B. 454; 63 L.J.Q.B. 4; 69 L.T. 580; 58 J.P. 21; 42 W.R. 1; 9 T.L.R. 601; 37 Sol. Jo. 669; 4 R. 531, C.A.; 16 Digest 389, *2309.*

(15) *Re Grosvenor and West End Railway Terminus Hotel Co., Ltd.* (1897), 76 L.T. 337; 13 T.L.R. 309; 41 Sol. Jo. 365, C.A.; 16 Digest 388, *2290.*

(16) *R.* v. *Local Government Board* (1882), 10 Q.B.D. 309; 52 L.J.M.C. 4; 48 L.T. 173; 47 J.P. 228; 31 W.R. 72, C.A.; 16 Digest 375, *2130.*

(17) *R.* v. *Woodhouse*, [1906] 2 K.B. 501; 75 L.J.K.B. 745; 95 L.T. 367, 399; 70 J.P. 485; 22 T.L.R. 603, C.A.; reversed, sub nom. *Leeds Corpn.* v. *Ryder*, [1907] A.C. 420; 76 L.J.K.B. 1032; 97 L.T. 261; 71 J.P. 484; 23 T.L.R. 721; 51 Sol. Jo. 716, H.L.; 16 Digest 398, *2421.*

(18) *In the matter of the Tithes of Crosby-upon-Eden* (1849), 13 Q.B. 761; 18 L.J.Q.B. 258.

(19) *Church* v. *Inclosure Comrs.* (1862), 11 C.B.N.S. 664; 31 L.J.C.P. 201; 8 Jur.N.S. 893; 142 E.R. 956; 11 Digest 74, *960.*

(20) *R.* v. *Hastings Board of Health* (1865), 6 B. & S. 401; 122 E.R. 1243; sub nom. *Frewin* v. *Hastings Local Board of Health*, 6 New Rep. 142; 34 L.J.Q.B. 159; 12 L.T. 346; 29 J.P. 711; 11 Jur.N.S. 670; 13 W.R. 678; 16 Digest 413, *2713.*

(21) *R.* v. *Kingstown Comrs.* (1885), 16 L.R. Ir. 150; 18 L.R.Ir. 179; 16 Digest 318, *d.*

(22) *Glasgow Insurance Committee* v. *Scottish Insurance Comrs.*, 1915 S.C. 504; 52 Sc.L.R. 378; [1915] 1 S.L.T. 217; 42 Digest 783, *2126 ii.*

(23) *R.* v. *Poor Law Comrs.*, *Re St. Pancras Parish* (1837), 6 Ad. & El. 1; 1 Nev. & P.K.B. 371; Nev. & P.M.C. 106; Will. Woll. & Dav. 79; 6 L.J.M.C. 41; 1 J.P. 21; 112 E.R. 1; 42 Digest 657, *659.*

(24) *Russell* v. *Magistrates of Hamilton* (1897), 25 R. (Ct. of Sess.) 350.

Appeal from an order of the Divisional Court (Lord Hewart, C.J., Avory and Roche, JJ.), discharging rules nisi for certiorari and prohibition which had been obtained against the Electricity Commissioners with reference to a scheme for the London district on the following grounds: (i) That the provisions of the London Electricity Scheme by which it was made compulsory upon the London Electricity Joint Committee at their first meeting to appoint and to keep appointed two committees of the Joint Committee were ultra vires the Electricity Commissioners and contrary to the Electricity (Supply) Acts, 1919 and 1922; (ii) that the provisions of the scheme by which it was rendered compulsory on the London Electricity Joint Committee to delegate to the two committees the powers and duties of the Joint Electricity Authority, mentioned in the third annex to the scheme, were ultra vires the Electricity Commissioners, and contrary to the provisions of the Electricity (Supply) Acts, 1919 and 1922. The Divisional Court held that, the scheme being still inchoate, the court would not at this stage grant the rules. Both rules were, therefore, discharged, and the Joint Committee appealed.

Talbot, K.C., Tyldesley Jones, K.C., Rowand Harker, W. S. Kennedy, and *Alfred Taylor,* for the Joint Committee.

The Attorney-General (Sir Douglas Hogg, K.C.), Macmorran, K.C., and *Bowstead,* for the respondents, the Electricity Commissioners.

Cur. adv. vult.

July 27. The following judgments were read.

BANKES, L.J.—These appeals are from two orders of the Divisional Court discharging two rules nisi, one for certiorari and the other for prohibition, obtained at the instance of the London Electricity Joint Committee (1920), Ltd., and directed to the Electricity Commissioners. The object of the application was to test the validity of a scheme proposed by the commissioners on or about Feb. 8, 1923, for effecting an improvement of the existing organisation for the supply of electricity in the London and Home Counties Electricity District.

The Electricity Commissioners are a statutory body set up by the Electricity (Supply) Act, 1919, as the authority to whom a reorganisation of the supply of electricity is entrusted. The Act contemplates the division of England, Scotland, and Wales, or parts of them, into separate electricity districts with joint electricity authorities who are to exercise full powers within their respective districts. The Electricity Commissioners are the authority to approve or themselves to formulate schemes for the formation of electricity districts and the setting up of joint electricity authorities. Section 7 of the statute [repealed by Electricity Act, 1947, see note supra] provides as follows:

> (1) The Electricity Commissioners may make an order giving effect to the schemes embodying decisions they arrive at as the result of such inquiry as aforesaid, and present the order for confirmation by the Board of Trade, who may confirm the order either without modification or subject to such modifications as they think fit. (2) Any such order shall be laid, as soon as may be after it is confirmed, before each House of Parliament, but shall not come into operation unless and until it has been approved either with or without modification by a resolution passed by each such House, and when so approved shall have effect as if enacted in this Act. . . .

The scheme to which objection is taken appears at the present stage of its existence as a "draft order under s. 7 of the Electricity (Supply) Act, 1919, constituting the London and Home Counties Electricity District and establishing and incorporating the London and Home Counties Joint Electricity Authority." The objection to this draft order is that the Electricity Commissioners are travelling outside their Parliamentary powers and are acting without jurisdiction in putting forward for adoption this scheme in its present form. Whether there are any good and sufficient reasons from the point of view of the business interests of the objectors for taking the objection it is not for this court to determine. The materials upon which to form any opinion upon that question are not before them. The only

A question on this part of the case is whether the objection as to want of jurisdiction is made out. In my opinion, it is, and on this short ground. Section 6 (2) of the Act of 1919 [repealed by Act of 1947] enables the Electricity Commissioners to formulate, or approve, schemes which contain provisions enabling the Joint Electricity Authority to delegate to committees of the authority any powers of the authority. In order to get over objections made by the London County Council B to having more than one district and more than one electricity authority for London and the Home Counties and the objections of the authorised undertakers within the district to having only one, the Electricity Commissioners have propounded this scheme, which, while in name providing for one electricity authority, and one district, in fact provides for two. The way in which this is proposed to be done is this. The scheme provides for the creation of a joint electricity authority under C the name of the London and Home Counties Joint Electricity Committee. It then provides that the joint committee at their first meeting shall appoint two committees of the joint committee, one to be called the Local Authority Committee, the other the Company Committee. In order to create the two authorities under one name, the scheme goes on to provide (cl. 9) that the Joint Committee shall delegate to the Local Authority Committee and to the Company Committee respec- D tively such of the powers and duties of the joint committee as are specified in the third annex to the scheme, and it assigns to each committee a separate portion of the joint electricity district. The effect of this provision is to set up within the one joint electricity district which the scheme purports to create two joint electricity authorities, each with its separate district and its independent powers. This is not, in my opinion, authorised by the Act of 1919. A further objection to E the validity of the proposed scheme is that the power of delegation which by the statute may be vested by a scheme in a joint electricity authority is, by this scheme, exercised by the Electricity Commissioners themselves. My view of the construction of the Act of 1919 on this point is that, whereas the Electricity Commissioners have the statutory right of determining whether a power of delegation to committees shall be conferred by a scheme upon a joint electricity authority, F the statutory right of exercising that power, if conferred, is vested in the joint authority alone. Without going into other questions, I am of opinion that upon the grounds which I have mentioned the scheme proposed by the Electricity Commissioners is to some extent ultra vires.

The important part of the appeal has reference to the jurisdiction of the court to make any order either for prohibition or certiorari. The first objection taken G was that any application was premature, the matter being still only in its opening stage. The commissioners, it was said, have decided nothing, and they have merely published the scheme in preparation for holding the local inquiry thereon which they are directed by s. 5 (4) of the Act of 1919 to hold before making any order. This objection may be a valid objection to the grant of a writ of certiorari, but as it is not necessary to decide the point, I express no opinion upon it. With H regard to prohibition, if the writ lies at all, I do not think that the objection is a sound one. The point was raised in *Byerley* v. *Windus* (1), and BAYLEY, J., deals with it in this way. He says (5 B. & C. at p. 21):

> "And this brings me to the second question, whether the proceedings are in such a state in the court below as to warrant a prohibition at present. . . . But I when once it appears by the proceedings in the spiritual court that the prescription, instead of being admitted, is disputed, and that the parties are in progress to bring its existence to trial, the courts of common law are not bound to wait till the parties have incurred the expense of putting it in issue, but the prohibition is grantable at one; and it was upon this principle that the prohibitions were granted in *Darby* v. *Cosens* (2), and in *French* v. *Trask* (3).

The statement of what occurred at the local inquiry as set out in para. 15 of Mr. Fladgate's affidavit brings this case, in my opinion, well within the principle laid down by BAYLEY, J., and I think that this objection fails.

The other objections to the grant of any writ were much more serious, and they raise difficult and important questions, constitutional as well as legal. In substance the objections come to this: (a) That the proceedings of the Electricity Commissioners are of an executive and not a judicial character; (b) that, whether that be so or not, their proceedings in reference to the preparation of schemes as directed by the Electricity (Supply) Act, 1919, are controllable by Parliament and by Parliament alone, and are such that there is no moment of time at which the court can intervene to inquire whether the proceedings are ultra vires or not. The argument on this second contention is presented in the following way. Section 7 of the Act, it is said, provides that the commissioners may make an order giving effect to a scheme, but that order has no force or effect in itself. It is merely a suggestion or advice to be passed on to the Board of Trade, which may confirm or modify the scheme. Even then the order has no force. It must first be approved by a resolution passed by each House of Parliament. Then and not till then has the order any force or effect. As soon as the order has been approved by both Houses of Parliament the section provides that it shall have effect as if enacted in the Act. The result, according to the respondents, is that any application to the courts for a writ of prohibition or certiorari must be either premature or too late—premature, if made before the order of the commissioners becomes an Act of Parliament, too late if made after it has attained that status. This argument has only become possible since the legislature has adopted the practice of providing that resolutions or orders which are directed to lie on the table for a certain period before becoming effective, or which have to be approved by resolution of the Houses of Parliament, are, when approved, to have effect as if they are themselves Acts of Parliament. The effect of legislation in this form was discussed in *Patent Agents Institute* v. *Lockwood* (4), where LORD WATSON concludes his speech by saying ([1894] A.C. at p. 365): "Such rules are to be as effectual as if they were part of the statute itself." The effect of accepting the argument of the Attorney-General on this point would be very far-reaching. It would amount to a decision that the subject has no longer the right in cases like the present, where this form of legislation is adopted, to come to a court of law and demand an inquiry whether the action or decision of which he is complaining is ultra vires or not. I question very much whether Parliament had any deliberate intention of producing this result by adopting this particular form of legislation.

I pass now to consider the contention that, if the court makes an order in the present case for the issue of a writ of prohibition, it will be trespassing on ground reserved by Parliament to itself. I cannot see why this action of the court should be so regarded. By the Act of 1919 Parliament laid down the limits of the jurisdiction of the Electricity Commissioners. It did so presumably because it considered that these limits were the proper ones and the ones which the commissioners should observe. Why should Parliament object to a court of law, if appealed to, using its powers to keep the commissioners within these limits? Parliament, no doubt, has, as between itself and the commissioners, provided that no order of the commissioners shall have effect unless first approved by Parliament. This reservation must, I consider, be treated as a reservation for the purposes of control and does not, in my opinion, exclude the jurisdiction of the courts of law. If any decision of a court of law in the opinion of Parliament unduly fetters the action of the commissioners, it is always open to Parliament to extend the limits of that jurisdiction.

I have so far only dealt in a general way with the arguments addressed to the court by the Attorney-General. The real question is whether the principles already laid down in reference to the power and duty of the courts to issue writs of prohibition apply to the present case. There can, of course, be no exact precedent, as the Electricity Commissioners are a body of quite recent creation. It has, however, always been the boast of our common law that it will, whenever possible, and when necessary, apply existing principles to new sets of circumstances. A study of the decisions of the courts in relation to writs of prohibition illustrates how

A true this is. In *Re Clifford and O'Sullivan* (5) LORD CAVE ([1921] A.C. at p. 582) quotes with approval the description of a writ of prohibition given in SHORT AND MELLOR'S PRACTICE OF THE CROWN OFFICE (2nd Edn.), p. 252, as

> "a judicial writ issuing out of a court of superior jurisdiction and directed to an inferior court for the purpose of preventing the inferior from usurping a
B jurisdiction with which it was not legally vested, or, in other words, to compel courts entrusted with judicial duties to keep within the limits of their jurisdiction."

Originally, no doubt, the writ was issued only to inferior courts, using that expression in the ordinary meaning of the word "court." As statutory bodies were
C brought into existence exercising legal jurisdiction, so the issue of the writ came to be extended to such bodies. There are numerous instances of this in the books, commencing in quite early times. In *R.* v. *Glamorganshire* (*Inhabitants*) (6), decided in 1700, the court expressed the general opinion that it would examine the proceedings of all jurisdictions erected by Act of Parliament, and if, under pretence of such Act, they proceeded to encroach jurisdiction to themselves greater than the
D Act warrants, the court could send a certiorari to them to have their proceedings returned to the court, to the end that the court might see that they keep themselves within their jurisdiction, and, if they exceed it, restrain them. It would appear from the judgments *Re Ystradgunlais Tithe Commutation* (7) and *Re Appledore Tithe Commutation* (8) that in both these cases the court was willing to assume that a writ of prohibition could lie against the Tithe Commissioners. In
E *Chabot* v. *Lord Morpeth* (9) the court certainly proceeded upon the assumption that a writ of prohibition might be issued to the Commissioners of Woods and Forests. The same was the case in *R.* v. *Clerkenwell General Comrs. of Taxes* (10), in reference to these commissioners. In *Re Hall* (11) and *R.* v. *Board of Trade, R.* v. *Light Railway Comrs.* (12), writs were ordered to be issued to the Comptroller-General of Patents and to the Light Railway Commissioners respectively. In
F *Board of Education* v. *Rice* (13), a writ of certiorari was directed to the Board of Education. In *R.* v. *L.C.C.* (14), this court doubted, but did not decide, whether prohibition could lie against the county council. KAY, L.J., expressed his doubt as being whether the county council would be exercising any judicial function in determining whether a churchyard which had become disused should be considered as part of one parish or of another parish. In *Re Grosvenor and West End Railway*
G *Terminus Hotel Co., Ltd.* (15), the court refused to issue a writ of prohibition to the Board of Trade and to their inspector, on the ground that the examination and report of an inspector under s. 56 of the Companies Act, 1862, was not a judicial proceeding in any proper sense of the term.

These authorities are, I think, conclusive to show that the court will issue the writ to a body exercising judicial functions though that body cannot be described
H as being in any ordinary sense a court. There are, I think, three dicta of learned judges which may usefully be borne in mind in approaching an examination of the decisions which bear most closely on the present case. There is the dictum of BRETT, L.J., in *R.* v. *Local Government Board* (16), where he says (10 Q.B.D. at p. 321):

> "My view of the power of prohibition at the present day is that the court
I should not be chary of exercising it, and that wherever the legislature entrusts to any body of persons other than the superior courts the power of imposing an obligation upon individuals, the courts ought to exercise as widely as they can the power of controlling those bodies of persons if those persons admittedly attempt to exercise powers beyond the powers given them by Act of Parliament."

There is the dictum of LORD SUMNER in *Re Clifford and O'Sullivan* (5), where he says ([1921] A.C. at p. 587):

"It is agreed also that, old as the procedure by writ of prohibition is, and few are older, there is not to be found in all the very numerous instances of the exercise of this jurisdiction any case in which prohibition has gone to a body which possessed no legal jurisdiction at all." A

Lastly, there is the dictum of FLETCHER MOULTON, L.J., in *R.* v. *Woodhouse* (17), where he is discussing what, in his opinion, constitutes a judicial act. He there says ([1906] 2 K.B. at p. 535): B

"Other instances could be given, but these suffice to show that the procedure of certiorari applies in many cases in which the body whose acts are criticised would not ordinarily be called a court, nor would its acts be ordinarily termed 'judicial acts'. The true view of the limitation would seem to be that the term 'judicial act' is used in contrast with purely ministerial acts. To these latter the process of certiorari does not apply, as for instance, to the issue of a warrant to enforce a rate, even though the rate is one which could itself be questioned by certiorari. In short, there must be the exercise of some right or duty to decide in order to provide scope for a writ of certiorari at common law." C

In that case the lord justice was dealing with an application for a writ of certiorari, but his observations here quoted apply, in my opinion, equally to prohibition. D

The authorities which require a close consideration are, in order of date: *In the Matter of the Tithes of Crosby-upon-Eden* (18), *Church* v. *Inclosure Comrs.* (19), *R.* v. *Hastings Board of Health* (20), *R.* v. *Kingstown Comrs.* (21), *Glasgow Insurance Committee* v. *Scottish Insurance Comrs.* (22). In the first of these cases a rule was made absolute for a writ of prohibition directed to the Tithe Commissioners of England and to one of the Assistant Tithe Commissioners prohibiting them from making their award as to the tithes of a parish until the decision of a suit then pending in the Court of Chancery. The application was based on the provisions of s. 50 of the Tithe Act, 1836 [repealed with savings: Statute Law Revision Act, 1890], under which, when all the suits and differences referred to in the section have been decided, the commissioners or assistant commissioner are directed to frame the draft of an award. This draft cannot become effective until after the opportunity has been given for dealing with objections to its provisions and until the commissioners themselves have finally approved it. The application for prohibition was made because the assistant commissioner refused to stay his hand in framing the draft of his award until after the suit had been determined. In that case the court saw no objection to the issue of the writ, although the matter was only in an initial stage and no draft of an award had been made. E F G

Church v. *Inclosure Comrs.* (19) is the one which requires the closest consideration of any of the cases cited during the arguments. It was a case in which the court granted a writ of prohibition directed to the Inclosure Commissioners prohibiting them from reporting the proposed enclosure of a certain common for the sanction of Parliament, or from taking any further steps towards the enclosure of the said common without first obtaining the consent of the complainant. To realise the importance of the decision, it is necessary to call attention to the material provisions of the Inclosure Act, 1845, in reference to the procedure to be followed. It appears from the provisions of s. 27 [repealed: Commons Act, 1876, s. 34] that some lands might be enclosed by order of the commissioners without the previous consent of Parliament, and some might not. The common in question in this case was one that could not be enclosed without the previous direction of Parliament. The course to be followed to secure the enclosure, therefore, was, first, the report of the assistant commissioner to the commissioners, followed by their report to Parliament, in which they certified their opinion as to the expediency of the proposed enclosure, which report Parliament might or might not adopt, or which Parliament could alter or vary, and which, as adopted, was included in an Act of Parliament. The objection on which the application to the court was made was that the assistant commissioner refused to consider a claim which was properly H I

brought to his attention. Objection was made to the court's making the rule absolute on very much the same grounds as are advanced by the Attorney-General in the present case. It was argued that the matter was not the subject of prohibition, as the question was left by the statute to the commissioners, who, if satisfied, then made a provisional order and, after hearing objections, then reported to Parliament, which might or might not act on it. In its essential features that case appears to me indistinguishable from the present case.

Reliance was placed by the Attorney-General on the decision in *R.* v. *Hastings Board of Health* (20). If I could take the same view of the position of the Electricity Commissioners under the Act of 1919 as was taken by the court in that case of the position of the Secretary of State under the Local Government Act, 1858 [repealed: Public Health Act, 1875], I should consider that case a guide as to what course this court should adopt in the present appeal. It is only necessary to refer to the reason which led MELLOR, J., to take the view upon which he acted to see what a very different case the present one is from that. I cannot look upon it either as a guide or as an authority.

The case in the Irish Courts of *R.* v. *Kingstown Comrs.* (21) requires serious consideration. If the view of PALLES, C.B., is to be accepted, that the proceedings of the Local Government Board which were questioned in that case were neither ministerial nor judicial but "quasi-legislative, that is, proceeding towards legislation," the decision goes far to support the argument of the Attorney-General. In the Court of Appeal this view was not the one on which the court acted. Much that was said by FITZGIBBON, L.J., is in favour of the appellants.

The Scottish case of *Glasgow Insurance Committee* v. *Scottish Insurance Comrs.* (22) needs consideration. By s. 65 of the National Insurance Act, 1911 [repealed, National Health Insurance Act, 1924; itself repealed by National Health Insurance Act, 1936; itself repealed by National Insurance Act, 1946], the Insurance Commissioners are empowered to make regulations which must be laid before both Houses of Parliament as soon as may be after they are made, and which are to have effect as if enacted in the Act. The Insurance Commissioners had made regulations the validity of which was challenged, and application was made to the court to restrain the commissioners from proceeding to lay the regulations before Parliament. The Lord Ordinary granted the application. On appeal his decision was reversed by a majority of the court, who laid stress on the special provision of the statute in reference to the regulations having the force of statute law.

The conclusion that I have come to in reference to the whole matter is that there is abundant precedent for the court's taking action at the present stage of the proceedings of the Electricity Commissioners, provided that it is satisfied that the commissioners are proceeding judicially in making their report, even though that report needs the confirmation of the Board of Trade and both Houses of Parliament before it becomes effective. In coming to a conclusion on this latter point it is necessary to deal with this case on its own particular circumstances. The Electricity (Supply) Act, 1919, imposes on the Electricity Commissioners very wide and very responsible duties and powers in reference to the approval or formulation of schemes. At every stage they are required to hold local inquiries to give interested parties an opportunity of being heard. Their authority extends to the creation of bodies which may exercise all or any of the powers of the authorised undertakers within the electricity district and to which the undertakings themselves may be transferred on terms settled by the commissioners. On principle and on authority it is, in my opinion, open to this court to hold, and I consider that it should hold, that powers so far-reaching, affecting as they do individuals as well as property, are powers to be exercised judicially and not ministerially, or merely, to use the language of PALLES, C.B., as proceedings towards legislation. On these grounds I consider that the appeal against the order of the Divisional Court, discharging the rule nisi for a prohibition, must be allowed with costs here and below, and the rule for a prohibition in the terms of the rule nisi must be made absolute. The

appeal against the order refusing to make the rule nisi for a certiorari absolute is dismissed without costs. A

ATKIN, L.J.—This is an appeal from orders of the Divisional Court discharging rules for writs of prohibition and certiorari addressed to the Electricity Commissioners. The rules were obtained for the purpose of preventing the commissioners from proceeding with a scheme published by the commissioners in February, 1923, under the Electricity Supply Acts, 1919-1922, providing for the appointment of a joint electricity authority in the London area defined in the scheme. The objection taken to the scheme is that it is beyond the powers of the commissioners. The Divisional Court have not decided this point, but they discharged the rules on the ground that at the present stage of the proceedings of the commissioners there should not be prohibition or certiorari. It appears to me to be necessary to decide what the commissioners' powers are and whether the proposed scheme is within those powers before deciding whether the stage at which prohibition should be granted has been reached. Indeed, if the commissioners are a body to whom prohibition will lie, and are, in fact, purporting to exercise a jurisdiction which they do not possess, I find it difficult to see how prohibition can be applied for at too early a stage. This, however, must be considered later. B C D

The Electricity Commissioners are a body constituted by the Electricity (Supply) Act, 1919. By s. 1 (1):

> "For promoting, regulating, and supervising the supply of electricity there shall be established as soon as may be after the passing of this Act, a body to be called the Electricity Commissioners, who shall have powers and duties as are conferred on them by or under this Act, and, subject thereto, shall act under the general directions of the Board of Trade." E

By s. 1 (2) the commissioners, not exceeding five in number, are to be appointed by the Board of Trade. It will be seen, therefore, that the commissioners are not a representative body; they are appointed by a government Department; their powers and duties are expressly limited to those conferred by or under the Act, and subject thereto, which I take to mean within the limits of such powers and duties, they are to act under the general directions of the Department that appoints them. By the remaining sections of the Act they are given very considerable powers for the purpose of organising the supply of electricity throughout the country. The Act is divided into groups of sections, headed Reorganisation of Supply of Electricity, ss. 5–8; Generating Stations, ss. 9–11; Powers of Joint Electricity Authorities, ss. 12–17; Transitory Provisions, ss. 18 and 19; Amendments of Electric Lighting Acts, ss. 20–27; Financial Provisions, ss. 28–30; and General, ss. 31–40. They have power to constitute and incorporate joint electricity authorities within areas defined by the commissioners, to provide for the exercise by such authority of any of the powers of authorised undertakers within the district and for the transfer to such authority of the undertakings of any of those undertakers. By s. 11 no new generating station may be established or existing generating station extended without their consent. By s. 13 they may transfer to a joint electricity authority any right existing in a local authority to purchase the undertaking of an authorised distributor. By s. 15 they may make representations to the Board of Trade on which the Board of Trade may by order give a joint electricity authority or an authorised undertaking rights of taking water, and, by s. 19, before the establishment of a joint electricity authority the commissioners may require authorised undertakers to render mutual assistance to one another in respect of giving and distributing supplies of electricity, the management and working of generating stations, and the provision of capital for the purpose of such assistance. By s. 26: F G H I

> "Anything which under the Electric Lighting Acts may be effected by a provisional order confirmed by Parliament, may be effected by a special order made by the Electricity Commissioners and confirmed by the Board of Trade,"

A or by an order establishing a joint electricity authority under the Act, provided that such special order be approved by a resolution passed by each House of Parliament. By s. 33 the commissioners have powers to hold inquiries, and by order to require any person to attend and give evidence on oath and produce documents at the inquiry, and any person failing to comply with such order is liable on conviction to a fine not exceeding £5. Further powers are given by the Electric (Supply) Act, B 1922, of which I need only notice the power to suspend the powers of a joint authority or local authority to purchase an undertaking, but only with the consent of the authority in whom the right of purchase is vested.

These are considerable powers, but there are corresponding considerable restrictions. The commissioners may not define an electricity district, should there be any objections, without holding an inquiry, nor may they approve or publish a C scheme for improving an electricity district without holding a local inquiry, nor make an order embodying the scheme without such an inquiry. The joint electricity authority is to be representative of authorised undertakers within the district, and no scheme is to provide for transfer to the joint electricity authority of any part of an undertaking except with the consent of the owners thereof (s. 5). By s. 12 the joint electricity authority have power to supply electricity within D their district, but not in the area of supply of an authorised distributor or of a power company without their consent, with certain exceptions, subject to provisos of appeal to the Electricity Commissioners. By s. 13 the powers of transfer to a joint authority of a local authority's rights of purchase can only be conferred on a joint authority on which the local authority is adequately represented. There are other limiting provisions as to consents and agreements which it is unnecessary E to detail.

The effect of the Act is to give the commissioners power to act within limits, wide indeed, but strictly defined by statute, and designed to give a large measure of protection to rights already vested in undertakers and private persons. The question now immediately at issue is the validity of a scheme for the constitution of a joint electricity authority for the London and Home Counties Electricity district F as defined in the scheme. The scheme is published by the commissioners pursuant to s. 5 (4) of the Act of 1919, and the commissioners have given notice of and commenced to hold an inquiry thereon in pursuance of the said subsection. The scheme, by s. 2 of the schedule, constitutes and incorporates a joint electricity authority for the district representative of the authorised undertakers within the district and also of local authorities and large consumers of electricity within the G district, giving eight representatives to local authority undertakers, six representatives to company undertakers within the county of London, six representatives to company undertakers outside the county of London, one representative to power companies, six representatives to the London County Council, three representatives to six other county councils, and two representatives to the Railway Companies' Association. But the scheme also provides, by s. 7 (1), that the joint authority H shall appoint and keep appointed two committees of the joint authority, namely, a committee of local authority undertakers consisting of the eight members appointed by the local authority undertakers and a committee of company undertakers consisting of the six members appointed by company undertakers within the county of London, and by s. 9 (1) provides that the joint authority shall delegate to the two respective committees the powers and duties mentioned in the third I annex to the scheme, which powers and duties shall continue to be exercised and performed by such committees within their respective areas until the event mentioned in the section. The powers and duties mentioned in the annex include powers and duties relating to the generation and transmission of electricity and to the supply of electricity in bulk to authorised distributors, and include powers to incur expenditure on capital account within the limits of estimates submitted to the joint authority and approved by the commissioners. The scheme, by s. 9 (3), provides that the two committees shall exercise and perform any delegated power or duty in the name and on behalf of the joint authority in like manner as the joint

authority could have exercised or performed such power or duty if the said power or duty had not been delegated to the committees. A

There is no dispute, and, indeed, it is of the essence of the scheme that by the above provisions the powers and duties in question are for the specified period taken away from the joint authority and confided to the committees without any power of resumption by the joint authority. These provisions appear to me to be a plain violation of the provisions of the Act of 1919. The joint authority in whom powers B are vested under the Act is to be joint and representative. It must be representative of authorised undertakers within the district (which I take to mean all authorised undertakers), and it may also, if the commissioners think fit, be representative of local authorities and large consumers. In the present case the commissioners have decided that the joint authority should be representative of both these classes. It is to such a body, joint and representative, that the statute has confided such C powers and duties as it gives direct to a joint authority and that the commissioners are empowered to confide such powers and duties as they have authority to give. The two committees to whom the powers in question are given under the scheme are neither joint nor representative, either in their constitution or by inheritance from those who in fact appoint them. In truth and in fact the joint authority are never intended to possess or exercise the powers which they are said to delegate, D and they have no voice in the selection of the committees. It is but a play upon words to style the two bodies committees of the joint authority. They are in fact in respect of their powers separate authorities, independent for the most part of the joint authority and operating each in its own district. It was sought to justify the provisions by reference to s. 6 (2) of the Act, which enacts that the scheme may provide for enabling the joint authority to delegate, with or without restric- E tions, to committees of the authority, any of the powers or duties of the authority. It is difficult to imagine two things more different than enabling a representative body to delegate powers and duties to a committee of its own choosing and compelling the representative body to transfer from itself to a named few of its constituent members such powers and duties. If the enabling power alone had been exercised it seems to me impossible to suppose that the authority so enabled could F divest itself of the powers in question without control or power of resumption. It was further sought to justify the provisions by reference to s. 26 of the Act. Anything which can be done by provisional order under the Electric Lighting Acts can be done by an order establishing a joint electricity authority, which this is. By the joint effect of s. 3 (8) and s. 4 of the Electric Lighting Act, 1882 [repealed: Electricity Act, 1947], a provisional order may contain such regulations and con- G ditions as the Board of Trade may think expedient, and, therefore, the Electricity Commissioners may put into their order constituting the authority any regulations and conditions they may think expedient. The answer seems to be, first, that the granting and imposing of these powers and duties are not things which could be effected under the Electric Lighting Acts by provisional order, for these orders relate to powers to supply electricity which in the case of joint electricity authori- H ties are specially provided for under special conditions by s. 12 of the Act of 1919; and, secondly, that the regulations and conditions mentioned in s. 3 (8) of the Act of 1882 are clearly regulations and conditions ancillary to the principal object of the licence or order mentioned, and in any case could not include conditions in contravention of the express statutory checks and restrictions imposed by the Act of 1919. I think that it is proved by the affidavits and exhibits in this case that the I commissioners consider this provision as to the two committees an essential part of their scheme, and that they determined to hold their inquiry into the scheme after hearing counsel on the point of its invalidity.

The question now arises whether the persons interested are entitled to the remedy which they now claim in order to put a stop to the unauthorised proceedings of the commissioners. The matter comes before us upon rules for writs of prohibition and certiorari which have been discharged by the Divisional Court. Both writs are of great antiquity, forming part of the process by which the King's courts

A restrained courts of inferior jurisdiction from exceeding their powers. Prohibition restrains the tribunal from proceeding further in excess of jurisdiction; certiorari requires the record or the order of the court to be sent up to the King's Bench Division, to have its legality inquired into, and, if necessary, to have the order quashed. It is to be noted that both writs deal with questions of excessive jurisdiction; and doubtless in their origin dealt almost exclusively with the jurisdiction B of what is understood in ordinary parlance as a court of justice. But the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognised as, courts of justice. Whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division, exer- C cised in these writs. Thus certiorari lies to justices of the peace of a county in respect of a statutory duty to fix a rate for the repair of a county bridge (*R.* v. *Glamorganshire Inhabitants* (6), in the year 1700), and to the poor law commissioners acting under the Poor Law Amendment Act, 1834, in prescribing the constitution of a board of guardians in a parish where there was an existing poor law authority: *R.* v. *Poor Law Comrs., Re St. Pancras Parish* (23), in the year 1837. D In that case it may be noted that the Attorney-General had obtained a rule for a mandamus to the new board of guardians to obey the order of the commissioners, and Sir Frederick Pollock subsequently obtained a rule for a certiorari to bring up the order to be quashed, and by agreement the question was argued on the rule for a certiorari. So certiorari has gone to the Board of Education to bring up and quash their determination under s. 7 (3) of the Education Act, 1902 [repealed: E Education Act, 1921, itself repealed: Education Act, 1944], on a question arising between the local education authority and the managers of a non-provided school: *Board of Education* v. *Rice* (13). Also to justices acting under the Licensing Acts and not in the strict sense as a court: *R.* v. *Woodhouse* (17). Similarly prohibition has gone to the Tithe Commissioners, and an assistant Tithe Commissioner, to prevent them from making an award as to the tithes in a particular parish: F *In the matter of the Tithes of Crosby-upon-Eden* (18), and to the Inclosure Commissioners from reporting the proposed enclosure of a common in the parish of Acton, and from taking any further steps towards the enclosure of the common: *Church* v. *Inclosure Comrs.* (19). So it has gone against the Light Railway Commissioners to restrain them from proceeding with an inquiry remitted to them by the Board of Trade after an appeal which it was held did not lie: *R.* v. *Board* G *of Trade*, *R.* v. *Light Railways Comrs.* (12). Here the right to prohibition was not raised by counsel, as a decision was desired on the point as to the validity of the appeal, but the point was raised in the dissenting judgment of PHILLIMORE, L.J., and must, I think, have been present in the minds of the majority of the court. I can see no difference in principle between certiorari and prohibition, except that the latter may be invoked at an earlier stage. If the proceedings establish that H the body complained of is exceeding its jurisdiction by entertaining matters which would result in its final decision being subject to being brought up and quashed on certiorari, I think that prohibition will lie to restrain it from so exceeding its jurisdiction. Reference was made to the case of *Re Clifford and O'Sullivan* (5), where an attempt was made to prohibit the proceedings of so-called military courts of the army in Ireland acting under proclamations which had placed certain Irish I districts in a time of armed disturbance under martial law. Prohibition, it was held in the House of Lords, would not lie because the so-called courts were not claiming any legal authority other than the right to put down force by force, and because the so-called courts were functi officio. I am satisfied that the observations of the Lord Chancellor in that case were directed to the first point, and that he had no intention of overruling, or indeed questioning, the long line of authority which has extended the writ in question to bodies other than those who possess legal authority to try cases and pass judgments in the strictest sense.

In the present case, the Electricity Commissioners have to decide whether they

will constitute a joint authority in a district in accordance with law, and with what powers they will invest that body. The question necessarily involves the withdrawal from existing bodies of undertakers of some of their existing rights, and imposing upon them of new duties, including their subjection to the control of the new body, and new financial obligations. It also provides in the new body a person to whom may be transferred rights of purchase which at present are vested in another authority. The commissioners are proposing to create such a new body in violation of the Act of Parliament and are proposing to hold a possibly long and expensive inquiry into the expediency of such a scheme, in respect of which they have the power to compel representatives of the prosecutors to attend and produce papers. I think that in deciding upon the scheme and in holding the inquiry, they are acting judicially, in the sense of the authorities I have cited, and that, as they are proposing to act in excess of their jurisdiction, they are liable to have the writ of prohibition issued against them.

It is necessary, however, to deal with what I think was the main objection of the Attorney-General. In this case he said the commissioners come to no decision at all. They act merely as advisers. They recommend an order embodying a scheme to the Board of Trade, who may confirm it with or without modifications. Similarly, the Board of Trade comes to no decision. They submit the order to the Houses of Parliament, who may approve it with or without modifications. The Houses of Parliament may put anything into the order they please, whether consistent with the Act of 1919 or not. Until they have approved, nothing is decided, and in truth the whole procedure—draft, scheme, inquiry, order, confirmation, approval—is only part of a process by which Parliament is expressing its will, and at no stage is subject to any control by the courts. It is unnecessary to emphasise the constitutional importance of this contention. Given its full effect, it means that the checks and safeguards which have been imposed by Act of Parliament, including the freedom from compulsory taking, can be removed, and new and onerous and inconsistent obligations imposed without an Act of Parliament, and by simple resolution of both Houses of Parliament. I do not find it necessary to determine whether, on the proper construction of the statute, resolutions of the two Houses of Parliament could have the effect claimed. In the provision that the final decision of the commissioners is not to be operative until it has been approved by the two Houses of Parliament I find nothing inconsistent with the view that in arriving at that decision the commissioners themselves are to act judicially and within the limits prescribed by Act of Parliament, and that the courts have power to keep them within those limits. It is to be noted that it is the order of the commissioners that eventually takes effect; neither the Board of Trade who confirm, nor the Houses of Parliament who approve can, under the statute, make an order, which in respect of the matters in question, has any operation.

I know of no authority which compels me to hold that a proceeding cannot be a judicial proceeding subject to prohibition or certiorari because it is subject to confirmation or approval, even where the approval has to be that of the Houses of Parliament. The authorities are to the contrary. In *In the matter of Tithes of Crosby-upon-Eden* (18), where prohibition went to the Tithe Commissioners, the assistant commissioner, with a view to commutation of tithes, had held an inquiry into the value of certain disputed tithes, and had declared his intention of awarding a particular amount to the vicar. By the Tithe Commutation Act, 1836, s. 50, the commissioner was not empowered to draft his award until certain preceding suits were decided, and, there being such a suit pending, prohibition went to the commissioner and the assistant commissioner. It is to be noted that when the writ was granted, the assistant commissioner had not even drafted his award, but had merely stated his intention so to do and to ignore the pending suit, and that his award, when drafted, was subject to objection and to amendment after a further hearing of such objections: s. 51, and was then subject to confirmation by the commissioner. In *Church* v. *Inclosure Comrs.* (19) the writ of prohibition was issued to prohibit the commissioners from reporting the proposed enclosure of Old

Oak Common, in the parish of Acton, for the sanction of Parliament, and from taking any further steps towards the enclosure of the said common without first obtaining certain consents. An assistant commissioner had held an inquiry and made a report to the commissioners, who had made a provisional order providing for enclosure. The assistant commissioner had wrongly estimated the values of the interests in question which was the ground of the invalidity relied on. The enclosure in question, being within fifteen miles of the city of London, could not be made without the authority of Parliament under s. 14 of the Commons Inclosure Act, 1845. By s. 27 of the Act, in such a case, after making the provisional order, it was the duty of the commissioners to publish it, to verify consents, and to certify in their annual report the expediency of the enclosure, and, by s. 32, the provisional order would only become operative when enacted in an Act of Parliament. It is noteworthy that the court (ERLE, C.J., and VAUGHAN WILLIAMS, WILLES, and KEATING, JJ.) thought the matter so clear that they refused the request of counsel for the commissioners that the prosecutor should declare in prohibition to give an opportunity of questioning whether prohibition would lie in such a case: see 11 C.B.N.S. 682, note (a). I cannot distinguish that case from the present. *R.* v. *Hastings Board of Health* (20) which was relied on by the Divisional Court seems to me to be of little assistance. The application was for a writ of certiorari to bring up to be quashed a provisional order of the Secretary of State made pursuant to the Local Government Act, 1858, whereby the Hastings Local Board was empowered to put in force the powers of the Lands Clauses Act in respect of certain land required for widening a road. The material section expressly provided that the order of the Secretary of State should not be of any validity unless the same had been confirmed by Act of Parliament, and at the time of the application no confirming Act of Parliament had been obtained. It seems quite clear that there was no order in existence in respect of which certiorari could be granted, and all the judges were of opinion that the Secretary of State was in the same position as a select committee to whom a Bill for such a purpose might be referred. BLACKBURN, J., stated that the order was not a judicial one. No authorities were cited to the court. I cannot consider this case or the Irish case cited which followed it (*R.* v. *Kingstown Comrs.* (21)), to be inconsistent with the principles on which is based the decision in *Church* v. *Inclosure Comrs.* (19). If there were any inconsistency, I prefer the authority of the latter case.

In coming to the conclusion that prohibition should go we are not, in my opinion, in any degree affecting, as was suggested, any of the powers of Parliament. If the above construction of the Act is correct the Electricity Commissioners are themselves exceeding the limits imposed upon them by the legislature, and so far from seeking to diminish the authority of Parliament we are performing the ordinary duty of the courts in upholding the enactments which it has passed. Nothing we do or say could in any degree affect the complete power of the legislature by Act of Parliament to carry out the present scheme, or any other scheme. All we say is, that it is not a scheme within the provisions of the Act of 1919. That it is convenient to have the point of law decided before further expense and trouble are incurred seems beyond controversy. I think, therefore, that the appeal should be allowed, so far as the writ of prohibition is concerned, and that the rule for the issue of the writ should be made absolute. So far as the writ of certiorari is concerned, the matter becomes unimportant. I have considerable doubt whether there is any such definite order as could be made the subject of certiorari, and in this respect I think that the appeal should be dismissed without costs.

YOUNGER, L.J.—I concur so entirely in the judgment just delivered that I hesitate to add anything. I permit to myself the privilege of observing only upon two of the matters discussed before us. The first is this. In the proposed scheme, immediately after cl. 7, which requires the joint authority to appoint and keep appointed the local authority committee and the company committee, and cl. 9, which requires the authority to delegate to these committees respectively the

extensive powers of the authority set forth in the third annex to the scheme, there comes cl. 10 by which it is provided that the local authority may delegate, subject to such restrictions or conditions as they may think fit, any of their powers or duties to any other committee appointed by them, with a proviso not for the moment material. I find in the contrast between this clause and cll. 7 and 9 a notable confirmation of the view we take of these two clauses. Clause 10 is the legitimate exercise by the commissioners of their power under s. 6 (2) of the Act of 1919, to provide by a scheme

> "for enabling the joint electricity authority to delegate, with or without restrictions, to committees of the authority any of the powers or duties of the authority";

and its very presence in the scheme throws into striking relief the difficulty—the impossibility as I think—of finding on reference to s. 6 (2) any justification for the mention in that scheme of such provisions as are here contained in cll. 7 and 9. I feel quite satisfied that a scheme containing such clauses is not such a scheme as Parliament by the Act of 1919 empowered the commissioners to make or formulate or the Board of Trade to confirm.

Ought, then, this court, if satisfied, as it is, that it has power to prohibit the commissioners from further proceeding with such a scheme, ought it to hesitate to exercise that power in the present circumstances of this case? The Attorney-General presented to us a very weighty argument to the contrary, namely, that the court, if it were now to intervene here, would be usurping the function of Parliament which by the Act of 1919 has reserved to itself alone the privilege of expressing effective approval or disapproval of any scheme, whether authorised by the Act or not, if brought before it after being made by the commissioners and confirmed by the Board of Trade. This important contention of the Attorney-General is the second matter upon which I wish to observe. If I thought that Parliament, by s. 7 (2) of the Act of 1919, had so enacted, I would myself at once accept the contention of the Attorney-General. I would conclude that by the terms of the statute the court had been dispensed from all responsibility in relation to the action either of the commissioners in making or of the Board of Trade in confirming any scheme under it. In such circumstances any interference by the court at any stage would, I agree, be, in the legal sense of the word, an impertinence. But I do not so read s. 7 (2) of the Act of 1919. That Act, in my judgment, contemplates that the commissioners' order which, when approved by a resolution passed by each House of Parliament, is to have effect as if enacted in the Act embodies not any scheme, but only a scheme which under the Act the commissioners are given power either to approve or formulate. Every scheme under the Act remains the scheme of the commissioners even after it is confirmed by the Board of Trade and approved by Parliament. The modifications in a scheme inserted either by the Board of Trade or by Parliament are limited to modifications, as I read the Act, which might have been lawfully made under the powers of the Act by the commissioners themselves had they been so minded. Parliament has not by the Act conferred upon the Board of Trade, nor has it in terms reserved to itself by a mere resolution of both Houses, power, under the name of modifications in a scheme of the commissioners, to insert in a scheme provisions which would under the Act be beyond the powers of the commissioners if inserted in the scheme by them in the first instance. So, at any rate, I read the Act. Fortunately, however, it is not necessary in this case to decide the very serious question whether if at any time Parliament should approve by resolution of each House a scheme which, adopting if I may, the language of LORD ROBERTSON in *Russell* v. *Magistrates of Hamilton* (24) (25 R. (Ct. of Sess.) at p. 357), could in fact be shown to be "an abuse of the statute," the scheme so approved would, nevertheless, by virtue of s. 7 (2) "have effect as if enacted in this Act," and would have to be given statutory effect by every court in which its terms were canvassed. To suggest that such a question is one which may in view of the terms

of this subsection arise, is not, of course, to suggest that Parliament cannot sanction and give the effect of statute law to any scheme it likes. It is only to suggest that it may not have in this Act reserved to itself the power by a mere resolution of each House to give statutory effect to a scheme, the formulation of which it has not by the statute authorised.

No such serious question, however, arises for decision now. For the moment it is, I think, enough to say that whatever may be the effect of such a joint resolution when once it is passed, Parliament in this statute contemplates that no such resolution will approve, except possibly by inadvertence, a scheme which it would under the Act be beyond the powers of the commissioners to formulate or the Board of Trade to confirm. If that be the true view of the statute the interference of the court in such a case as this and at this stage, so far from being a challenge to its supremacy even in the most diluted sense of the word, will be an assistance to Parliament. It will relieve each House, to some extent at least, from the risk of having presented to it for approval by resolution schemes which go beyond the powers committed by the statute to the commissioners who made them, or the Board of Trade who confirmed them. It will leave each House to a great extent untrammelled by any apprehensions of this kind, to devote itself to the consideration of the question the Act has undoubtedly reserved to it, namely, whether in the particular case the scheme should be approved or not. For these reasons I am of opinion that if we have the power in this case to interfere, we are rendering a service not only to the parties concerned, but to each House of Parliament by exercising it as we propose to do.

Appeal allowed as to prohibition.

Solicitors: *Ashurst, Morris, Crisp & Co.*; *Sherwood & Co.*; *Slaughter & May*; *Solicitor to the Board of Trade.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

QUEEN'S CLUB GARDENS ESTATES, LTD. *v.* BIGNELL

[KING'S BENCH DIVISION (Lush and Salter, JJ.), May 2, 10, 1923]

[Reported [1924] 1 K.B. 117; 93 L.J.K.B. 107; 130 L.T. 26; 39 T.L.R. 496; 21 L.G.R. 688, D.C.]

Landlord and Tenant—Notice to quit—Weekly tenancy—Monthly tenancy—Week's or month's notice expiring on last day of week or month of tenancy.

A notice to quit to determine a weekly tenancy, to be valid, must be a week's notice expiring on the last day of a week of the tenancy, and not during such a week. Thus, where a tenancy was "for the term of a weekly tenancy from Jan. 13, 1912" (which was a Saturday), a notice to quit served by the landlord on the tenant on a Friday (Oct. 6, 1922) "for the termination of your tenancy one week from Monday next," was **held** to be a bad notice because it did not expire at the end of a current week of the tenancy, but purported to terminate the tenancy on the second day of a current week of the tenancy.

Simmons v. *Crossley* (1), [1922] 2 K.B. 95, not approved.

Semble: the position would be the same, mutatis mutandis, in the case of notice to terminate a monthly tenancy.

Notes. By s. 16 of the Rent Act, 1957 (37 HALSBURY'S STATUTES (2nd Edn.) 550), no notice by a landlord or a tenant to quit any premises let as a dwelling is valid unless it is given not less than four weeks before the date on which it is to

take effect. This, therefore, renders the present case inapplicable to a weekly tenancy of a dwelling-house, but the case still applies to all monthly tenancies and to weekly tenancies of hereditaments other than dwelling-houses.

Applied: *Precious* v. *Reedie*, [1924] All E.R.Rep. 573. Followed: *Braby* v. *Bedwell*, [1926] 1 K.B. 456. Approved: *Lemon* v. *Lardeur*, [1946] 2 All E.R. 329. Considered: *Dagger* v. *Shepherd*, [1946] 1 All E.R. 133; *Braithwaite & Co.* v. *Elliott*, [1946] 2 All E.R. 537. Approved: *Crate* v. *Miller*, [1947] 2 All E.R. 45. Considered: *Royal Crown Derby Porcelain Co.* v. *Russell*, [1949] 1 All E.R. 749; *Bathavon R.D.C.* v. *Carlile*, [1958] 1 All E.R. 801. Referred to: *Aston* v. *Smith*, [1924] 2 K.B. 143; *Dagger* v. *Shepherd*, [1946] 1 All E.R. 133; *Lemon* v. *Lardeur*, [1946] 2 All E.R. 329; *Royal Crown Derby Porcelain Co.* v. *Russell*, [1949] 1 All E.R. 749; *Bathavon R.D.C.* v. *Carlile*, [1958] 1 All E.R. 801.

As to weekly and other periodic tenancies, see 23 Halsbury's Laws (3rd Edn.) 529–531; and for cases see 31 Digest (Repl.) 480, 484, 485.

Cases referred to:

(1) *Simmons* v. *Crossley*, [1922] 2 K.B. 95; 91 L.J.K.B. 643; 127 L.T. 337; 38 T.L.R. 571; 66 Sol. Jo. 524; 20 L.G.R. 653, D.C.; 31 Digest (Repl.) 485, *6109*.

(2) *Sandford* v. *Clarke* (1888), 21 Q.B.D. 398; 57 L.J.Q.B. 507; 59 L.T. 226; 52 J.P. 773; 37 W.R. 28, D.C.; 31 Digest (Repl.) 382, *5099*.

(3) *Bowen* v. *Anderson*, [1894] 1 Q.B. 164; 58 J.P. 213; 42 W.R. 236; 38 Sol. Jo. 131; 10 R. 47, D.C.; 31 Digest (Repl.) 382, *5100*.

(4) *Oldershaw* v. *Holt* (1840), 12 Ad. & El. 590; 1 Arn. & H. 1; 4 Per. & Dav. 307; 10 L.J.Q.B. 221; 4 Jur. 1012; 113 E.R. 935; 31 Digest (Repl.) 284, *4188*.

(5) *Skelly* v. *Thompson* (1911), 45 I.L.T. 138; 31 Digest (Repl.) 488, **1968*.

(6) *Harvey* v. *Copeland* (1892), 30 L.R.Ir. 412; 31 Digest (Repl.) 488, **1967*.

(7) *Jones* v. *Mills* (1861), 10 C.B.N.S. 788; 31 L.J.C.P. 66; 8 Jur.N.S. 387; 142 E.R. 664; 31 Digest (Repl.) 480, *6057*.

(8) *Mellows* v. *Low*, [1923] 1 K.B. 522; 92 L.J.K.B. 363; 128 L.T. 667; 39 T.L.R. 190; 67 Sol. Jo. 261; 21 L.G.R. 180, D.C.; 31 Digest (Repl.) 480, *6059*.

(9) *Mayhew* v. *Suttle* (1854), 4 E. & B. 347; 3 C.L.R. 59; 24 L.J.Q.B. 54; 24 L.T.O.S. 159; 19 J.P. 38; 1 Jur.N.S. 303; 3 W.R. 108; 119 E.R. 137, Ex. Ch.; 30 Digest (Repl.) 548, *1819*.

(10) *Gandy* v. *Jubber* (1865), 5 B. & S. 485; 9 B. & S. 15; 29 J.P. 645; 13 W.R. 1022; 122 E.R. 911; Ex. Ch.; 31 Digest (Repl.) 382, *5098*.

(11) *Kemp* v. *Derrett* (1814), 3 Camp. 510, N.P.; 31 Digest (Repl.) 490, *6161*.

(12) *Doe d. Finlayson* v. *Bayley* (1831), 5 C. & P. 67, N.P.; 31 Digest (Repl.) 489, *6153*.

Appeal from West London (Brompton) County Court.

The plaintiffs, Queen's Club Gardens Estates, Ltd., claimed from the defendant, Harry Wallace Bignell, possession of the premises, No. 34A, Musard Road, Fulham, let by the plaintiffs to the defendant on a weekly tenancy, which tenancy, they said, had been determined by notice to quit.

The plaintiffs claimed possession on the ground that the premises were let to the defendant in consequence of his employment by the plaintiffs as an emergency engineer, that such employment had ceased, and that they required possession for another whole-time employee in the place of the defendant. The weekly rent of the premises was 12s. 6d. The notice to quit was worded as follows:

> "October 6, 1922. Mr. H. W. Bignell, 34A, Musard.—The Estate Company hereby give you the requisite week's notice for the termination of your tenancy one week from Monday next, on or before which date they will require vacant possession."

The day of the service of the notice was a Friday, and the day of the termination was Monday, Oct. 16.

By the agreement, dated July 7, 1908, under which the defendant held the premises it was provided:

> "The landlords hereby let and the tenant hereby takes all that messuage and premises known as No. 34A, Musard Road, belonging to the landlords and situate in the parish of Fulham in the county of London, together with the appurtenances thereunto belonging, which premises are hereinafter referred to as 'the said house,' for a term of one year from July 20, 1908, at a yearly rent of £44 4s. payable by equal weekly payments of 17s. in advance, the first weekly payment to be made on signing this agreement."

This agreement was modified in 1912 when the defendant became the tenant of part only of the house at a reduced rent. On Jan. 13, 1912, an agreement was signed by the parties which differed from the agreement of July, 1908, in the respect that the plaintiffs agreed to let and the defendant to take

> "No. 34A (top half), Musard Road, for the term of a weekly tenancy from Jan. 13, 1912, at the yearly rent of £24 14s. payable by weekly payments of 9s. 6d. in advance."

The defendant attended to the emergency repairs on the plaintiff company's estate until 1915, when he was appointed temporarily to occupy the position of the company's electrical engineer on the company's permanent electrical engineer joining the army. Subsequently the defendant himself was called up. On his discharge from the army he returned to the plaintiff's service as electrical engineer and continued to occupy half the house. In January, 1922, the defendant gave notice to the plaintiffs to terminate his employment with them, and the plaintiffs' foreman gave him a week's verbal notice to quit. The plaintiffs confirmed this notice by the letter of Oct. 6, 1922, set out above. The defendant claimed the protection of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, but the plaintiffs relied on s. 5 (1) (d) of the Act [see now Rent, &c., Restrictions Act, 1938, Sched. I, para. (g)] and said that the premises were reasonably required by them for a man in their whole-time employment and that in such a case, under s. 5 (1) (i), they were not required to find alternative accommodation. The county court judge held that the plaintiffs had employed the defendant, the dwelling-house was let to him in consequence of that employment, and he had ceased to be in that employment before the action was commenced, and he made an order for possession. The defendant appealed.

H. S. Nichols for the defendant.
F. C. Wynn Werninck for the plaintiffs.

Cur. adv. vult.

May 10. The following judgments were delivered.

LUSH, J.—In this case the learned judge of the Brompton County Court made an order for possession in the suit of a landlord against the tenant, and the tenant has appealed. The question of law for our decision is whether this notice to quit was valid or invalid? There is really a second question of law, also of great importance, although it is quite consistent with the judge's note, that he treated it as a question of fact. The second question of law is whether there was any evidence to support the learned judge's finding of fact that the house was let in consequence of employment. In order to see whether that second question was necessary I will just say this, that the defendant, the tenant, was in the employment of the landlords, the plaintiffs. He had ceased to be in that employment. If he had not been in that employment he would have been entitled, if an order for possession were made, to have alternative accommodation offered to him, but the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, by s. 5 (1) (i), taken in conjunction with s. 5 (1) (d), enacts that if the landlord reasonably requires the dwelling-house for occupation by some person in his whole-time employment, and if the tenant was in the employment of the landlord and the dwelling-house was let to him in consequence of that employment, then the land-

lord was not bound to offer alternative accommodation. Therefore, it was necessary for the learned judge to decide whether the dwelling-house was let to the tenant in consequence of his employment.

The first question that we have to decide is whether the notice to quit was valid or invalid. The defendant was a weekly tenant. He had been a weekly tenant for a very long time, and the tenancy began on a Saturday. On Oct. 6, 1922, which was a Friday, the landlords served on him this notice:

> "The Estate Company hereby give you the requisite week's notice for the termination of your tenancy, one week from Monday next. . . ."

The notice to quit, therefore, did not expire at the end of the current week; it was a notice for determination a week from Monday next. Then it adds "on or before which date they will require vacant possession." I feel very great doubt whether, if this notice to quit be valid in other respects, a notice can be said to be valid when the landlord requires possession on a specific date, and adds "on or before which date we will require vacant possession." A notice to quit must be certain and definite, and I have great doubt whether that is a certain and definite notice to quit on the day specified. It may be that the landlords will require possession before that date. If so, it is obviously a bad notice to quit. But I am not going to rest my judgment on that. It is a little technical and it may be that the reasonable interpretation of that notice to the tenant is: "If you like to give up possession before Monday, we are willing to take it." I have great doubt whether it is right to put so favourable an interpretation as that on the notice to quit, and I shall leave that question without expressing any definite opinion with regard to it, because, in my opinion, with great respect to the learned judge, the notice to quit is invalid.

It is a little strange that there is no clear and definite decision on the point, considering the vast number of weekly tenancies that have been granted for generations past, so that one would have thought the question must have arisen and been definitely and clearly decided as to what notice to quit is necessary in the case of a weekly tenancy. There are two questions one has to consider with regard to it. The first question is: What length of notice must a landlord or a tenant give to determine a weekly tenancy? The second question is: When the answer to the first question has been ascertained, may a landlord or a tenant, in the case of a weekly tenancy, determine the tenancy in the middle of a week? Or, must they, when they do give notice to quit, give one which expires at the end of a current week?

With regard to the first question—namely, that with regard to the length of notice required—whether, for instance, it has to be a week's notice, or, as was once said by a very learned judge, half a week's notice, or whether a reasonable notice is sufficient, there are cases to be found in the books, one of them apparently laying down one of these propositions and another laying down another proposition. There are many cases that decide that a reasonable notice is all that is necessary. I feel great doubt in seeing for myself how that can be. Certainly a notice to quit at the end of a reasonable time could not be a good notice; it is not definite, it is not certain. Then suppose a landlord or tenant says: "I give notice to quit on such and such a date." If that notice must be reasonable, no one will know whether or not it is a good notice to quit until some tribunal has decided whether it is a reasonable notice or not, because even reasonable people can take different views with regard to what is a reasonable notice to quit, and that leaves it uncertain. But the tendency of recent decisions has been to define what a reasonable notice to quit is, and to say that it is a week's notice, and that is, in my opinion, the proper view to take. I am not going to occupy further time with regard to this part of the question which we have to decide, because I think that the law is, in the case of weekly tenancy, that a week's notice is the proper notice to give.

The notice served in this case was a week's notice, and, therefore, there is no difficulty, I think, with regard to the duration of the notice. But the question

whether the notice to quit must expire at the end of a current week, or whether it may be made to expire on any day that the landlord chooses to fix is a much more serious one, and the conflict of authority on that point is a little surprising. First of all, I express my view on this question without regard to authority, because, with great respect to two of my learned brethren who have decided this question recently in a way which is contrary to my opinion, it does seem to me reasonably clear that in any periodic tenancy, whether it be a yearly, quarterly, or monthly tenancy, or a weekly tenancy, the notice to quit must expire at the end of a current period. It is admitted, and it is quite clear, that in the case of a yearly tenancy and of a quarterly tenancy it must so expire, and a notice to quit in either of those cases would be bad if it were made to expire in the middle of a current period. The question is whether the same rule applies to a weekly tenancy, and I may add to a monthly tenancy, for a monthly tenancy stands on the same footing as a weekly tenancy as regards the notice to quit: see *Simmons* v. *Crossley* (1), where SWIFT, J., held, and I think quite correctly, that a monthly tenancy and a weekly tenancy are similar in this respect.

It seems to me that when one considers what the nature of a weekly tenancy is it must follow that if notice to quit be not given at the end of the first, second or third week, and the tenant be given another week, he is really beginning another complete week. It is a tenancy by the week just as a quarterly tenancy is a tenancy by the quarter. He begins a fresh week, and I do not see how it is possible for the landlord to give him notice to quit in the middle of a week. A fresh week begins, and then a fresh week, and so on, just as a fresh quarter begins and then a fresh quarter. WILLS, J., when sitting as a member of the Divisional Court, expressed the view in *Sandford* v. *Clarke* (2) that when a week expires the tenancy comes to an end, but the learned judge recalled that judgment in *Bowen* v. *Anderson* (3), and held that it was wrong. I cannot help thinking that when the judgment in *Bowen* v. *Anderson* (3) is considered, what WILLS, J., really held was that the tenant must be ordered to go out at the end of a week and not at the end of a broken period. WILLS, J., held that a notice to quit is necessary, and he impliedly held that it must terminate at the end of a week and not at the end of a broken period. But, however that may be, in my view and apart from authority, when once a new week is entered on, there is a tenancy for the week, and if the landlord wishes to turn his tenant out he can only do so at the expiration of the week. I feel the greatest difficulty in seeing what is to become of the rent if that be not right. The rent is only due at the end of the week. Suppose a landlord gives notice to a weekly tenant whose tenancy began on a Saturday, to quit on a Wednesday, is the tenant to pay rent from the Saturday to the Wednesday? Or if the tenant gave notice to quit on the Wednesday, is he to pay the rent for the broken week? The Apportionment Act, 1834, does not apply to such a case. It was so held in *Oldershaw* v. *Holt* (4). LITTLEDALE, J., held, and I do not think the other members of the court differed from him, that the Apportionment Act did not apply to a case as between a landlord and tenant. The Apportionment Act, 1834, regulates the rights as between tenant for life and remainderman. Before the Apportionment Act was passed the difficulty would have arisen, and in *Oldershaw* v. *Holt* (4) this difficulty as to what would happen if a landlord gave notice to quit in a broken period, in the middle of a week, was pointed out in the judgment. I do not see what is going to happen about the rent in the case of a weekly tenancy if the landlord or the tenant can determine the tenancy in the middle of a week. Apart from authority I should have thought that all these periodic tenancies are on the same footing, and that, if either party wishes to give notice to quit, he must take care that the notice expires at the proper time, unless, of course, they choose to agree otherwise. There is no difficulty if one of the parties is doubtful with regard to the proper day. He has only to add the words that are given in the common form of a notice to quit and state that, if the date named in the notice to quit be not the real date of the end of the

period, the notice to quit is to expire on the day next arriving after the expiration of the current period. A

The authorities have to be reconciled or distinguished, and one has to express one's view whether a particular authority is right or wrong if they are in conflict. In *Simmons* v. *Crossley* (1) SWIFT, J., went through the authorities, and came to this conclusion:

> "In this conflict of judicial opinion it seems to me that the view held by WRIGHT, J., in *Skelly* v. *Thompson* (5) is the more correct. I think that to determine a monthly or weekly tenancy reasonable notice must be given, and that such notice, if in other respects reasonable, is not rendered unreasonable and invalid because it expires on some day other than the last day of a month or week calculated from the commencement of the tenancy. In our view the learned county court judge was justified by the facts in holding that the notice given was a reasonable notice to quit." B C

I have pointed out that SWIFT, J., said that the same proposition applied to a weekly tenancy, and that ACTON, J., expressed no opinion on that point. The reason why SWIFT, J., came to that conclusion is that in two cases decided by the Irish courts that view had been laid down and the learned judge followed those cases. This question is one of importance and I must examine the two Irish authorities, because I cannot agree with SWIFT, J., that they justify him in arriving at that conclusion. D

The first is *Harvey* v. *Copeland* (6), the headnote to which is as follows:

> "A weekly tenancy commencing on Thursday held to be duly determined by written notice served on Thursday, Nov. 5, to quit and deliver up possession on or before Friday, Nov. 13 (GIBSON, J., dissenting). Held, by O'BRIEN and GIBSON, JJ., that a week's notice, and by JOHNSON, J., that a reasonable notice, is necessary and sufficient to determine a weekly tenancy. Held, by GIBSON, J., that the tenancy could only be determined by a notice expiring on a Thursday." E

Therefore, GIBSON, J., took the view that I have said is, in my opinion, the right one, namely, that the tenancy can only be determined by a notice to quit expiring at the proper time. I need not read the judgments, but I want to say with regard to the judgments of the other two learned judges, that I am not sure that they took the view which SWIFT, J., thought they did. It will be noticed that the notice to quit in the case before them was for Friday—one day after Thursday. JOHNSON, J., refers to other authorities, among them *Jones* v. *Mills* (7), and then he says: F G

> "In my opinion the notice was a reasonable one putting an end to his weekly tenancy, and is not vitiated by offering him an additional day if he so desired, free of rent, to clear out. . . ."

The learned judge, therefore, gave effect to his view that a reasonable notice is the right one, but, if that view be wrong (and I have already said that I think there are cases in the courts of this country which establish now that a week's notice is the right one), I do not see that JOHNSON, J.'s judgment can be taken as an authority in support of the proposition that when a week's notice is necessary, it can be made to expire on any given date. The foundation of the learned judge's judgment was that it was not necessary to make it expire on a given day because a reasonable notice was all that need be given. If that be wrong, the conclusion would not necessarily have been drawn by the learned judge. But he did draw it. O'BRIEN, J., in his judgment, deals with the question of sufficiency of notice and said that he was of opinion that it ought to be laid down that a week's notice to quit is necessary to determine a weekly tenancy. But, further, he was of opinion that the notice in the case before him was not only sufficient; it was more than sufficient. The tenant entered on a Thursday and was required to leave on or before the following Friday. H I

In my opinion, that case does not support SWIFT, J.'s judgment in *Simmons* v.

Crossley (1). The other case relied on by SWIFT, J., in *Simmons* v. *Crossley* (1) was *Skelly* v. *Thompson* (5). The headnote of that case reads as follows (45 I.L.T. 138):

> "A week's notice to quit expiring on any day is sufficient to determine a weekly tenancy."

The judgment of the learned judge (WRIGHT, J.) was short. He said: "*Harvey* v. *Copeland* (6) is a direct authority for the proposition that reasonable notice is sufficient to determine a weekly tenancy." I will read what follows, but I must interpose this. I cannot, with great respect, see that *Harvey* v. *Copeland* (6) established that. I have read the judgment, and it appears to me that, although the three learned judges took three different views, they seem to me to establish that a week's notice is the right one. WRIGHT, J., then goes on:

> "A week's notice has always been held reasonable and sufficient, and the question I have now to decide is whether or not it must determine on the last day of the tenancy. I hold that the notice, if it is sufficient in other respects, may be given for any day of the week, and accordingly I affirm the decree for possession."

Although he expresses that view, I think that he came to that conclusion on the authority of *Harvey* v. *Copeland* (6), and it would be wrong to say that *Harvey* v. *Copeland* (6) so decided, because that judgment would not be correct. Those are the authorities on which SWIFT and ACTON, JJ., decided *Simmons* v. *Crossley* (1).

In another case, *Mellows* v. *Low* (8), MCCARDIE, J., says ([1923] 1 K.B. at p. 524):

> "Was the county court judge right in giving judgment for the plaintiff? The first question is: What is the position of a weekly tenant? It is vital to remember that the letting to a weekly tenant is not a letting which expires at the end of the first week or at the end of each succeeding week; in the ordinary case, as in the present case, it is a letting for a period of time which is determinable by due notice generally regarded as a week's notice."

In *Jones* v. *Mills* (7), ERLE, C.J., said (10 C.B. at p. 796):

> "I also think that the tenant, having held for several years, was not liable to be turned out at the end of any week without notice; I cannot find any authority for saying that this tenancy was determined at the end of each week. The rule which applies to tenancies from year to year has never, it seems, been extended to the case of a weekly or monthly tenant, but throughout it has been laid down that a weekly or a monthly holding does not require a week's or a month's notice to determine it, unless there be some special agreement of custom. . . . It would be most unreasonable if a landlord was held to be entitled to turn his weekly tenant out at twelve o'clock at night on the last day of the week. . . ."

WILLIAMS, J., added:

> "It appeared that the defendant had held the premises for many weeks at a weekly rent. It cannot be said that there was a new contract each week; it must be a tenancy from week to week so long as the parties respectively please. . . . How long the notice should be it is unnecessary upon this occasion to determine inasmuch as none was given. But the inclination of my opinion is that where the tenant is holding from week to week, a week's notice should be given and a month's notice where he is holding from month to month."

This case, I think, supports the view that to terminate a weekly tenancy the notice must expire at the end of a week.

In *Mayhew* v. *Suttle* (9), if the tenancy had been a monthly tenancy, then, as WIGHTMAN, J., said, the notice to quit would expire at the end of each month from the commencement, and it was because the agreement did not provide for the ordinary consequences of a monthly tenancy that the court, among other things, held that there had been no monthly tenancy at all. The question in that case was whether the plaintiff, who had agreed to manage a beerhouse for the defendant,

was the tenant or servant of the defendant. WIGHTMAN, J., decided that he was the servant and not the tenant of the defendant, and said that the notice under the agreement between the parties might be given at any time, "and not at the end of each month from the commencement." That must mean that if it had been a monthly tenancy the notice to terminate must have expired at the end of a month from the commencement. I think that that judgment supports the view which I have stated, which is that the ordinary incidence of a monthly tenancy is that it should be determined by a notice to quit expiring at the end of a month of the tenancy.

For these reasons I think that the notice to quit given in this case is bad. It is not a notice to expire at the end of a week, and, although it might seem a little technical to persons who might not know what the law is about these matters, one cannot depart from the well-known principle that a notice to quit must conform to those conditions which the law lays down, and that, if it does not expire at the proper time, it is a bad notice. Where the tenancy is a weekly or a monthly tenancy, the notice should expire at the end of a week or of a month from the date of the commencement of the tenancy. As the notice in this case does not comply with that condition, it is a bad notice and the appeal must be allowed.

SALTER, J.—I am of the same opinion on the question of the notice to quit, and in view of the general importance of the point raised, I will very shortly state my reasons.

It was admitted that the defendant was entitled to notice to quit, and the question, therefore, is whether the notice given was good in law. The tenancy was created by writing dated Jan. 13, 1912, in these terms:

> "The landlords hereby let and the tenant hereby takes all that messuage . . . for the term of a weekly tenancy from Jan. 13, 1912, at the yearly rent of £24 14s. payable by weekly payments of 9s. 6d. in advance, the first payment to be made on signing this agreement."

January 13, 1912, was a Saturday, and the tenancy is a tenancy from week to week ending on a Saturday. The notice to quit is in writing, and is dated Oct. 6, 1922, which was a Friday. It is in these terms:

> "The Estate Company hereby give you the requisite week's notice for the termination of your tenancy one week from Monday next, on or before which date they will require vacant possession."

"One week from Monday next" was an ascertained date, in fact, Monday, Oct. 16. The notice, therefore, says in effect that the tenant is given the requisite week's notice for the termination of his tenancy on Monday, Oct. 16—that was ten days ahead—on or before which date the landlord will require vacant possession. I do not think that we can safely treat this notice as bad for ambiguity. It does not seem to me to say on the part of the landlords, "I claim to determine your tenancy on Monday or to determine it at some earlier date." I think the meaning of the notice is this: "Your tenancy will come to an end on Monday, Oct. 16. Until that day we shall have all the rights of landlords and you will have all the duties of tenant; on that day our relations will cease." I think that the words "on or before which date they will require vacant possession" mean no more than this: "If you are pleased to surrender and give up your tenancy at an earlier date, we will meet your convenience." I think that the meaning of this notice is that the tenancy will come to an end on Monday, Oct. 16. It will continue until that day, the landlords will have the rights and the tenant will have the duties of tenant, and on that day the relations of landlords and tenant would cease. It is, I think, a notice to determine the tenancy on Monday, Oct. 16, and on no other date.

In some of the cases it has been said that a notice to determine a periodic tenancy is good if it be given for the last day or for the first day of the period. I do not think that this notice can be treated as good on the ground that it gives a notice either for the last day or the first day of the period. A fresh week of this tenancy began when Saturday, Oct. 14, passed, and on Monday, Oct. 16, two days

of that week had elapsed. I think we must treat it as a notice which, rightly or wrongly, claims as of right to determine the tenancy on the second of the seven days forming a current week of the tenancy.

In this case no question of length of notice arises, and I shall say nothing about it. It was not suggested that, so far as duration goes, this notice was either too long or too short. The term of every tenancy depends on the agreement of the parties. I deal, of course, only with tenancies such as this, where the parties have not expressed any intention except that the tenancy shall be a periodic tenancy—in this case a tenancy from week to week—and when nothing can be gathered either from the words that they have used, or from their conduct in the particular case to show any further or other intention. In the case of periodic tenancies, whether from year to year or from quarter to quarter, or from month to month, or from week to week, or for any other period, the law, as I gather it from the authorities, is that the tenancy is from period to period, from one fixed date to another. It is a tenancy for so many years, for so many quarters, or for so many months or weeks, as the parties may think fit. If a new period be allowed to begin, the tenancy must, in the absence, of course, of an arrangement between the parties, continue until the period ends. Neither party can, against the will of the other, put an end to the tenancy during the currency of that period. The characteristics of the periodic tenancy from year to year were laid down in the opinions of the Court of Exchequer Chamber in *Gandy* v. *Jubber* (10) (9 B. & S. at p. 18). The court was there dealing with a tenancy from year to year. In my opinion, the characteristics of such a tenancy are the characteristics of all periodic tenancies. They are applied to a weekly tenancy in *Bowen* v. *Anderson* (3), and in *Jones* v. *Mills* (7), to which my Lord has referred, WILLES, J., in delivering judgment, said (10 C.B.N.S. at p. 799):

> "It is clear that, in contemplation of law, a lease for a week stands upon precisely the same footing as a lease for a year or any number of years."

For my part, I am at a loss to understand on what principle any distinction can be made of the characteristics of one periodic tenancy and another as regards the point now in question. It appears to me to be of the essence of every periodic tenancy that it can only be broken by either party in invitum at the end of the period of the tenancy. *Kemp* v. *Derrett* (11) decides that where premises are let under an agreement by which "the tenant is always to be subject to quit at three months' notice," this constitutes a quarterly tenancy which may be determined by three months' notice expiring at the same time of year it commenced, or any corresponding quarter day. As regards a weekly tenancy, *Jones* v. *Mills* (7), in my view, is conclusive upon the point. *Doe d. Finlayson* v. *Bayley* (12) is also in point. There the court held a notice to quit insufficient which required a tenant to give up a weekly tenancy on a Wednesday where the landlord had no recollection whether Tuesday or Wednesday was the day on which the week expired. *Harvey* v. *Copeland* (6) is not, in my opinion, a direct authority for the proposition that a reasonable notice is sufficient to determine a weekly tenancy, although this appears to have been the view expressed by WRIGHT, J., in *Skelly* v. *Thompson* (5). *Simmons* v. *Crossley* (1) has been referred to by my Lord. That case dealt with a monthly tenancy, and it is not, strictly speaking, necessary for us to differ from it; but it would not be right not to say that I cannot agree with the decision so far as it laid down that a notice to determine a monthly tenancy can be good if it be made to expire during the currency of the month.

For these reasons I think that the notice given in this case was bad, and, therefore, the judgment of the county court judge was wrong. I agree that the appeal should be allowed on the ground that in order to determine a weekly tenancy, a week's notice expiring at the end of the week of the tenancy is necessary.

Solicitors: *Pierron & Morley*; *Richard J. Davis.* *Appeal allowed.*

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

A

ELLIOTT *v.* BOYNTON

[Court of Appeal (Sir Ernest Pollock, M.R., Warrington, L.J., and Astbury, J.), November 21, 22, 30, 1923]

[Reported [1924] 1 Ch. 236; 93 L.J.Ch. 122; 130 L.T. 497; 40 T.L.R. 180; 68 Sol. Jo. 236] B

Landlord and Tenant—Mesne profits—Breach of covenant—Re-entry—Recovery of mesne profits from date of writ—No relation back to breach.

In a lease dated Jan. 31, 1918, the lessee covenanted that he would not sublet the premises without the consent of the lessor, and it was further provided that if there should be any breach of any of the lessee's covenants it C should be lawful for the lessor to re-enter and re-possess the demised premises. On several occasions, the first of which was Oct. 20, 1919, the defendant sublet the premises without the lessor's consent. These breaches came to the knowledge of the lessor in March, 1922, and on May 12, 1922, he issued his writ against the lessee and the underlessees.

Held: it being well settled that under such a proviso as that in question the D lease was not void, but was voidable at the option of the lessor, and that the lease remained in force until some conclusive determination of it by the lessor in the exercise of his option, in the present case such conclusive determination was effected by the issue of the writ; until that time the lessee was in possession under the lease; the rights of the lessor did not relate back to the breach of covenant which gave the right to re-entry; and, therefore, the lessor was en- E titled to recover damages by way of mesne profits only from the date of the issue of the writ.

Decision of Sargant, J., [1923] 1 Ch. 422, affirmed.

Notes. Referred to: *Abrahams* v. *MacFisheries*, [1925] All E.R.Rep. 194; *Gee* v. *Harwood*, [1933] Ch. 712; *Times Furnishing Co.* v. *Hutchings*, [1938] 1 All E.R. F 422; *Oak Property Co.* v. *Chapman*, [1947] 2 All E.R. 1; *Carter* v. *Green*, [1950] 1 All E.R. 627.

As to recovery of mesne profits, see 23 Halsbury's Laws (3rd Edn.) 561, 708; and for cases see 31 Digest (Repl.) 622–624.

Cases referred to:

(1) *Dunlop* v. *Macedo* (1891), 8 T.L.R. 43; 38 Digest 784, *1173*. G

(2) *Ocean Accident and Guarantee Corpn.* v. *Ilford Gas Co.*, [1905] 2 K.B. 493; 74 L.J.K.B. 799; 93 L.T. 381; 21 T.L.R. 610, C.A.; 35 Digest 394, *1363*.

(3) *Doe d. Bryan* v. *Bancks* (1821), 4 B. & Ald. 401; 106 E.R. 984; 31 Digest (Repl.) 524, *6471*.

(4) *Davenport* v. *R.* (1877), 3 App. Cas. 115; 47 L.J.P.C. 8; 37 L.T. 727, P.C.; 31 Digest (Repl.) 525, *6480*. H

(5) *Roberts* v. *Davey* (1833), 4 B. & Ad. 664; 1 Nev. & M.K.B. 443; 2 L.J.K.B. 141; 110 E.R. 606; 31 Digest (Repl.) 524, *6475*.

(6) *Doe d. Lawrence* v. *Shawcross* (1825), 3 B. & C. 752; 5 Dow. & Ry.K.B. 711; 107 E.R. 912; 31 Digest (Repl.) 533, *6577*.

(7) *Jones* v. *Carter* (1846), 15 M. & W. 718; 153 E.R. 1040; 31 Digest (Repl.) 530, *6527*. I

(8) *Barnett* v. *Earl of Guildford* (1855), 11 Exch. 19; 3 C.L.R. 1440; 24 L.J.Ex. 281; 25 L.T.O.S. 85; 1 Jur.N.S. 1142; 156 E.R. 728; 38 Digest 784, *1174*.

(9) *Aslin* v. *Parkin* (1758), 2 Burr. 665; 2 Keny. 376; 97 E.R. 501; 21 Digest 145, *86*.

(10) *Doe d. Compere* v. *Hicks* (1797), 7 Term Rep. 433; 101 E.R. 1061; 43 Digest 728, *1649*.

(11) *Pearse* v. *Coaker* (1869), L.R. 4 Exch. 92; 38 L.J.Ex. 82; 20 L.T. 82; 31 Digest (Repl.) 623, *7369*.

(12) *Hartshorne* v. *Watson* (1838), 4 Bing.N.C. 178; 6 Dowl. 404; 1 Arn. 15; 5 Scott, 506; 7 L.J.C.P. 138; 2 Jur. 155; 132 E.R. 756; 31 Digest (Repl.) 525, *6477.*

(13) *Selby* v. *Browne* (1845), 7 Q.B. 620; 14 L.J.Q.B. 307; 5 L.T.O.S. 213; 9 Jur. 923; 115 E.R. 623; 31 Digest (Repl.) 273, *4055.*

(14) *Arnsby* v. *Woodward* (1827), 6 B. & C. 519; 9 Dow. & Ry.K.B. 536; 108 E.R. 542; sub nom. *Armsby* v. *Woodward*, 5 L.J.O.S.K.B. 199; 31 Digest (Repl.) 527, *6503.*

(15) *Tharpe* v. *Stallwood* (1843), 5 Man. & G. 760; 1 Dow. & L. 24; 6 Scott, N.R. 715; 12 L.J.C.P. 241; 7 J.P. 400; 7 Jur. 492; 134 E.R. 766; sub nom. *Sharpe* v. *Stallwood*, 1 L.T.O.S. 110; 43 Digest 374, *29.*

(16) *Terrell* v. *Chatterton*, [1922] 2 Ch. 647; 91 L.J.Ch. 816; 127 L.T. 621; 38 T.L.R. 786, C.A.; affirmed sub nom. *Chatterton* v. *Terrell*, [1923] A.C. 578; 92 L.J.Ch. 605; 129 L.T. 769; 39 T.L.R. 589, H.L.; 31 Digest (Repl.) 418, *5471.*

Appeal from an order of SARGANT, J.

By an indenture of lease, dated Jan. 31, 1918, the plaintiff demised to the defendant Boynton and one Dowsett a house for a term of fourteen years from Dec. 25, 1917. The lease contained a joint and several covenant by the lessees not to sublet or part with the possession of the premises or any part thereof without the consent in writing of the lessor first had and obtained, but such consent was not to be unreasonably withheld in the case of a respectable and responsible person. The lease contained a proviso for re-entry which provided that if the rent was in arrear for twenty-one days or if there should be any breach or non-observance of any of the lessees' covenants it should be lawful

> "for the lessor at any time thereafter into and upon the said demised premises or any part thereof in the name of the whole to re-enter, and the same to have again re-possess and enjoy as in his former estate."

Subsequently, the plaintiff assented to an assignment of the lease to the defendant Boynton, and this was duly effected. At that time the plaintiff did not know that on three previous occasions the lessees had sublet parts of the premises without asking for or obtaining his consent. After this date the defendant Boynton effected two further underlettings without licence. These breaches came to the knowledge of the plaintiff in March, 1922, and he issued his writ against the defendant and his underlessees in May, 1922, claiming possession and mesne profits. On June 26, 1922, an order was made for recovery of possession against all the defendants and it was further ordered that "the plaintiff do recover against the defendant Boynton mesne profits to be assessed." On Dec. 18, 1922, the master made a certificate assessing the mesne profits as from the date of the first breach of covenant which was on Oct. 20, 1919. On an application to review the master's certificate, SARGANT, J., held ([1923] 1 Ch. 422) that mesne profits were only payable as from the date of the writ in the action. The plaintiff appealed.

W. A. Greene, *K.C.*, and *Ashworth James* for the plaintiff.

Wilfrid M. Hunt for the defendants.

Cur. adv. vult.

Nov. 30. The following judgments were read.

SIR ERNEST POLLOCK, M.R.—This is an appeal from the judgment of SARGANT, J., given by him on Feb. 23, 1923, upon a summons to review a certificate given by the master in an action to recover possession of certain premises subject to a lease under a proviso for re-entry. By an indenture of lease dated Jan. 31, 1918, the premises were demised to the defendant and another, whose interest is now vested in the defendant as sole lessee. There has been a breach of the covenant not to sublet or part with the possession of the premises, or any part thereof, without the consent in writing of the lessor whereby the lessor—the

plaintiff—has become entitled to recover possession. There have been several breaches of that covenant. The earliest was committed on Oct. 20, 1919. Subsequent breaches occurred, though all were committed without the knowledge of the lessor. By these breaches a profit rental was secured over and above the rent payable under the lease to the lessor, the now plaintiff. At some date in March, 1922, the breaches of covenant came to his knowledge, and on May 12 he issued his writ to recover possession. No appearance was entered to the writ, and on June 26, 1922, it was ordered that the plaintiff do recover possession of the premises and mesne profits to be assessed. On Dec. 18, 1922, the master gave his certificate, assessing the mesne profits at the sum of £841—a figure accepted by the defendant -if the basis on which the assessment is to be made is that the mesne profits are to be calculated from the date of the first breach of covenant, that is to say, Oct. 20, 1919. On the summons to review the master's certificate, the learned judge limited the mesne profits to run from the date of the writ, holding that down to the date of the writ the tenant was to be liable for the amount of the rent and no more.

The point is thus raised: From what date does the plaintiff's right to mesne profits, that is to say, damages for trespass, begin? Does it run only from the date of the writ, or does it relate back to the date of the breach of covenant which gave rise under the proviso, to the plaintiff's right to re-enter? For the plaintiff it is contended that the breach relied upon is not a continuing breach; that the right to re-enter arose when the breach was committed; and that the breach is the foundation of his right to judgment for possession, and carries with it the right to mesne profits from that date. *Dunlop* v. *Macedo* (1) and *Ocean Accident and Guarantee Corpn.* v. *Ilford Gas. Co.* (2), as well as a number of other authorities, to which the attention of SARGANT, J., had been directed, were cited to support this view. During the course of the argument I was much impressed with the case presented on behalf of the plaintiff. The above authorities appeared to justify it, and to be in accord with the well-known proposition of law stated by COLLINS, M.R., in the *Ocean Accident Case* ([1905] 2 K.B. at p. 497), that in an action of trespass, the right to sue as against a wrongdoer relates back after entry to the time at which the right to enter accrued so as to give a right of action for trespass intermediate in point of time between the date of the right to enter and that of the actual entry. Further consideration and research has, however, led me to the conclusion that that principle does not apply to the present case, and that the judgment of the learned judge is right.

The terms of the proviso under which the plaintiff's right accrued are as follows:

> "If there shall be any breach or non-observance of any of the lessee's covenants hereinbefore contained, then and in any of the said cases it shall be lawful for the lessor at any time thereafter into and upon the said demised premises or any part thereof in the name of the whole to re-enter and the same to have again re-possess and enjoy as in his former estate."

It is unnecessary, however, to consider the precise words of, or construction to be placed upon, the forfeiture clause, for in a long series of cases it has been determined that a provision that a lease shall be void on a breach of covenant or conditions by the lessee means that the lease is voidable only at the option of the lessor: see *Doe d. Bryan* v. *Bancks* (3) and *Davenport* v. *R.* (4), 3 App. Cas. at p. 129, where the cases are fully considered; and also that the lessor must do some act evidencing his intention to enter for the forfeiture and to determine the lease: see *Roberts* v. *Davey* (5), *Doe d. Lawrence* v. *Shawcross* (6), 3 B. & C. at p. 756; COLE ON EJECTMENT (1857), p. 408. It was necessary, therefore, for the plaintiff in this case to take such a step in order to render his cause of action complete, and the issue of the writ is such a step: *Jones* v. *Carter* (7).

But when the plaintiff's cause of action is thus completed, from what time do his rights accrue? The question that had to be determined in the *Ocean Accident and Guarantee Corpn.* v. *Ilford Gas Co.* (2) was whether second mortgagees were

A entitled to stand in the shoes of the mortgagor so as to found their claim against a trespasser, who, as a wrongdoer, could not dispute their title. No doubt after entry there is a relation back to the actual title as against a wrongdoer, and in such a case a plaintiff can, as against a wrongdoer, maintain an action for trespasses committed prior to his entry: see *Barnett* v. *Earl of Guildford* (8). In the present case, however, the defendant was in possession under the lease, and was entitled B to remain in possession, unless and until some act was done by the lessor to put an end to the lease. The issue of the writ, therefore, was essential to alter the possession of the tenant. Until his voidable lease was determined he had a right to remain where he was. *Dunlop* v. *Macedo* (1) does not determine the question of relation back, for the mesne profits in fact allowed were only those accruing during the time elapsed since the plaintiff gave the defendant notice requiring the C rent to be paid to him.

Under the old procedure the action of ejectment and the action of trespass for mesne profits were separate actions, and remained so until, by the Common Law Procedure Act, 1852, a simpler procedure was introduced. By s. 214 of that Act it was made possible for damages by way of mesne profits to be given upon the trial of an ejectment. The cases under the old procedure may, however, be looked D at to ascertain whether mesne profits were recoverable from the earliest date at which the plaintiff's title accrued. In *Aslin* v. *Parkin* (9) (2 Burr. at p. 667) the opinion of the judges taken by LORD MANSFIELD declares that the judgment in ejectment proves nothing as to the length of time that the tenant has occupied; that the judgment does not relate back beyond the date of the demise laid in the ejectment proceedings, although in the same case it was definitely held that, although E fictitious in form, the old ejectment action was really brought by the lessor of the plaintiff to force the parties to go to trial on the merits. In *Doe d. Compere* v. *Hicks* (10) a point analogous to the present point was actually decided. It was an action of trespass for mesne profits. The plaintiff's title accrued on Mar. 19, 1794, but was not protected until he made an actual entry upon the premises on June 2, 1797. One of the questions that arose and was argued was whether the F plaintiff was entitled to the mesne profits from the time when his title first accrued on the ground that, by virtue of his entry, the plaintiff's title related back to the time when it accrued, and it was said that it was unreasonable that the plaintiff should lose the rents and profits in the interval between the time when his right accrued and the subsequent entry. But it was held that the plaintiff could not be said to have been in possession before entry, and that he could not recover the G mesne profits that accrued before that date, June 2, 1797. In *Pearse* v. *Coaker* (11), decided after the simpler procedure of the Common Law Procedure Acts had been introduced, in an action for mesne profits based upon a judgment by default in ejectment it was held that they were recoverable only from the date of the writ in the action of ejectment down to the time that possession of the premises was obtained, and not for the earlier period during which the plaintiffs claimed title in H the writ of ejectment. CHANNELL, B., said (L.R. 4 Exch. at p. 99):

> "It cannot be doubted that a judgment, though by default, in ejectment is proof of title in an action for mesne profits, as from the day of the demise on the day named in the writ of ejectment. It did not, however, nor does it now, prove possession by the defendant for a corresponding period. . . . In the absence of any further evidence he [the plaintiff] would be entitled to a verdict, I indeed [for mesne profits], but not to damages from the day named in the writ as that on which the plaintiff had a right to eject."

These two cases appear to me to establish that the judgment in an action of ejectment—now an action for the recovery of land—does not, per se, relate back to the date when the plaintiff's title was laid or arose, and particularly where the defendant—the lessee—was not originally a trespasser or wrongdoer and some act was necessary to found the plaintiff's right of action. Until that step was taken, the plaintiff's cause of action was not complete. The observations of TINDAL, C.J.,

in *Hartshorne* v. *Watson* (12) (4 Bing. N.C. at p. 182), and of LORD DENMAN in *Selby* v. *Browne* (13) (7 Q.B. at p. 633), point in the same direction, although, by reason of the issues to be determined in those cases, they cannot, in my judgment, be taken to be decisions upon the point. Upon the authorities which I have referred to above, and for the reasons I have given, I am of opinion that the judgment of SARGANT, J., was right and that the appeal must be dismissed with costs.

WARRINGTON, L.J.—At the date of the issue of the writ in this action the defendant Boynton was tenant to the plaintiff under a lease which contained a covenant against sub-letting except by consent and a proviso for re-entry on breach of covenant. The defendant committed several breaches of the covenant, the first of which was the grant of an underlease dated Oct. 20, 1919. The plaintiff did not discover any of those breaches until March, 1922, and on May 12, 1922, he issued his writ for recovery of possession of the land demised and for mesne profits. On June 25, 1922, he obtained judgment for possession and mesne profits to be assessed. A question being raised as to the date from which the mesne profits should be calculated—the defendant saying it should be from the date of the writ and the plaintiff that it should be from the date of the first breach of covenant—SARGANT, J., has adopted the view of the defendant. The plaintiff appeals. It happens that the rent reserved by the lease is considerably lower than the present annual value, and the question, therefore, is of some importance to the parties.

[His Lordship read the proviso for re-entry and continued:] It is well settled that according to its true construction under such a proviso the lease is not void, but voidable only at the option of the lessor (*Arnsby* v. *Woodward* (14)). It is also settled that the lease remains in force until some conclusive determination thereof by the lessor in the exercise of his option. In the present case such conclusive determination was effected by the issue of the writ and the lease thereupon determined. To use the words of TINDAL, C.J., in *Hartshorne* v. *Watson* (12) (4 Bing. N.C. at p. 182):

> "The proper construction of [the condition of re-entry] is that from the time of re-entry, the lessor shall have the land as if the indenture had not been made: for the period previous to re-entry the lessee had it subject to the indenture."

In the present case the issue of the writ is the equivalent of actual entry in the case cited. Now, damages by way of mesne profits are awarded in cases where the defendant has wrongfully withheld possession of the land from the plaintiff. According to the authorities I have cited, until the determination of the lease by the writ, his possession was under the lease and was not wrongful and for this period, therefore, no damages could be recovered as there was no wrong. Damages can only be recovered as from the determination of the lease, whatever form it may take, whether by effluxion of time or by re-entry under a proviso for that purpose.

So far I feel no difficulty in holding that the judgment of SARGANT, J., is correct. But it is said that the re-entry when made relates back to the previous breach of covenant giving the right to re-enter and thus enables the lessor to recover mesne profits as from the date of such breach, and I must, therefore, deal with that argument. In considering this part of the question it must be borne in mind that damages by way of mesne profits cannot be given for breach of covenant not to underlet. Such a breach inflicts in most, if not all, no pecuniary wrong on the lessor and its chief effect is to enable him to determine a lease which may be, and in the present case apparently is, of considerable value to the lessee. The damages are given for a different wrong altogether, viz., the withholding possession after the determination of the lease, and this wrong was committed upon and not before the service of the writ. If, then, the doctrine of relation were resorted to in this case the result would be to turn into a wrongful act that which at the time it was done was no wrong at all, viz., the remaining in possession under and by virtue of the lease until it was determined by the lessor's election to avoid it. The case mainly relied upon by the plaintiff in support of his contention was *Oceanic*

Accident and Guarantee Corpn. v. *Ilford Gas Co.* (2), and particularly the observations of COLLINS, M.R., but it must be remembered that in that case the doctrine of relation was resorted to for the purpose of establishing the right of a particular plaintiff, in that case a mortgagee (who had not gone into actual possession till after the commission of the wrong sued upon), to recover damages for that which was unquestionably a wrongful act, and not for the purpose of converting into a wrong an act which was rightful at the time it was done. In this, as in every other, case the judgment of the Master of the Rolls must be read in reference to the facts and circumstances with which he was dealing, and, so read, the judgment lends no support to the appellant's argument. In fact in *Tharpe* v. *Stallwood* (15), one of the cases discussed and acted on by the Master of the Rolls, COLTMAN, J., begins his judgment in favour of applying the doctrine of relation in that case by saying (5 Man. & G. at p. 774):

> "There are various authorities to show that a man shall not be made a trespasser by relation in respect of an act which was lawful at the time."

No authority has been cited which is inconsistent with this statement and I do not believe any can be found.

In my opinion, therefore, in the present case the doctrine of relation cannot be resorted to so as to antedate the wrongful possession of the defendant, and make it begin with the original breach of covenant. As to the argument founded on the practice in an action for mesne profits following on a judgment in an action for ejectment under the old system, under which practice damages were given as from the date of the demise to the plaintiff which might be laid as of a date anterior to the declaration, the practice appears to be founded on an estoppel by reason of which the defendant could not deny the facts alleged as to the demise, the entry thereunder, and the ouster, and, in my opinion, such practice has no application at the present day. Moreover, it may be that the demise to the plaintiff which had to be taken as admitted may have been in itself a final election by the lessor to avoid the subsisting lease as being an act inconsistent with its continuance. At any rate no successful argument in such a case as the present can, in my opinion, be founded on the practice in actions long since abolished. I think the judgment of SARGANT, J., was right, and the appeal must be dismissed with costs.

ASTBURY, J.—I agree. Mesne profits, being damages for trespass, can only be claimed, in a case like the present, as from the date when the defendant ceased to hold the demised premises as tenant under the lease. Under the proviso for re-entry in the present demise, the plaintiff's right to re-enter and determine the lease arose on his doing an unequivocal act, after the lessee's breach of covenant, giving evidence of his intention to take advantage of the proviso, which act in the present case was the issue of the writ. Prior to this date the defendant was in possession under the lease, and was in no sense a trespasser. The plaintiff contends that mesne profits are recoverable from the date of the lessee's first breach of covenant, as being the date when the right of re-entry first arose, this contention being based on the well-known contention of relation back. With the exception of *Terrell* v. *Chatterton* (16) in which the order in the Court of Appeal, qua relation back, was drawn up per incuriam and altered in the House of Lords, no authority has been found, or principle referred to, justifying, in my opinion, any such proposition, the authorities cited all being cases where the defendant was an admitted trespasser at the antecedent date. The doctrine of relation back was relied on, and, in consequence of the subsequent establishment of a sufficient title in the plaintiff to maintain his suit, he was entitled to succeed. No application of the well-known doctrine of relation back can, for the purpose of extending a claim for trespass, turn a lawful into an unlawful possession. A plaintiff in ejectment is now entitled to recover damages, in a proper case, for any period over which he can prove a right to possession, but when the defendant in possession is not a

trespasser at all until his title is made void, as, for instance, by entry or by writ, mesne profits can only be recovered as from such latter date. In my opinion, the judgment of the learned judge in the court below was right in every particular, and I have only added a short expression of my own opinion out of respect to the able arguments which have been addressed to this court.

Solicitors: *Williams & James*; *Boulton, Sons & Sandeman.*

[*Reported by* J. L. Denison, Esq., *Barrister-at-Law.*]

PEYRAE *v.* WILKINSON AND ANOTHER

[King's Bench Division (Bailhache, J.), October 26, 1923]

[Reported [1924] 2 K.B. 166; 93 L.J.K.B. 121; 130 L.T. 511]

Money—Currency—Rate of exchange—Debt payable in foreign currency—Judgment obtained—Date for conversion into English currency.

In an action in England for a debt for goods sold and delivered payable in a foreign currency the rate of exchange for converting the foreign currency into English currency is the rate current on the date when the debt became due and payable and not the rate current at the date of judgment.

Uellendahl v. *Pankhurst, Wright & Co.* (1), [1923] W.N. 224, followed.

Cohn v. *Boulken* (2) (1920), 36 T.L.R. 767, not followed.

Notes. Considered: *Graumann* v. *Treitel*, [1940] 2 All E.R. 188; *Madeleine Vionnet et Cie* v. *Wills*, [1940] 1 K.B. 72.

As to conversion of foreign currency liabilities, see 27 Halsbury's Laws (3rd Edn.) 6, 7; and for cases see 35 Digest 172 et seq.

Cases referred to:

(1) *Uliendahl* v. *Pankhurst, Wright & Co.* (1923), 39 T.L.R. 628; sub nom. *Uellendahl* v. *Pankhurst, Wright & Co.*, [1923] W.N. 224; 67 Sol. Jo. 791; 35 Digest 173, *38*.

(2) *Cohn* v. *Boulken* (1920), 36 T.L.R. 767; 64 Sol. Jo. 636; 35 Digest 174, *45*.

(3) *Société des Hôtels Le Touquet-Paris-Plage* v. *Cummings*, [1922] 1 K.B. 451; 91 L.J.K.B. 288; 126 L.T. 513; 38 T.L.R. 221; 66 Sol. Jo. 269, C.A.; 35 Digest 173, *36*.

Action.

The plaintiff, who carried on business at Lyons, in France, brought an action against the defendants to recover the balance of the price of goods sold and delivered by him to the defendants. The agreement for the sale of the goods was made in October, 1921, and the price specified was 10,630 francs, subject to certain allowances. The judge found that the goods ought to have been paid for on Dec. 10, 1921. On April 7, 1922, the defendants paid on account £50, an amount which represented, at the rate of 48 francs to the pound, 2,400 francs. The plaintiff now sought to recover the balance of 8,017 francs. The question for decision was whether, in converting that sum into English currency, the rate of exchange current when payment should have been made for the goods, namely, Dec. 10, 1921, should prevail, or whether the rate of exchange should be taken as at the date of the judgment in the action. The value of the franc had depreciated considerably between those dates.

du Parcq for the plaintiff.

W. T. Monckton for the defendants.

BAILHACHE, J.—So far as actions for damages for breaches of contract are concerned, the question which arises here has already been decided; the proper date to be taken for the purpose of applying the rate of exchange in calculating the amount of the damages in English currency is the date of the breach of contract. It has, however, been contended on behalf of the defendants here, that, in an action for debt for goods sold and delivered, the proper date for calculating the rate of exchange should be the date of the judgment for the purpose of arriving at the amount of British currency necessary to pay the debt, and not the rate of exchange current at the date on which the debt became due and payable, so that, applying this to the facts of the present case, the debt existed in francs until it was converted into English currency by the judgment. Although there seems to be some force in that argument, I am of opinion that there is no real difference between an action for debt and an action for damages for breach of contract as regards the proper date on which to apply the rate of exchange in order to convert the sum into English currency. ATKIN, L.J., said this in *Société des Hôtels de Touquet-Paris-Plage* v. *Cummings* (3) ([1922] 1 K.B. at p. 465):

> "But no case that I know of has yet decided what the position is when a foreign creditor, to whom a debt is due in his country in the currency of his country, comes to sue his debtor in the courts of this country for the foreign debt. Much may be said for the proposition that the debtor's obligation is to pay, say, francs, and so continues until the debt is merged in the judgment which should give him the English equivalent at that date of those francs. It is a problem which seems to require very full consideration, and which I personally should desire to reserve."

That passage seems to show that the learned lord justice had not definitely decided that the same rate for calculating the rate of exchange should apply in the case of actions for debt as in the case of actions for damages for breach of contract. The question has been decided in one way by ROWLATT, J., in *Uellendahl* v. *Pankhurst, Wright & Co.* (1), and in the other way by ACTON, J., in *Cohn* v. *Boulken* (2). I think it is very important that there should be a definite ruling as to the date for calculating the rate of exchange in the case of actions for debt, and, having carefully considered these last-mentioned cases, I propose to follow the decision of ROWLATT, J. I, therefore, hold that the proper date to be taken for the purpose of applying the current rate of exchange is the date when the debt became due and payable and not the date of the judgment of the action, and the result of that is that the debt must be converted into sterling at the rate of exchange current on the date when the debt became due and payable. Judgment must, therefore, be for the plaintiff.

Judgment for the plaintiff.

Solicitors: *Aylett & Gotto*; *Trotter, Goodhall & Patteson.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

A

R. *v.* GOVERNOR OF BRIXTON PRISON. Ex parte PERRY

[KING'S BENCH DIVISION (Lord Hewart, C.J., Sankey and Swift, JJ.), December 10, 1923]

[Reported [1924] 1 K.B. 455; 93 L.J.K.B. 380; 130 L.T. 731; 40 T.L.R. 181; 68 Sol. Jo. 370; 27 Cox, C.C. 597] B

Extradition—Habeas corpus—Committal—Fresh evidence since committal—Jurisdiction to review magistrate's decision—Extradition Act, 1870 (33 & 34 *Vict.*, *c.* 52), *s.* 11.

The applicant had been committed by a magistrate, who, admittedly, had jurisdiction, for extradition to France on a charge of absconding in Paris with a diamond brooch which had been entrusted to him for a prospective purchaser, there being evidence on which the magistrate was entitled to make the order. A rule nisi for a writ of habeas corpus was obtained by the applicant on the ground that, since the committal, fresh evidence, showing that he was not the man who had absconded with the brooch, had been discovered. C

Held: the court had no power to review the magistrate's decision on the ground put forward, the matter being one which could be dealt with by the Secretary of State under the Extradition Act, 1870, s. 11; the rule must, therefore, be discharged. D

Notes. As to an application for habeas corpus in extradition cases, see 16 HALSBURY'S LAWS (3rd Edn.) 576, 577; and for cases see 24 DIGEST (Repl.) 1006–1008. For the Extradition Act, 1870, s. 11, see 9 HALSBURY'S STATUTES (2nd Edn.) 882. E

Cases referred to:

(1) *Re Meunier*, [1894] 2 Q.B. 415; 63 L.J.M.C. 198; 71 L.T. 403; 42 W.R. 637; 18 Cox, C.C. 15; 10 R. 400, D.C.; 24 Digest (Repl.) 994, *38*.

(2) *Re Arton* (*No. 2*), [1896] 1 Q.B. 509; 65 L.J.M.C. 50; 74 L.T. 249; 60 J.P. 132; 44 W.R. 351; 12 T.L.R. 189; 40 Sol. Jo. 258; 18 Cox, C.C. 177, D.C.; 24 Digest (Repl.) 991, *21*. F

(3) *R.* v. *Governor of Holloway Prison, Re Siletti* (1902), 71 L.J.K.B. 935; 87 L.T. 332; 67 J.P. 67; 51 W.R. 191; 18 T.L.R. 771; 46 Sol. Jo. 686; 20 Cox, C.C. 353, D.C.; 24 Digest (Repl.) 1007, *133*.

(4) *Re Castioni*, [1891] 1 Q.B. 149; 60 L.J.M.C. 22; 64 L.T. 344; 55 J.P. 328; 39 W.R. 202; 7 T.L.R. 50; 17 Cox, C.C. 225, D.C.; 24 Digest (Repl.) 993, *36*. G

Rule nisi for a writ of habeas corpus.

In December, 1922, a man named Watson, who was entrusted in Paris with a diamond brooch worth about £2,000 in order that he might show it to a prospective purchaser, absconded with the jewel. The applicant, Daniel Arthur Perry, was arrested in England for the offence of larceny within the jurisdiction of the French Government, it being alleged that he and Watson were the same person. In extradition proceedings before the chief magistrate at Bow Street, evidence was given which identified Perry with Watson, although the identity was disputed. In October, 1923, the applicant was committed to Brixton Prison to await extradition to France. This rule was obtained on the ground that, since the committal, fresh evidence, showing clearly that the applicant was not the same person as Watson, had been discovered. It was admitted, however, on behalf of the applicant that the magistrate had jurisdiction and had some evidence before him on which he might commit the applicant for extradition. H I

The Extradition Act, 1870, s. 11, provides:

"If the police magistrate commits a fugitive criminal to prison, he shall inform such criminal that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of habeas corpus. Upon

the expiration of the said fifteen days, or, if a writ of habeas corpus is issued, after the decision of the court upon the return to the writ, as the case may be, or after such further period as may be allowed in either case by a Secretary of State, it shall be lawful for a Secretary of State, by warrant under his hand and seal, to order the fugitive criminal (if not delivered on the decision of the court) to be surrendered to such person as may in his opinion be duly authorised to receive the fugitive criminal by the foreign State from which the requisition for the surrender proceeded, and such fugitive criminal shall be surrendered accordingly. . . .''

Percival Clark showed cause.
Roland Oliver in support of the rule.

LORD HEWART, C.J.—In this case the only question argued has been whether this court, on fresh evidence, will review the decision of the magistrate who committed the applicant for extradition, it being admitted that the magistrate had jurisdiction and also had evidence before him on which he might commit. In *Re Meunier* (1), Cave, J., said ([1894] 2 Q.B. at p. 418): ''The magistrate has a discretion in each case, as to whether the evidence is or is not sufficient to justify a committal,'' the test being whether, if the offence had been one committed in this country, there would have been evidence justifying a committal for trial. In the present case, no doubt exists that, when the magistrate had to decide whether to commit or not, there was evidence to show that the applicant was the same person as Watson. It is now said that further evidence of a strong, and, indeed, conclusive, character has arisen which, side by side with the material before the magistrate, would have caused him to reach the opposite conclusion.

The matter has been dealt with in several cases, and the principle is laid down in *Re Arton (No. 2)* (2), by Lord Russell, C.J. ([1896] 1 Q.B. at p. 518):

> ''We are not a Court of Appeal on questions of fact from him [the magistrate]. We have only to see that he had such evidence before him as gave him authority and jurisdiction to commit.''

Again, in *R.* v. *Governor of Holloway Prison, Re Siletti* (3), Bigham, J., said (87 L.T. at p. 334):

> ''I think the only question that this court can entertain is the question of jurisdiction. . . . He [the accused] may also say that there was absolutely no evidence upon which the magistrate could exercise his discretion as to whether he would commit or not.''

In the same case, Darling, J., said in words which obviously apply here (ibid., at p. 335):

> ''This case is a peculiar one, because . . . the evidence is evidence which has never yet been given. It is evidence which has been procured since the order was made, and it is said that, if the magistrate had had that before him, it is conceivable that he would have come to a different conclusion; and it is said, therefore, that in any case where you can produce evidence which the magistrate has not had before him, but as to which it can be said to this court that, if the magistrate had had it before him, it would have affected his decision, this court will order a rule for a habeas corpus to be made absolute. In my opinion, to do so would be to do what the courts have never yet done.''

That is a statement of the law with which I respectfully agree. It is true that in *Re Castioni* (4) the law seems to be differently expressed; but as to that case two observations are to be made. First, the questions of mixed law and fact happened to be peculiarly interwoven with the question of jurisdiction; if the applicant there was right, the magistrate had no jurisdiction. Secondly, if that case is intended to be an authority for the proposition that, on a question of fact within the jurisdiction of the magistrate, this court will review his conclusion on evidence subsequently arising, I agree with the view taken by the court in *R.* v. *Governor*

of Holloway Prison, Re Siletti (3), that to that extent the decision in *Re Castioni* (4) cannot be supported. A

It is argued for the applicant that hardships may arise where a British subject is sent abroad for trial and matter of a conclusive character arises which, if it had been before the magistrate, would have prevented a committal for extradition. As to this, it is to be observed that in all cases put by way of hypothesis the matter is presumed to be so clear that no reasonable person would send the accused for B trial abroad. That is just the case provided for by the Extradition Act, 1870, s. 11. The question is not as to revising on a conflict of testimony the conclusions of the magistrate, but merely of recognising the unanswerable force of something which has unexpectedly arisen since the committal. In such a case, the Secretary of State, acting under s. 11, would not order the accused to be surrendered to the foreign government, but would exercise his statutory powers in his favour. Those C powers differ entirely from the powers of this court. If the argument in support of this rule were right, it would follow that, in every case of fresh evidence arising after the order of the magistrate, this court would, at the request of the accused, have to review the magistrate's decision. Committal for trial in this country is in some respects not quite the same as committal for trial abroad, for instance, in the matter of compelling the attendance of witnesses. But this is an application for D a writ of habeas corpus, and, if the writ is to issue, the right to it arises from the fact that the imprisonment is unlawful. Here it is not possible to show that the imprisonment is unlawful. Where the evidence is such that the magistrate is entitled to commit, this court will not review his decision because of evidence adduced since the committal. If this is a case for refusing to surrender the fugitive for trial abroad, no doubt the Secretary of State will exercise his powers under the E statute. The argument on the question of hardship fails, and the rule must be discharged.

SANKEY, J.—I agree with the statement of HAWKINS, J., in his judgment in *Re Castioni* (4) ([1891] 1 Q.B. at p. 163):

> "What follows afterwards shows that it is not the magistrate who is to deter- F
> mine these matters, but it is the Home Secretary who is to determine whether or not ultimately the prisoner is to be sent abroad."

If the facts are in accordance with contention of counsel in support of the rule, the applicant has his remedy with the Home Secretary, who will decide as to his ultimate surrender.

G

SWIFT, J.—I agree.

Rule discharged.

Solicitors: *Director of Public Prosecutions*; *Edgar Smith & Co.*

[*Reported by* J. F. WALKER, ESQ., *Barrister-at-Law.*]

R. v. DEVON JUSTICES. Ex parte DIRECTOR OF PUBLIC PROSECUTIONS

[KING'S BENCH DIVISION (Lord Hewart, C.J., Sankey and Swift, JJ.), December 20, 21, 1923]

[Reported [1924] 1 K.B. 503; 93 L.J.K.B. 284; 130 L.T. 640; 88 J.P. 73; 40 T.L.R. 213; 68 Sol. Jo. 422; 27 Cox, C.C. 593]

Quarter Sessions—Jurisdiction—Offence alleged to have been committed in one of His Majesty's ships in Scottish waters—Prisoner arrested in England—Larceny Act, 1861 (24 & 25 *Vict.*, *c.* 96), *s.* 115—*Larceny Act*, 1916 (6 & 7 *Geo.* 5, *c.* 50), *s.* 17 (1) (*a*), *s.* 39 (1).

C. was charged with having committed larceny on board one of His Majesty's ships when she was lying in the tidal waters of the Firth of Forth. He was placed under arrest in the ship, and later, when the ship was at Torbay, he was arrested by the Devon police and charged before the justices who committed him for trial at Devon Quarter Sessions. The indictment charged an offence contrary to the Larceny Act, 1916, s. 17 (1) (a), committed on the high seas. Quarter sessions declined to proceed with the indictment on the ground that they had no jurisdiction since the Larceny Act, 1861, s. 115, did not extend to offences committed in estuaries in Scotland, and that the offence was properly triable by the Scottish courts.

Held: the offence was committed within the jurisdiction of the Admiralty of England, and, therefore, being an offence mentioned in the Act of 1861, was triable by the quarter sessions under s. 115 of that Act.

Per **Curiam**: The same result might be reached under the Larceny Act, 1916, s. 39 (1).

Notes. The Larceny Act, 1916, s. 39 (1), was repealed by the Criminal Justice Act, 1925, s. 49 (4) and Sched. III. See now s. 11 (1) of that Act.

As to Admiralty jurisdiction in criminal cases, see 10 HALSBURY'S LAWS (3rd Edn.) 319 et seq.; and for cases see 14 DIGEST (Repl.) 150 et seq. For the Larceny Act, 1861, s. 115, and for the Larceny Act, 1916, s. 17, see 5 HALSBURY'S STATUTES (2nd Edn.) 747, 1021; and for the Criminal Justice Act, 1925, s. 11, see 14 HALSBURY'S STATUTES (2nd Edn.) 935.

Rule Nisi to the justices for Devonshire, sitting in quarter sessions, for a mandamus ordering them to hear and determine an indictment preferred against Roderick William Castle charging him with larceny contrary to s. 17 (1) (a) of the Larceny Act, 1916.

The alleged offence was committed on or about July 10, 1923, on board H.M.S. *Princess Margaret*, a ship attached to the Atlantic Fleet. From July 5 to July 12, 1923, the ship was in the tidal waters of the Firth of Forth between Rosyth and Port Edgar above the Forth Bridge at a place to which the largest ships of the Navy could go, where the Firth of Forth was about two miles wide, and which was alleged to be within the jurisdiction of the Admiralty of England. On July 12, 1923, Castle was placed under open arrest by an officer of the ship. On July 17, 1923, the ship was in Torbay, and Castle was arrested by a detective-constable of the Devon Constabulary, and was charged before the Torquay magistrates and committed for trial at the Devon Quarter Sessions. On Oct. 3, 1923, a true bill against Castle was found by the Grand Jury at the quarter sessions, the particulars of the alleged offence being that Castle, being clerk or servant to the Navy, Army, and Air Force Institutes, stole from them the sum of £40 on the high seas, contrary to the Larceny Act, 1916, s. 17 (1) (a). Castle pleaded not guilty. The quarter sessions declined to proceed with the indictment on the ground that they had no jurisdiction as s. 115 of the Larceny Act, 1861, did not extend to offences committed in estuaries in Scotland and that the offence was properly triable by

the Scottish courts. The jury were thereupon discharged without giving a verdict, and Castle was discharged from custody.

This rule was then obtained on the ground that, by virtue of s. 115 of the Larceny Act, 1861, quarter sessions had jurisdiction to try the case.

The Larceny Act, 1861, s. 115, provides:

"All indictable offences mentioned in this Act which shall be committed within the jurisdiction of the Admiralty of England or Ireland shall be deemed to be offences of the same nature, and liable to the same punishments, as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried, and determined in any county or place in which the offender shall be apprehended or be in custody; and in any indictment for any such offence . . . the venue in the margin shall be the same as if the offence had been committed in such county or place, and the offence itself shall be averred to have been committed 'on the high seas': Provided, that nothing herein contained shall alter or affect any of the laws relating to the government of Her Majesty's land or naval forces."

The Larceny Act, 1916, provides:

"Section 17. Every person who—(1) being a clerk or servant or person employed in the capacity of a clerk or servant—(a) steals any chattel, money or valuable security belonging to or in the possession or power of his master or employer . . . shall be guilty of felony. . . .

Section 39. (1) A person charged with any offence against this Act may be proceeded against, indicted, tried, and punished in any county or place in which he was apprehended or is in custody as if the offence had been committed in that county or place; and for all purposes incidental to or consequential on the prosecution, trial, or punishment of the offence, it shall be deemed to have been committed in that county or place."

Travers Humphreys and *R. E. Dummett* showed cause.

Harold L. Murphy in support of the rule.

LORD HEWART, C.J., stated the facts and continued: The justices declined to proceed with the trial of the indictment on the ground that the contention raised by the defence was correct. That contention was that s. 115 of the Larceny Act, 1861, did not extend to offences committed in estuaries or rivers in Scotland, and that the offence was properly triable by the courts of Scotland only. [His Lordship read s. 115 of the Larceny Act, 1861, and continued:] It is because of the provisions of that section that one finds in the particulars of the offence set out in this indictment the expression "on the high seas." Although it may well be that, for certain purposes, the provisions of s. 115 have now become of less utility than formerly, it is not correct to say that the section has been repealed. It appears to me to be still of full force and effect.

It is argued that that section, in any event, cannot assist the prosecution in the present case, as the offence charged against Castle, in the circumstances already referred to, was not an offence mentioned in the Act of 1861, and committed within the jurisdiction of the Admiralty of England. It is quite clear that the offence charged is an indictable offence mentioned in the Act of 1861. Is it true, in the circumstances, to say that it was committed within the jurisdiction of the Admiralty of England?

The argument before us has gone back to comparatively ancient times, beginning with the statute 15 Rich. 2, c. 3. It is not necessary that I should retrace the history of the law. It is enough to say that, under the Naval Discipline Act, 1866, this offence, being committed on one of His Majesty's ships, was an offence committed within the jurisdiction of the Admiralty of England. The offender was either a naval rating, or he was not. If he was a naval rating, then it is obvious that he was subject to the jurisdiction of the Admiralty of England. If he was not a naval rating, nevertheless, by s. 89 of the Naval Discipline Act, 1866, he was

still subject to the jurisdiction of the Admiralty of England. In my opinion, therefore, the contention raised on behalf of the prosecution in this case was correct and, as the defendant in the criminal proceedings was apprehended, and was in the county of Devon, the quarter sessions for the county of Devon had jurisdiction to try him on this indictment.

Some other questions have been raised in the argument, but it is not necessary that I should refer to them at any length. It may well be that a similar result may be reached if one looks at the provisions of s. 39 (1) of the Larceny Act, 1916, but it is not necessary to decide that point. I am satisfied that the contention urged on the part of the prosecution at quarter sessions and before us is correct, and that the justices had the jurisdiction which they thought they had not.

In these circumstances, the rule must be made absolute.

SANKEY, J.—I agree.

SWIFT, J.—I agree.

Rule absolute.

Solicitors: *Ford, Lloyd, Bartlett & Michelmore*, for *Brian S. Miller*, Exeter; *Director of Public Prosecutions.*

[*Reported by* J. F. Walker, Esq., *Barrister-at-Law.*]

R. *v.* DUKE OF LEINSTER

[Court of Criminal Appeal (Lord Hewart, C.J., Sankey and Salter, JJ.), October 22, 1923]

[Reported [1924] 1 K.B. 311; 93 L.J.K.B. 144; 130 L.T. 318; 87 J.P. 191; 40 T.L.R. 33; 68 Sol. Jo. 211; 27 Cox, C.C. 574; 17 Cr. App. Rep. 176; [1924] B. & C.R. 78]

Bankruptcy—Undischarged bankrupt—Obtaining credit to the extent of £10 or upwards—No disclosure to person from whom credit obtained—Absolute obligation to make disclosure—Bankruptcy Act, 1914 (*4 & 5 Geo. 5, c. 59*), *s. 155 (a).*

Section 155 of the Bankruptcy Act, 1914, which enacts: "Where an undischarged bankrupt—(a) either alone or jointly with any other person obtains credit to the extent of £10 or upwards from any person without informing that person that he is an undischarged bankrupt . . . he shall be guilty of a misdemeanour," imposes an absolute obligation on the bankrupt to give such information; therefore, it is no defence to a prosecution under s. 155 (a) that the undischarged bankrupt, before he obtained credit, instructed his agent to give such information to the person giving credit and had reasonable grounds for believing that the agent had done so.

Notes. As to offences by a bankrupt, see 2 Halsbury's Laws (2nd Edn.) 626 et seq.; and for cases see 5 Digest (Repl.) 1119 et seq. For the Bankruptcy Act, 1914, s. 155, see 2 Halsbury's Statutes (2nd Edn.) 437.

Cases referred to in argument:

Sherras v. *De Rutzen*, [1895] 1 Q.B. 918; 64 L.J.M.C. 218; 72 L.T. 839; 59 J.P. 440; 43 W.R. 526; 11 T.L.R. 369; 39 Sol. Jo. 451; 18 Cox, C.C. 157; 15 R. 388, D.C.; 14 Digest (Repl.) 39, *90.*

Toppin v. *Marcus*, [1908] 2 I.R. 423; 14 Digest (Repl.) 40, **71.*

Stonehouse v. *Masson*, [1921] 2 K.B. 818; 91 L.J.K.B. 93; 125 L.T. 463; 85 J.P. 167; 37 T.L.R. 621; 19 L.G.R. 477; 27 Cox, C.C. 23, D.C.; 15 Digest (Repl.) 925, *8866.*

Appeal against conviction.

The appellant was convicted of obtaining credit, contrary to s. 155 (a) of the Bankruptcy Act, 1914, to the extent of £725 from Straker-Squire, Ltd., without informing them that he was an undischarged bankrupt. At the trial at the Central Criminal Court the Recorder of London put the following questions to the jury: (i) Did the appellant obtain credit from Straker-Squire, Ltd.?—Answer: Yes. (ii) Did the appellant inform them or their agent Mr. Wood that he was an undischarged bankrupt?—Answer: No. (iii) Did Straker-Squire, Ltd., or their agent in fact know before giving credit to the appellant that he was an undischarged bankrupt?—Jury disagreed. (iv) Did the appellant know that Straker-Squire, Ltd., or their agent were or was in possession of that knowledge, if any?—Answer: No. (v) Did the appellant instruct Fraser [the appellant's secretary] to inform Straker-Squire, Ltd., or their agent that he was an undischarged bankrupt?—Answer: Yes. (vi) Did Fraser so inform them or their agent?—Answer: No. (vii) If no, did the appellant on reasonable grounds believe that Fraser had so informed them or their agent?—Answer: Yes. In view of these answers, a verdict of guilty was recorded and the appellant was bound over.

Sir E. Marshall-Hall, K.C. (*St. John Hutchinson* with him), for the appellant.
Cecil Whiteley, K.C., and *J. P. Valetta* for the Crown.

LORD HEWART, C.J., delivered the judgment of the court in which he stated the facts, and continued: There is no doubt that the appellant at the material time was an undischarged bankrupt, and it is quite clear that neither the appellant himself nor any agent of his informed Straker-Squire, Ltd., or their agent of that fact, although it is true that the jury found that the appellant had instructed his agent to inform them, and the argument is based on the fact that the jury found he had reasonable grounds to believe that the agent had done so. That sends one back to the words of the statute and its object and purport. If s. 155 (a) of the Bankruptcy Act, 1914, had been intended to bear a different meaning, it would have been differently worded, and it might have said that an undischarged bankrupt should not "wilfully" or "fraudulently" obtain credit from any person without informing that person that he was an undischarged bankrupt. But it does not say so. An absolute obligation is imposed by it on an undischarged bankrupt to convey the information to the person giving credit. If it were otherwise, the section would be to a great extent nugatory; the object is to protect the person giving credit, and such persons would not be protected in many cases if the information were not given. Having regard to the words and the manifest purpose of the section, the court is of opinion that there is an absolute obligation on the undischarged bankrupt to disclose the fact. The information must be given and the disclosure must be made. If that is not done, then, whatever the state of mind of the bankrupt, an offence has been committed. No doubt, where the jury finds that the undischarged bankrupt has given instructions for the information to be given and had reason to believe that it had been given, that fact may well be taken into account on the question of punishment, but it has no bearing on the question whether the offence has been committed.

In this case there were three essential questions: (i) Was the appellant an undischarged bankrupt?—Yes. (ii) Did he obtain credit?—Yes. (iii) Did he in fact inform the person from whom he obtained credit that he then was an undischarged bankrupt?—No. The appeal must be dismissed.

Appeal dismissed.

Solicitors: *Appleton & Co.*; *Director of Public Prosecutions.*

[*Reported by* J. N. Fletcher, Esq., *Barrister-at-Law.*]

ADAMS *v.* MORGAN & CO., LTD.

[Court of Appeal (Bankes, Scrutton and Atkin, L.JJ.), October 30, 1923]

[Reported [1924] 1 K.B. 751; 93 L.J.K.B. 382; 130 L.T. 792; 40 T.L.R. 70; 68 Sol. Jo. 348]

Indemnity—Contract of agency—Indemnity clause—Sale of business to limited company—Vendor carrying on business for benefit of company—Vendor assessed to supertax—Right to indemnity.

By an agreement in writing, dated in August, 1919, by which the plaintiff sold his business to the defendants, a limited company, it was provided that the sale was to take effect as from the beginning of the year, and that, from then until the date of completion, the plaintiff was to carry on the business on account of and for the benefit of the defendants, and would account and be entitled to be indemnified accordingly. The plaintiff was assessed to supertax in respect of profits earned on behalf of the defendants.

Held: although the defendants, as a limited company, were not liable to pay supertax, the plaintiff was entitled under the contract to be indemnified in respect of the supertax.

Judgment of McCardie, J., [1923] 2 K.B. 234, affirmed.

Notes. Distinguished: *Re Hollebone's Agreement*, [1959] 2 All E.R. 152.

As to reimbursement and indemnity of an agent by his principal, see 1 Halsbury's Laws (3rd Edn.) 203–206; and for cases see 1 Digest 528 et seq.

Appeal from a judgment of McCardie, J.

By an agreement dated Aug. 22, 1919, the plaintiff sold his business to the defendants, a limited company, as from Jan. 1, 1919, for the sum of £120,000. The material clauses of the agreement were as follows:

"2. There shall be excepted out of the sale hereby agreed upon assets equivalent to the liability for excess profits duty and income and supertax for the year 1918 and to the amount of the liabilities of the business all as shown in the balance sheet at midnight on Dec. 31, 1918 . . . [other than certain specified liabilities]. . . . 5. The vendor shall pay discharge and satisfy all debts and liabilities of the said business including income tax and excess profits duty up to Dec. 31, 1918. . . . 7. The purchase shall be completed on . . . Sept. 15, 1919 . . . The possession of the property hereby agreed to be sold shall be retained by the vendor until completion and he shall in the meantime carry on the said business as heretofore and from Dec. 31, 1918, shall be deemed to have been carrying on the said business on account of and for the benefit of the purchasers and the vendor shall account and be entitled to be indemnified accordingly. . . . 13. The purchasers shall pay to the vendor as from Jan. 1, 1919, up to the actual date of the completion a sum at the rate of £208 6s. 8d. per calendar month by way of remuneration for his services in connection with the management and carrying on of the business from Jan. 1, 1919, until the actual date of completion."

The plaintiff carried on the business from Jan. 1, 1919, in his own name until the actual date of completion on behalf of the defendants, and by reason thereof he was assessed by the Commissioners of Income Tax to supertax on the profits earned by him therein on behalf of the defendants in a sum of £1,459 in excess of that for which he would otherwise have been assessed. This assessment was in respect of the period from April 6 to Aug. 22, 1919. On appeal by the plaintiff, this assessment was affirmed and the plaintiff had to pay the sum of £1,459, and he incurred costs to the amount of £30 10s. in connection with the assessment and appeal. The defendants, who had been informed of these proceedings, were then called on to indemnify the plaintiff in respect of those two sums, and as they denied liability, the plaintiff claimed to recover those amounts in the present action.

McCardie, J., gave judgment for the plaintiff. The defendants appealed. A
Schiller, K.C., and *Blanco White* for the defendants.
Compston, K.C., and *Croom-Johnson* for the plaintiff.

BANKES, L.J.—This case is too clear for serious argument. The plaintiff had been carrying on a very successful business. On Aug. 22, 1919, he sold it to the defendants, who were a newly-formed limited company, as from the previous Jan. 1. B
The contract of sale dealt with income tax and supertax for the year 1918. The period between Jan. 1 and Sept. 15 of that year, which was the date named for completion, was provided for by cl. 7 and cl. 13 of the contract. Clause 7 provided that the plaintiff should retain possession of the property until completion and should carry on the business, and from Dec. 31, 1918, should be deemed to have been carrying it on for the benefit of the defendants and on their account, and C
should be entitled to be indemnified accordingly. That is how the parties dealt with the matter. But as between the plaintiff and the revenue authorities, the plaintiff was, between Jan. 1 and Sept. 15, carrying on business on his own account. There is no dispute that he was liable to pay income tax and that the defendants were liable to indemnify him for the payments he made on that account; but it is said that supertax is only imposed on individuals and not on companies D
and, therefore, the defendants must be treated as if no supertax had been imposed at all. Clause 7 of the contract affords the answer to this contention. The plaintiff was to carry on the business. That could not be done without incurring the tax. And he was to be "entitled to be indemnified accordingly." The appeal must be dismissed.

SCRUTTON, L.J.—I agree. I can see no material difference between income E
tax and supertax. They are both taxes on profits. Why the plaintiff should be indemnified in respect of the one and not of the other is more than I can understand.

ATKIN, L.J.—I agree.

Appeal dismissed. F

Solicitors: *Billinghurst, Wood & Pope*; *E. Flux, Leadbitter & Neighbour.*

[*Reported by* W. C. Sandford, Esq., *Barrister-at-Law.*]

R. v. KAKELO

[COURT OF CRIMINAL APPEAL (Sankey, Salter and Swift, JJ.), June 25, 26, July, 10, 1923]

[Reported [1923] 2 K.B. 793; 92 L.J.K.B. 997; 129 L.T. 477; 87 J.P. 184; 39 T.L.R. 671; 68 Sol. Jo. 41; 27 Cox, C.C. 454; 17 Cr. App. Rep. 150]

Alien—Nationality—Burden of proof—Aliens Restriction Act, 1914 (4 & 5 *Geo.* 5, *c.* 12), *s.* 1 (4)—*Aliens Restriction (Amendment) Act*, 1919 (9 & 10 *Geo.* 5, *c.* 92), *s.* 13 (1).

Alien—Offence under Aliens Order, 1920—*Offence punishable on summary conviction—Not triable on indictment unless accused so elects—Aliens Restriction Act*, 1914 (4 & 5 *Geo.* 5, *c.* 12), *s.* 1 (2)—*Aliens Restriction (Amendment) Act*, 1919 (9 & 10 *Geo.* 5, *c.* 92), *s.* 13 (4)—*Aliens Order*, 1920 (*S.R. & O.* 1920 *No.* 448), *art.* 18 (4) (*b*).

Criminal Law—Offence under statutory order—Proof of order—Objection that order not proved to be taken at trial.

An objection, taken on a prosecution for an offence against a statutory order, that the order has not been proved must be taken at the trial and cannot be made subsequently.

In cases under the Aliens Restriction Act, 1914, s. 1 (4), and the Aliens Restriction (Amendment) Act, 1919, s. 13 (1), the burden of proving that the person charged is not an alien lies on him.

Offences against the Aliens Restriction Act, 1914, and the Aliens Restriction (Amendment) Act, 1919, are only punishable in the manner prescribed by these statutes, i.e., on summary conviction, and are not triable on indictment unless the person charged claims the right to be tried by a jury under the Summary Jurisdiction Act, 1879, s. 17.

Notes. The Aliens Order, 1920, has been revoked and replaced by the Aliens Order, 1953 (S.I. 1953 No. 1671, as amended by S.I. 1957 No. 597). Article 18 (4) of the 1920 Order is replaced by art. 25 (3) of the 1953 Order.

The Summary Jurisdiction Act, 1879, s. 17, has been repealed by the Magistrates' Courts Act, 1952, s. 132 (1) and Sched. vi. See now s. 25 of the Act of 1952.

Applied: *R.* v. *Barnett*, [1951] 1 All E.R. 917; *R.* v. *Cohen*, [1951] 1 All E.R. 203.

As to jurisdiction and offences in the case of an alien, see 1 HALSBURY'S LAWS (3rd Edn.) 523 et seq.; and for cases see 2 DIGEST (Repl.) 181 et seq. For the Aliens Restriction Act, 1914, s. 1, and the Aliens Restriction (Amendment) Act, 1919, s. 13, see 1 HALSBURY'S STATUTES (2nd Edn.) 691, 697. For the Aliens Order, 1953, art. 25, see 2 HALSBURY'S STATUTORY INSTRUMENTS.

Cases referred to:

(1) *Bennington* v. *Huddleston* (1922), Dec. 15, D.C., unreported.

(2) *R.* v. *Hall*, [1891] 1 Q.B. 747; 60 L.J.M.C. 124; 64 L.T. 394; 17 Cox, C.C. 278; 14 Digest (Repl.) 233, *1967*.

Appeal against conviction.

The facts appear in the judgment.

Caporn for the appellant.

Percival Clarke for the Crown.

July 10. **SANKEY, J.**, read the following judgment of the court.—The appellant arrived in London from New York in March, 1923, and, describing himself as the Prince of Kurdistan, went first to the Savoy Hotel and then to the Hyde Park Hotel and stayed several days at each, leaving without paying his bill. He further borrowed money from one of the hotel managers and hired motor cars without paying. Shortly afterwards he was arrested and tried at the London Sessions and

convicted on five counts of an indictment which charged him with obtaining credit by fraud under the Debtors Act, and with making a false statement contrary to art. 18 (4) (b) of the Aliens Order, 1920. He was sentenced to six months' imprisonment in the second division and was recommended for deportation. He applied for leave to appeal against conviction and sentence, but in respect of the counts for obtaining credit by fraud such leave was refused.

He was, however, granted leave to appeal against his conviction for the offence under the Aliens Order and, on the case coming on, three points were taken on his behalf. It was said (i) that there was no proof given of the Aliens Order itself; (ii) that there was no proof given that the appellant was an alien; (iii) that the offence under the Aliens Order was punishable by summary conviction, and that the sessions had no jurisdiction to entertain the indictment.

As to (i) that there was no proof of the Aliens Order, reliance was placed on *Bennington* v. *Huddleston* (1) recently decided by a Divisional Court. In that case there was a prosecution before the justices under a motor-car order, and it was objected at the hearing that there was no proof of the order itself. The magistrates stated a Case on the point. The court held that, the objection being taken in the court below, it was incumbent on the prosecution to produce the order, and that, as they had not done so, the case must go back in order to give the prosecution an opportunity of putting themselves in order. We think that case wholly inapplicable to the present circumstances. In the case now before us, no such point was taken by the appellant at the trial. We are of opinion that it is a point which ought to have been taken by him if he wished to rely on it. Had it been taken, there can be no doubt that the order would have been forthcoming immediately, or within a very short time. In the circumstances of this case, it is too late to take this point for the first time on appeal.

As to (ii), there being no proof that the appellant was an alien, it was contended on his behalf that the allegation that he was an alien was set out in the count of the indictment, and that, therefore, it was incumbent on the prosecution to prove it. The argument was as follows: It was admitted that, by the Aliens Restriction Act, 1914, s. 1 (4), in respect of cases under orders made in pursuance of such Act, it was expressly enacted that the proof that the person charged was not an alien was upon the person alleging that he was not an alien, but it was said that the Act only applied during a state of war or during some national emergency; that this was clear from the Aliens Restriction (Amendment) Act, 1919, which did not re-enact s. 1 (4), and that, therefore, the onus remained on the prosecution to prove that the appellant was an alien. We think that this point is wholly misconceived. It will be observed that the 1914 Act was not repealed by the 1919 Act; in fact, by the terms of the 1919 Act, both Acts are to be read as one. The 1919 Act repealed that part of the 1914 Act which says that the provisions of the Act were only to be applied in cases of war or national emergency, but we can find nowhere in the 1919 Act any express provision, or, indeed, any intention to repeal s. 1 (4) of the 1914 Act, and, reading the two Acts together, we come to the conclusion that that subsection still remains and has not been repealed. We, therefore, are of opinion that the onus was on the appellant to prove that he was not an alien and not on the prosecution to prove that he was. Further, we think that the burden of proof may, in the course of a case, be shifted from one side to the other, and in considering the amount of evidence necessary to shift the burden of proof, the court has regard to the opportunity of knowledge with respect to the fact to be proved which may be possessed by the parties respectively: see STEPHEN'S DIGEST OF THE LAWS OF EVIDENCE (9th Edn.) art. 96. In this case, there was evidence given by the prosecution sufficient to shift the onus of proof and to make it necessary for the appellant to prove that he was not an alien.

As to (iii), that the offence under the Aliens Order was punishable by summary conviction, and that sessions had no jurisdiction to entertain the indictment, this depends on the Aliens Restriction Act, 1914, s. 1 (2), and the Aliens Restriction (Amendment) Act, 1919, s. 13 (4), which is as follows [His Lordship read s. 13 (4),

and continued :] The law on the subject is elaborately dealt with in *R.* v. *Hall* (2), which was a motion to quash an indictment charging one Hall, an overseer of the poor of the parish of St. Mary, Whitechapel, with a misdemeanour. The motion succeeded on the ground that an offence by an overseer within the meaning of s. 51 of the Parliamentary Registration Act, 1843, was not an indictable misdemeanour. The learned judge, after referring to a passage in HAWKINS' PLEAS OF THE CROWN, Book 2, chap. 25, s. 4, which says:

> "Where a statute makes a new offence which was no way prohibited by the common law, and appoints a peculiar manner of proceeding against the offender as by commitment, or action of debt, or information, &c., without mentioning an indictment, it seems to be settled at this day, that it would not maintain an indictment, because the mentioning the other methods of proceeding only, seems impliedly to exclude that of indictment"

went at length through the cases bearing on the matter. We think that the law is that, where a statute renders acts punishable for the first time, if the statute contains no general prohibition, such acts cannot be prosecuted by indictment unless that mode of trial is prescribed, but can only be prosecuted in the manner which the statute directs. There are certain statutes which, while prescribing a summary penalty, expressly reserve the right to prosecute by indictment, as, for example, the Merchandise Marks Act, 1887, s. 2 (3).

The question for determination here is, In which category the statutes under discussion fall? It is to be observed that the remedy by indictment is not specifically preserved, nor are we able to hold that either the Aliens Restriction Act, 1914, or the Aliens Restriction (Amendment) Act, 1919, contains a general prohibition. It is enacted by s. 13 (1) of the latter Act that a person acting in contravention of the Act shall be guilty of an offence against the Act, and by sub.-s. (4) that a person who is guilty of an offence against the Act shall be liable on summary conviction to a fine not exceeding £100 or to imprisonment with or without hard labour for a term not exceeding six months. We are of opinion that these statutes fall within the doctrine above quoted, and that all offences against them, or orders made under them, are only punishable in the manner prescribed by the statutes, viz., on summary conviction.

We have not lost sight of the fact that, under s. 17 of the Summary Jurisdiction Act, 1879, it is always open to a person charged before a court of summary jurisdiction with an offence entailing such a penalty as the offence alleged to have been committed by the appellant in this case, to claim a right to be tried by jury, a right of which the court must inform him. In the event of his claiming the right, he is triable on indictment before a jury, and so on his own election turns the offence into an indictable one. No claim was, however, put forward by the appellant. The matter was treated as an indictable one before the magistrate and before the sessions. We are of an opinion that it was not an indictable offence, and that the conviction at the sessions must be quashed. We do not propose to interfere with the recommendation for deportation which the court had the right to make on the conviction of the appellant on the counts of the indictment relating to obtaining credit by fraud, for, on a consideration of all the circumstances, we think such recommendation should be upheld.

Appeal allowed, conviction for an offence against the Aliens Order, 1920, quashed.

Solicitors: *Lloyd, Richardson & Co.*; *Wontner & Sons.*

[*Reported by* J. N. FLETCHER, ESQ., *Barrister-at-Law.*]

A

DODD *v.* AMALGAMATED MARINE WORKERS' UNION

[COURT OF APPEAL (Sir Ernest Pollock, M.R., Warrington and Sargant, L.JJ.), October 26, 30, 31, 1923]

[Reported [1924] 1 Ch. 116; 93 L.J.Ch. 100; 129 L.T. 819; 40 T.L.R. 44; 68 Sol. Jo. 117] B

Trade Union—Inspection of books by member—Employment of accountant—"Proper case"—Bona fides—Onus of proof—Trade Union Act, 1871 (34 & 35 *Vict., c.* 31), *s.* 14, *Sched. I, para.* 6.

A member of a trade union who desires to exercise his statutory right of inspecting the books of the union under the Trade Union Act, 1871, s. 14, and Sched. I, para. 6, may "in proper cases" employ an accountant to assist him. C

Norey v. *Keep* (1), [1909] 1 Ch. 561, applied.

The onus of showing that a member, in employing an accountant to assist him in the inspection, is not acting bona fide lies on the trade union resisting that inspection.

Decision of ASTBURY, J., [1923] 2 Ch. 236, affirmed. D

Notes. As to the statutory requirements as to the provisions of the rules of a trade union, see 32 HALSBURY'S LAWS (2nd Edn.) 492, 493; and for cases see 43 DIGEST 101, 109. For the Trade Union Act, 1871, s. 14 and Sched. I, see 25 HALSBURY'S STATUTES (2nd Edn.) 1252, 1256.

Cases referred to:

(1) *Norey* v. *Keep*, [1909] 1 Ch. 561; 78 L.J.Ch. 334; 100 L.T. 322; 25 T.L.R. 289; 43 Digest 109, *1147*. E

(2) *Bevan* v. *Webb*, [1901] 2 Ch. 59; 70 L.J.Ch. 536; 84 L.T. 609; 49 W.R. 548; 17 T.L.R. 440; 45 Sol. Jo. 465, C.A.; 36 Digest (Repl.) 564, *1228*.

Appeal from an order of ASTBURY, J.

In April, 1922, the Amalgamated Marine Workers' Union, a registered trade union, dismissed Alfred Dodd and other members of the union, who were officials F of the union, from their positions, without affecting their membership. An action disputing the validity of these dismissals was commenced in July, 1922, and was still pending. On Aug. 17, 1922, Dodd and one Williams, another dismissed official, called to inspect the books of the union, in exercise of their rights under s. 14 of, and Sched. I, para. 6, to, the Trade Union Act, 1871, and under the rules of the union made in accordance therewith. They were told that the books were G with the auditors, but they were refused the names of the auditors, which they only obtained by sending a letter to the union's offices addressed to "The Auditors," which was forwarded to the auditors, and replied to by them. They were subsequently told that delay was caused by the fact that the books were in a mess and that there was something wrong with some Australian stock. On Sept. 4, Dodd and others commenced an action for a declaration that the general secretaries of H the union were invalidly appointed, and, on Dec. 4, SARGANT, J., gave judgment in their favour. On Sept. 20, after the books had been returned by the auditors, Dodd and Williams were shown certain books, but, on their attemping to take extracts, the books were removed. On Oct. 14, the union purported to expel Dodd and the other former officials from membership. On Dec. 11, the expelled members commenced an action for a declaration that their expulsion was invalid. This I action was not seriously contested, and on Feb. 23, 1923, ASTBURY, J., on a short cause, made such a declaration. Dodd subsequently heard a rumour that the funds of the union had in the course of a year fallen from £100,000 to £67,000. On Mar. 5, 1923, he gave notice to the union that he would attend on Mar. 7 with a chartered accountant to inspect the union's books, and that the accountant would give to the union an undertaking not to make use of the information acquired except for the purpose of communicating the same to him. On Mar. 7, Dodd, with Williams and another member of the union, attended at the offices with

Cuthbert Smedley, a chartered accountant, who was not a member of the union. Smedley tendered to the secretary of the union a written undertaking in the above terms, but the secretary refused to allow any inspection of the books to take place in the presence of the accountant, and Dodd and Williams declined to inspect in his absence. Dodd then commenced this action for a declaration that he was entitled to inspection of the books by an accountant, on the accountant giving the undertaking which had been tendered, and for an order for the production of the books for inspection. On Mar. 23, ASTBURY, J., on an interlocutory motion, made an order for the books to be produced for inspection. The defendant union appealed from this order, and, on April 11, the Court of Appeal discharged the order on the ground that it was contrary to practice to grant the whole relief in an action on an interlocutory motion. The case came on for trial before ASTBURY, J., who, on the evidence, held that the plaintiff's claim to inspect the books was bona fide, and granted the declaration asked for.

The defendant union appealed.

The Trade Union Act, 1871, provides:

> "Section 14. With respect to the rules of a trade union registered under this Act, the following provisions shall have effect: (1) The rules of every such trade union shall contain provisions in respect of the several matters mentioned in Sched. I to this Act. . . . Schedule I, para. 6. The inspection of the books and names of members of the trade union by every person having an interest in the funds of the trade union."

By r. 25 of the rules of the defendant union:

> "The books and accounts shall be open to inspection by any member or person having an interest in the funds of the union at all reasonable hours at the head office of the union, and it shall be the duty of the secretaries to produce them."

A. Grant, K.C., and *David White* for the defendants.

A. F. C. Luxmoore, K.C., and *Lavington* for the plaintiff.

SIR ERNEST POLLOCK, M.R.—The question here is whether the plaintiff, when he asked the defendants that he should be allowed to inspect their books by an accountant, was entitled to make that inspection, or, rather, whether the defendants were entitled to refuse it to him. The case was argued with reference to the circumstances of a trade union, but the consideration of the point raised by the case is one of wider reference than that of a matter affecting trade unions; it is a matter which concerns the right of inspection which may be claimed by other persons: members of companies, partners, and others—not a question concerning trade unions alone. [His Lordship stated the facts, and continued:] ASTBURY, J., thought, on the evidence, that the plaintiff was acting bona fide, and that he was entitled to enjoy the privileges granted to him and to all other members of this trade union.

Under the Trade Union Act, 1871, it is provided, by s. 14, that the rules of a trade union shall contain the provisions mentioned in Sched. I, and para. 6 of that schedule provides that there may be inspection of the books and names of members of the trade union by every person having an interest in the funds of the trade union. In fact, the rules of the defendant trade union did make provision in accordance with that statute, and by r. 25 the right to inspect was given. The plaintiff is a member of the union, and, therefore, entitled to inspection; and he claims, and ASTBURY, J., finds it a legitimate claim, that he should be allowed to inspect the books and accounts through a skilled accountant. The question is whether a member is entitled to inspect by an accountant. Counsel for the defendant union admits that, in certain cases, some assistance must be given to an inspecting member, as, for instance, in the case of a member who happened to be blind. But in 1901, *Bevan* v. *Webb* (2) was decided by the Court of Appeal. That case arose under the Partnership Act, 1890, which provided that partners might inspect books of account practically in the same manner as it is provided by the

Trade Union Act, 1871, and the question was raised whether a partner was entitled to inspect by an agent, or only personally. It was held that a partner was entitled to inspect by an agent, and that there was no negation of that liberty in the Act. COLLINS, L.J., said this ([1901] 2 Ch. at p. 68):

> "What is the common-sense meaning of it? Surely the object is to enable the partners to ascertain the position of the partnership business. . . . It is said that, because there is no provision either in the articles or in the Act enabling the partners in express terms to inspect by the agency of someone else, the right so to inspect is excluded. But again I ask, what is there to found the presumption that there is such an exclusion, for there is certainly no express exclusion? It must, if at all, be implied because the word 'agent' has not been used. If I were dealing with a matter not relating to a partnership, I should say that primâ facie a permission accorded to a specified person to do an act is accorded to him or his agents."

A little later on he says (ibid.):

> "I should say that primâ facie the permission to do a thing carries with it the right to use the instrument necessary to prevent that right so conferred from being ineffective."

Then he said that, if a partner were unable, through some infirmity or want of experience, to avail himself of the right of inspection personally, he would not be on the same terms with the other partners, unless he were able to make use of some instrument to put himself on the same terms. I think, therefore, that that decision establishes that, where a person is under a disability, he is entitled, by using an agent, to make that disability good. STIRLING, L.J., added this (ibid. at p. 78):

> "I agree that where the right which is to be exercised is conferred by some written instrument, as, for example, either by a statute incorporated in a partnership contract or by the articles of partnership, it may be that, upon the true construction of the instrument, it is found that the intention of the parties was that the right of inspection should be a personal right; but, unless you can find something of that nature in the instrument itself, you are not entitled to say that, because an agent is not expressly mentioned, the exercise of the right by an agent is excluded."

Those passages which I have quoted show that this court has decided that one may make use of an agent to make inspection effective, and the onus lies on those who wish to deny that right to show why it should not be exercised. In other words, when the Act says "inspection," it means effective inspection, if necessary by the instrument required to make it effective.

PARKER, J., in *Norey* v. *Keep* (1), followed the decision in *Bevan* v. *Webb* (2), and he applied that decision to the case of a trade union, and held that a member of a society was entitled to inspect by an accountant. He pointed out that the inspection contemplated by the legislature might be defeated if it were held that only personal inspection were permitted. Therefore, it seems that the law on the subject is quite clear. But counsel for the defendant union says that, though the claim may be primâ facie right, yet there must be some power in the trade union to resist inspection, if they have proper and reasonable grounds for doing so. As I have said, the onus of establishing that a member has not the right claimed lies on the trade union, and there is nothing in the Act to show that there is a discretion in the defendant union, or a right to refuse inspection merely because, in their uncontrolled judgment, they have a suspicion that the plaintiff is acting improperly. I think the two cases on this subject are quite clear, and ASTBURY, J., after careful scrutiny, has found that the plaintiff is not acting improperly, and that he is entitled to the relief claimed, though he has limited the right by imposing the limitations imposed by PARKER, J., in *Norey* v. *Keep* (1). I think that the judgment of ASTBURY, J., was right, and that the appeal must be dismissed.

WARRINGTON, L.J.—I am of the same opinion. I think the Act and the rules of the defendant union cannot be read so as to imply that only personal inspection is intended. It is said that a trade union might be able to show certain facts which would justify the court in refusing to assist a member desiring to inspect by an agent, but the onus in that case is cast on those who dispute the primâ facie right of every member of the union. Here, the defendant union set out to establish special circumstances. These were: that the plaintiff was actuated by a desire to injure the defendant union; that he was acting in the interests of another and a rival trade union; and that he was acting mala fide and improperly. The learned judge who tried those issues of fact was satisfied that the plaintiff was a witness of truth, that he was in no way acting for the other unions referred to, and that he was not deserving of the accusation that he was acting mala fide. The result is that, on a question of fact, the learned judge has found that the facts alleged by the defendant union were not proved, and it is quite impossible for us to interfere with that finding. Therefore, the primâ facie right to inspect through a skilled agent remains. That right has been qualified by the learned judge by adding the expression "under proper conditions," and those conditions, as stated by PARKER, J., in *Norey* v. *Keep* (1), are that the agent should not be objectionable to the union on personal grounds, and that he should give an undertaking not to disclose the information obtained except to his client. Those conditions are, I think, fulfilled in the present case. Counsel for the defendant union has invited us to hold that, where trade union officials have reasonable grounds for suspicion in regard to the motive of the applicant—if they have grounds for thinking that he is acting mala fide—then they have an implied discretion to refuse inspection. The result of so holding would be to place entirely in the hands of trade union officials the right of determining what are, or are not, reasonable grounds on which they can refuse to give to a member this statutory right. I agree that the appeal should be dismissed.

SARGANT, L.J.—I am of the same opinion. The defendant union here deny the right of the plaintiff to exercise a legal right which has been clearly established by the decisions in *Bevan* v. *Webb* (2) and *Norey* v. *Keep* (1). I quite agree that there might be circumstances in which the court might refuse to assist an applicant desiring to obtain inspection, but the authorities cited show that the onus of establishing that such a right should not be exercised lies here on the defendant union. In my view, the judge's findings of fact in the action really conclude the matter, and show that that onus resting on the defendant union has not been discharged. Counsel for the defendant union claims that the reasonableness of refusing a claim such as that of the plaintiff is to be determined by the trade union. If they, in their judgment, think that a member is acting in a hostile manner, or a manner which shows a lack of bona fides, then, it is said, they are entitled to refuse the inspection. That may justify them in their domestic forum, but what we have to consider is the legal rights of the plaintiff, and these must be determined by the courts in the ordinary way.

Appeal dismissed.

Solicitors: *White & Co.*; *Frank Daphne.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

A

ANSTRUTHER-GOUGH-CALTHORPE *v.* McOSCAR AND ANOTHER

[Court of Appeal (Bankes, Scrutton and Atkin, L.JJ.), November 20, 21, December 14, 1923] B

[Reported [1924] 1 K.B. 716; 93 L.J.K.B. 273; 130 L.T. 691; 40 T.L.R. 223; 68 Sol. Jo. 367]

Landlord and Tenant—Repair—Breach of covenant—Damages—Measure—Deterioration of neighbourhood during long term.

By a covenant in a lease, dated Mar. 2, 1825, of three houses, which were then newly built, for ninety-five years from June 24, 1824: "The lessee his executors administrators and assigns shall well and sufficiently repair support uphold maintain paint pave . . . and keep the said messuages" and yield up the same so repaired and kept at the determination of the term. The term having come to an end on June 24, 1919, the successor in title to the original lessor brought an action against the tenants then occupying the property to recover damages for breach of the covenant. The neighbourhood in which the property was situated had deteriorated during the term, and in 1919 and 1920 the only tenants who would be likely to want accommodation in that neighbourhood would be short-term tenement tenants. C D

Held: the depreciation of the neighbourhood could not affect the measure of damages for breach of the covenant; the court must look at the character of the property and its ordinary user at the time of the demise; and the proper measure of damages for breach was the cost of the repairs necessary to put the premises into the condition in which a reasonable owner would keep them having regard to their age, locality, continued maintenance, and probable tenants. E

Morgan v. *Hardy* (1) (1887), 35 W.R. 588, applied.

Proudfoot v. *Hart* (2) (1890), 25 Q.B.D. 42, explained and distinguished. F

Decision of McCardie, J., [1923] 2 K.B. 573, reversed.

Notes. Referred to: *Sotheby* v. *Grundy*, [1947] 2 All E.R. 761.

As to covenants to repair, see 23 Halsbury's Laws (3rd Edn.) 578 et seq.; and for cases see 31 Digest (Repl.) 349 et seq.

Cases referred to: G

(1) *Morgan* v. *Hardy* (1887), 35 W.R. 254; 17 Q.B.D. 770; reversed 35 W.R. 588; 18 Q.B.D. 646, C.A.; affirmed sub nom. *Hardy* v. *Fothergill* (1888), 13 App. Cas. 351, H.L.; 31 Digest (Repl.) 359, *4902*.

(2) *Proudfoot* v. *Hart* (1890), 25 Q.B.D. 42; 59 L.J.Q.B. 389; 63 L.T. 171; 55 J.P. 20; 38 W.R. 730; 6 T.L.R. 305, C.A.; 31 Digest (Repl.) 359, *4900*.

(3) *Lurcott* v. *Wakely and Wheeler*, [1911] 1 K.B. 905; 80 L.J.K.B. 713; 104 L.T. 290; 55 Sol. Jo. 290, C.A.; 31 Digest (Repl.) 363, *4953*. H

(4) *Lister* v. *Lane and Nesham*, [1893] 2 Q.B. 212; 62 L.J.Q.B. 583; 69 L.T. 176; 57 J.P. 725; 41 W.R. 626; 9 T.L.R. 503; 37 Sol. Jo. 558; 4 R. 474, C.A.; 31 Digest (Repl.) 358, *4893*.

Also referred to in argument: I

Re London Corpn., London Corpn. v. *Great Western and Metropolitan Railways*, [1910] 2 Ch. 314; 79 L.J.Ch. 622; 103 L.T. 20; 54 Sol. Jo. 562; 31 Digest (Repl.) 357, *4883*.

Cooke v. *Cholmondeley* (1858), 4 Drew. 326; 27 L.J.Ch. 826; 32 L.T.O.S. 59; 4 Jur.N.S. 827; 6 W.R. 802; 62 E.R. 126; 40 Digest (Repl.) 703, *1983*.

Doe d. Dalton v. *Jones* (1832), 4 B. & Ad. 126; 1 Nev. & M.K.B. 6; 2 L.J.K.B. 11; 110 E.R. 403; 31 Digest (Repl.) 365, *4971*.

Soward v. *Leggatt* (1836), 7 C. & P. 613, N.P.; 31 Digest (Repl.) 361, *4926*.

Appeal from an order of McCardie, J., on a Special Case stated by an arbitrator.

By a repairing covenant contained in a lease under seal from George Lord Calthorpe to one N. Stallwood, dated Mar. 2, 1825, of three messuages and premises therein described and now known as Nos. 17, 19, and 21, Calthorpe Street, Gray's Inn Road, London, for the term of ninety-five years from June 24, 1824, the said Stallwood covenanted that he, his executors, administrators and assigns should and would at his or their own proper costs and charges from time to time and as often as occasion should require during the said term well and sufficiently repair, support, uphold, maintain, paint, pave, empty, scour, cleanse, amend and keep the said three several messuages and buildings thereby demised and all such other buildings as should during the said term thereby granted be erected upon the said grounds and premises thereby demised and all the walls, fences, pavements, vaults, cellars, sinks, privies, sewers, drains, water-courses and other appurtenances belonging or to belong thereto in by and with all and all manner of needful and necessary reparations and amendments whatsoever, and the said messuages, buildings, and premises with their appurtenances so being in all things well and sufficiently repaired, supported, upheld, maintained, painted, paved, emptied, scoured, cleansed, amended and kept as aforesaid at the end or sooner determination of the said term thereby granted should and would peaceably and quietly leave, surrender and yield up unto the said George Lord Calthorpe and his assigns or other the person or persons for the time being entitled as aforesaid together with all marble and other chimney pieces, mantels, jambs and slabs, hearths and covings, sash and other window casements, shutters, doors, locks, keys and other fastenings whatsoever, water-closets and cisterns and things thereunto belonging, and all wainscots, linings, partitions and finishings whatsoever, and all closets, cupboards, dressers, shelves, presses, drawers, pumps, pipes, posts, pales and rails and other fixtures fixed or fastened to the said messuages, buildings and premises or which should be found thereon or any part thereof during the last seven years of the same term. The successor in title of George Lord Calthorpe at the time of the determination of the lease was the Honourable Rachel Anstruther-Gough-Calthorpe, the plaintiff. On May 21, 1920, the plaintiff brought an action in the King's Bench Division against one Laura McOscar and another as defendants to recover damages for breach of the said covenant. By an order dated Nov. 3, 1922, it was by consent ordered that A. F. Brown of 11, Little College Street, Westminster, should be appointed as arbitrator to assess the amount of the damages, and that the plaintiff should be at liberty to sign final judgment for the amount so ascertained. The arbitrator having taken upon himself the burden of the reference and having viewed the said houses and heard and examined the allegations and evidence of the parties, made his award concerning the matters referred to him as in the Case set forth, subject to the opinion of the court upon the questions of law therein mentioned.

In the Case the arbitrator stated that it was not disputed that the measure of damages to be recovered by the plaintiff for breaches of the covenant to repair was the cost of the repairs rendered necessary when the term ended in June, 1919, by reason of the defendants not having performed the covenant, but the parties differed as to the nature and extent of the repairs that were necessary for the due performance of the covenant. The defendants contended that the effect of the covenant was limited to the extent of imposing an obligation to carry out such repairs only as, having regard to the age, character, and locality of the premises, would make them reasonably fit to satisfy the requirements of reasonably minded tenants of the class that would be likely to occupy them, and that the cost of the work necessary for that purpose was the measure of damages. The plaintiff contended that the true effect of the covenant was to render the defendants responsible to do all needful and necessary acts well and sufficiently to repair, &c., the premises in the words of the covenant without limitation to such repairs as would satisfy the requirements of reasonably minded persons of the class likely to become

occupiers of the premises. The arbitrator found as a fact that the tenants likely to occupy the premises would only take the houses separately or only part of a house for short terms, on weekly, monthly, or quarterly tenancies, and would not accept any repairing obligations, and that the requirements of reasonably minded tenants of this class would not include many repairs which were necessary for the repair and maintenance of the property. If the plaintiff's contention were correct, then, making due allowance for the age of the premises and the change in the residential character of the locality brought about in the century that had elapsed since the lease was granted, he estimated the cost of the repairs which were necessary at £586, and assessed the damages at that sum. If the defendants' contention were correct he estimated the cost of the repairs at £220, and assessed the damages at that sum. He awarded no damages for loss of rent during the period of repair. The question for the opinion of the court was which of the said contentions was correct. McCardie, J., decided in favour of the defendants' contention. The plaintiff appealed.

Topham, K.C., C. G. O. Bridgeman and *F. L. Hinde* for the plaintiff.
W. Banks for the defendants.

Cur. adv. vult.

Dec. 14. The following judgments were read.

BANKES, L.J.—The question in reference to which this appeal is brought came before McCardie, J., on a Special Case stated by an arbitrator, to whom the question of damages had been referred in an action by a landlord against a tenant for breaches of a covenant to repair. The covenant is contained in a lease dated Mar. 2, 1825, for a term of ninety-five years from June 24, 1824, of three houses known as 17, 19, and 21, Calthorpe Street, Gray's Inn Road. The covenant is expressed in an extended form,

> "well and sufficiently to repair, support, uphold, maintain, paint, pave, empty, scour, cleanse, amend, and keep the three several messuages and buildings . . . with all and all manner of needful and necessary reparations and amendments whatsoever"

and to yield them up at the end of the term well and sufficiently repaired, supported, &c., as aforesaid. I attach no importance to the particular form of words used in the covenant. The effect is the same, in my opinion, whatever words the parties use provided that they plainly express the intention that the premises are to be repaired, kept in repair, and yielded up in repair. In the present case the covenant was one in reference to newly erected buildings, and the question, therefore, does not arise, which in some cases is very material, as to the effect of a covenant to repair, where, at the time when the covenant is entered into, the buildings to which it applies are old and dilapidated. Considerations which arise in such a case were discussed in *Lurcott* v. *Wakely and Wheeler* (3). They do not arise here.

McCardie, J., decided in favour of the defendants' contention. He discussed at length a number of the reported cases dealing with questions of breaches of covenant to repair, and at the conclusion of his judgment he expressed the view that the decision in *Proudfoot* v. *Hart* (2) supplies a useful working rule for the normal covenants to repair, however variously they may be worded. With all respect to the learned judge I cannot agree with this view. No case, in my opinion, has been more misunderstood, or more frequently misapplied, than *Proudfoot* v. *Hart* (2), as I think the further information supplied in the present case well illustrates. When the appeal came before this court it was felt that without some further information from the arbitrator as to how the difference between the two sets of figures was arrived at, it was really impossible to answer the questions in the Special Case satisfactorily. The court, therefore, asked the arbitrator to supplement the case with further information as to how he arrived at the two sets of figures, and in reply he furnished the court with a schedule of dilapidations and with a very clear and enlightening statement which demonstrates better than

anything else could do how misleading a test of the obligation under a covenant to repair the supposed wants of an intending tenant at the expiration of a long term of years may be. I cannot do better than quote the last four pages of the arbitrator's report. He says:

"The principal difference between the figures arises in the items of outside and structural repair. I was in considerable doubt as to whether anything under these items should be included in the lower figure, as the class of tenant which I considered likely to occupy the houses would be very unlikely to require repairs of this class to be done, which was the contention of the defendants. My reason for including in my second estimate any amounts in respect of such repairs at all is that the local authorities have power to require such works to be done to houses occupied by the working classess where want of them is likely to endanger health and where they may, therefore, be considered to act as the tenants' agents, but the amounts I did so include are comparatively small; for example, I only allowed for pointing in small quantities where the brickwork was particularly bad or damp had already appeared in the rooms. The brickwork of a house may be very bad, and yet the renewal of the pointing needful and necessary for the maintenance of the structure, so that it may be expected to last for its normal life if properly kept in repair, may be deferred for many years before the house becomes 'untenantable,' or before the need of it would be even noticed by a tenant who had no repairing liability. The differences in the amounts allowed for inside repairs, are also due to the difference between the quantity of such repairs as I thought necessary for the maintenance of the property and keeping it in a fair average state of cleanliness, and the quantity which I thought a tenant would require on his own account or the local authority might require for him. To summarise: (i) The higher sum in my award is my estimate of the cost of doing all needful and necessary acts well and sufficiently to repair, &c., the premises in the words of the covenant, which I took generally to mean the cost of putting the premises—(a) into such condition as I should have expected to find them in had they been managed by a reasonably minded owner, having full regard to the age of the buildings, the locality, the class of tenant likely to occupy them, and the maintenance of the property in such a way that only an average amount of annual repair would be necessary in the future; or (b) in such state of repair as would satisfy the requirements of reasonably minded persons who would be prepared to take on lease the houses either singly or as a block upon similar repairing covenants to those contained in the expired lease and on such conditions as to rent as would presume the premises being put at the commencement of the term free of expense to the lessee in such a state of good and sufficient repair as would render only an average amount of annual expenditure necessary during the term. (ii) The lower sum is my estimate of the cost of such repairs as would satisfy the literal requirements of reasonably minded tenants of the class now likely to occupy the premises who would not accept any repairing obligations, with such additions as would be necessary to avoid the receipts of notices from the local authorities. Such repairs would not include many repairs necessary for the maintenance of the structures in accordance with (i) (a) and (b) above, the neglect of which, however, would not (i) interfere with the immediate comfort of the occupiers and so come within their requirements, or (ii) cause danger to health and so come within the purview of the local authorities."

Now that the court has the further facts before it, it appears that the class of tenant at the present time likely to occupy these houses is content so long as the rain does not penetrate the walls or the sanitary inspector does not interfere on the ground that a nuisance exists on the premises, and that in the lower figure arrived at by the arbitrator he has, acting upon the defendants' contention as to the rule laid down in *Proudfoot* v. *Hart* (2), allowed only such items of repair as

will satisfy this class of tenant. It seems impossible that any court can have laid down a rule which requires so extraordinary a construction to be placed upon the covenant in the present case. If the rule contended for by the defendants exists, it must apply to cases where the status of the house to be repaired has appreciated, as well as to cases where it has depreciated, and it must descend to such depths of degradation as to meet the case where, what had, at the commencement of the tenancy, been a high-class residence, is, at the end of the tenancy, occupied in tenements by a class of tenants who look upon an outer door, or an area gate, as an unnecessary obstruction, and who, therefore, require neither the one nor the other. If the rule in *Proudfoot* v. *Hart* (2) is of universal application it would have to be applied in such a case as that just mentioned, and, apparently, also, even although the condition of things at the end of the tenancy had been largely, if not entirely, brought about by a failure to perform the covenant to repair. In my opinion, *Proudfoot* v. *Hart* (2) laid down no rule of general application. The language used by the lords justices is quite appropriate to the facts of that case and must, I think, be read as applicable to those facts and to similar facts only. To extend it, as was done by the learned judge in the court below, and as has been done in many other cases, is not only, in my opinion, to misapply it, but to put the decision into conflict with a previous decision of the Court of Appeal to which Lord Esher himself was a party.

The decision to which I refer is that of *Morgan* v. *Hardy* (1). In that case the contention between the parties was in substance the same as that between the parties in the present case. In a reasoned judgment Denman, J., rejected the defendant's contention. The case went to the Court of Appeal, and curiously the report of the decision in the Law Reports makes no reference to the decision of the court on this point, and the report is confined to the decision of the court reversing the judgment of Denman, J., on the other part of the case. What really occurred appears in the report in the Weekly Reporter, where both points are reported separately. On the first point counsel opened the appeal by repeating their argument that the proper measure of damages for breach of the covenant to repair is proportionate to the value of the house at the time when the breach occurs. The report suggests that their argument at a very early stage was met by an almost contemptuous interruption on the part of Lord Esher, M.R., in which the other members of the court concurred. He is reported as saying:

> "As far as I understand this contention it is that the fact that a neighbourhood has deteriorated ought to decrease the measure of damages for a breach of a covenant to leave in repair. I think that such a proposition is wholly untenable, and that every case is to the exact contrary. The appeal, therefore, must be dismissed."

After this the argument proceeded on the other ground. The decision thus arrived at confirmed the judgment of Denman, J., on this point, and is clearly in accordance with general principles. In construing the covenant in the present case, or any other covenant, it is material to see what the subject-matter was which the parties had in their contemplation when the covenant was entered into. Here there is no doubt as to the subject-matter. It was the three houses described in the lease, and the obligation undertaken was the repair of those houses. How can the extent of such an obligation be measured by the requirements of the class of tenants who happen to be occupying the premises ninety-five years afterwards? *Proudfoot* v. *Hart* (2) did not, in my opinion, lay down any such rule. When the facts of that case are looked into it is manifest that the lords justices who decided the case had no such question in their minds. What they were dealing with, and all that they were dealing with, was a three years' agreement for a tenancy, in which case the class of tenant at the end of the tenancy was, in their view, no doubt the same class as the class of tenant at the commencement. Upon that assumption only is the rule which was laid down by Lopes, L.J., and accepted by the Master of the Rolls, in my opinion, explainable or understandable. The

arbitrator in the present case has rendered a real service by laying down so clearly the lines on which he proceeded. In his mind, apparently, heads (a) and (b) of cl. (i) of that portion of the report in which he summarises the position mean the same thing, or at any rate lead to the same result. To most people head (a) will, I think, prove the more useful guide, and provided that the age of the buildings is regarded as the dominant feature, and the locality and class of tenant are only taken into account in relation to, or as a consequence of, the age of the buildings, then I consider the rule as laid down by the arbitrator a good working rule of general application. Had it been applied to the facts in *Proudfoot* v. *Hart* (2) it would have produced the same result as the rule framed by LOPES, L.J., for those facts. Not to apply that rule to the facts of the present case is, I think, to make an entirely new contract for the parties and to substitute a different standard of obligation for the one to which the parties did agree. In my opinion, the answer to the arbitrator's question is that the plaintiff's contention is correct. The appeal, therefore, succeeds with costs here and below.

SCRUTTON, L.J.—This appeal raises a question of principle of some general importance on the construction of repairing covenants. The lease was for ninety-five years, from 1824, of houses off the Gray's Inn Road, which had just been built by the lessee under a building agreement. It expired at Midsummer, 1919. The repairing covenant was a very long one, but it may be shortened for the purposes of this case to a covenant

> "during the term well and sufficiently to repair with all manner of necessary reparations and to yield up at the end of the term the premises so being in all things well and sufficiently repaired."

The question of the amount of damages for breach of this covenant was referred to an arbitrator, who stated a Special Case and a supplementary Case as to the principles on which he could act. I refer to the Case and the supplementary explanation for the full definition of the alternative principles contended for. Shortly the landlord contended for the cost of all repairs necessary to put the premises into the condition in which a reasonable owner would keep them having regard to their age, locality, continued maintenance and probable tenants, while the tenant contended that at the end of the term only short-term tenants would live in the house, and that he was only liable for the cost of such repairs as such tenants would want, or as the local authorities would require. The tenant relied on the decision of this court in *Proudfoot* v. *Hart* (2), the landlord mainly on the decision of this court in *Morgan* v. *Hardy* (1). McCARDIE, J., decided in favour of the tenant's contention; the landlord appeals to this court.

The judge below appears to have read or to have had cited to him an enormous number of cases, and we allowed a few to be cited to us. In my view, the matter can be dealt with as if the covenant were one to "keep and yield up at the end of the term in repair." I do not think there is any substantial difference in construction between "repair," which must mean "repair reasonably or properly," and "keep in good repair," or "sufficient repair," or "tenantable repair," or most of the various phrases cited to us. There is an analysis of the meaning of "repair" by BUCKLEY, L.J., in *Lurcott* v. *Wakely and Wheeler* (3), with which, as far as it goes, I agree. The tenant must, when necessary, restore by reparation or renewal of subsidiary parts the subject-matter demised to a condition in which it is reasonably fit for the purposes for which such a subject-matter would ordinarily be used. The question in dispute seems to be whether, as the purposes for which such a subject-matter is ordinarily used may vary from time to time, the standard of repair is to vary from time to time, or remains as it was when the subject-matter was demised. For instance, where a fashionable mansion let for a long term of years has fallen to the position of a tenement house for the poorer classes, is the standard of repair to become less onerous than when the house is let? To take an illustration of my Lord's, if the sub-tenants of a tenement house do not want a front door, need the tenant keep a properly repaired front door on the premises?

In my view, this question has been decided as far as this court is concerned by the decision in *Morgan* v. *Hardy* (1). In that case the referee had to decide between the claim that the premises must be properly repaired, and the contention that, as the premises and the neighbourhood had deteriorated and in consequence of such deterioration a great portion of the repairs required "were not suited to the said premises and were unnecessary to their use and enjoyment," they need not be considered in awarding damages. This court, affirming DENMAN, J., said very summarily that it was a wholly untenable proposition that the depreciation of the neighbourhood ought to lower the amount of damages for breach of a covenant to repair. This can only mean that the fact that the class of persons who would use the house at the end of the term had deteriorated, so that their requirements in the way of repairs were less, was immaterial in ascertaining the repairs that the tenant was bound to execute. *Morgan* v. *Hardy* (1) was a case of a fifty years' lease.

In *Proudfoot* v. *Hart* (2) the lease was for three years only, and the covenant was to keep in good tenantable repair. There was no suggestion of any change in the character of the house or of its probable tenants between the beginning and the end of the term. LOPES, L.J., framed a definition, which LORD ESHER, M.R., adopted, as follows (25 Q.B.D. at p. 55):

> "Such repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a reasonably minded tenant of the class who would be likely to take it."

I do not think there was any intention of suggestion that a deterioration in the class of tenants would lower the standard of repairs; the point was not before the court and had been decided the other way by the court four years previously. It follows, in my view, that we are bound to look to the character of the house and its ordinary user at the time of the demise. It must then be put in repair and kept in repair. An improvement of its tenants or of its neighbourhood will not raise the standard of repair, nor will their deterioration lower that standard. It follows in this case that the principle put forward by the tenant was erroneous, and that the statement by the arbitrator in (i) (a) of the supplementary Case is accurate, but must be limited to conditions at the time of the demise. The arbitrator has told us how he has applied the two principles, but these are questions of fact with which we cannot interfere. I would only say that, on the question of the age of buildings, guidance will be found in the judgments in *Lurcott* v. *Wakely and Wheeler* (3), care being taken to distinguish between practical repairs, and complete reconstruction as in *Lister* v. *Lane and Nesham* (4).

In my view, the appeal should be allowed and judgment entered for the plaintiff in accordance with the directions of the award. The plaintiff must have the costs of the appeal and of the hearing before MCCARDIE, J.

ATKIN, L.J.—In this case the ultimate question is the construction of a repairing covenant entered into in 1825 in a lease for the term of ninety-five years from June 24 of houses then lately built, situate in Calthorpe Street, Gray's Inn Road. The term as expired, and the immediate question before us arises upon a Case stated by an arbitrator, a surveyor, appointed by the parties under an order for reference made in an action for breach of the covenant. It is unnecessary to read the words of the covenant.

I see no reason for construing the words of covenants in leases dealing with obligations to repair in any other way than that in which one would construe any other covenant. Effect should be given if possible to every word used by the parties: see per MOULTON, L.J., in *Lurcott* v. *Wakely and Wheeler* (3) ([1911] 1 K.B. at p. 915). It does not appear to me useful to refer to such covenants as the usual covenants to repair, or general repairing covenants, and then consider only what is the meaning of "repair." It appears to me still less useful to take a number of terms which may be found in different leases, treat them all as synonymous, and so impute to all of them a special meaning attached by authority

A to one of them. In the present case the learned judge, after finding that there is no difference between repair, and good, substantial, thorough, habitable, and tenantable repair, fixes on the word "tenantable," finds that it has been construed in a three years' agreement for the letting of a house as "such repair as would make it reasonably fit for the occupation of a tenant of the class who would be likely to take it," and he construes the covenant in question by that standard, B though the word "tenantable" is nowhere to be found in it. By an extension of the construction of "tenantable" as laid down in *Proudfoot* v. *Hart* (2), he finds that "the class of tenant who would be likely to take it" must be ascertained as at the date at which the premises are to be yielded up, and, having a finding of the arbitrator that the only tenants who would now be likely to take a house in the particular situation would be short-term tenement tenants, he fixes the measure C of damages by the repairs which such tenants would be likely reasonably to require, which, as now explained by the arbitrator, seems to be no more than is sufficient to keep the wind and water out. To apply such a test to a repairing covenant taken upon a ninety-five years' term seems to me to expose both landlord and tenant to possibilities of the most astonishing variation of obligations and rights. The obligation is a continuing obligation, and, therefore, would presumably vary D with the requirements of a hypothetical possible tenant during each moment of the tenancy. The neighbourhood might deteriorate, or it might appreciate, or it might during the term several times alternate between the two extremes. In this decade it might be lettable as a dwelling-house, in that only for a shop, or in the next for a factory.

It is, I think, sufficient for us to say that this view of construction has been E contumeliously rejected by a decision of the Court of Appeal in *Morgan* v. *Hardy* (1) in the year 1887. The contention as between plaintiff and defendant, as appears from the report below, was precisely that taken by the defendants in the present case. It was rejected by DENMAN, J., and in the Court of Appeal the judgment is as follows. LORD ESHER, M.R. (35 W.R. at p. 588):

F "As far as I understand this contention it is that the fact that a neighbourhood has deteriorated ought to decrease the measure of damages for a breach of a covenant to leave in repair. I think that such a proposition is wholly untenable, and that every case is to the exact contrary. The appeal, therefore, must be dismissed."

BOWEN and FRY, L.JJ., concurred. It is unfortunate that the report of this case G in the Court of Appeal was not brought to the attention of the learned judge, for it would inevitably have affected his decision, being binding on him as it is on us.

For my own part I should be very reluctant to introduce into covenants in leases considerations of fitness for a particular purpose, which cause much difficulty in contracts of a different kind. Unguided I should have thought that the original and proper sense of "tenantable" was "fit to be tenanted, that is, occu- H pied," and that the word meant no more than, if it meant as much as, "habitable." But *Proudfoot* v. *Hart* (2) binds me to hold that in a three years' agreement it has reference to the reasonable requirements of a tenant of the class who would be likely to take the house. Accepting that construction, I have no doubt that the requirements of such a tenant are deemed to continue the same during the term, or, if not, are to be estimated by the requirements of such a tenant as would be I likely to take the premises at the commencement of the term. When once one is extricated from the clutch of the hypothetical tenant, I do not think there is much difficulty in construing the covenant in this case

"well and sufficiently to repair . . . maintain paint pave amend and keep the premises in by and with all manner of needful and necessary reparations and amendments whatsoever, and so amended and kept yield up."

There is a very full discussion of what is meant by "repair" in the judgments of MOULTON and BUCKLEY, L.JJ., in *Lurcott* v. *Wakely and Wheeler* (3), with which I respectfully concur. "Repair" is not confined to houses; it applies to

chattels, and it connotes the idea of making good damage, so as to leave the subject so far as possible as though it had not been damaged. It involves renewal of subsidiary parts; it does not involve renewal of the whole. Time must be taken into account; an old article is not to be made new, but, so far as repair can make good, or protect against the ravages of time and the elements, it must be undertaken. Speaking generally, I have not seen a better statement of the duties of a tenant under such a covenant as this than the statement in the present case by the arbitrator of the principles under which he proceeded in arriving at the higher sum, which has been read by my Lord. It is true that he refers to the class of tenant likely to occupy the premises as being one of the matters to which a prudent owner would have regard, but I gather from the whole report that he does not regard this consideration as involving a fluctuating standard. I would myself prefer to eliminate the possible tenant, and would be content with the arbitrator's earlier test when he was dealing with the pointing as being "needful and necessary for the maintenance of the structure so that it may be expected to last for its normal life if properly kept in repair." I think that in arriving at the higher figure the arbitrator has taken a correct view of the law, and that judgment should be entered for the plaintiff for that sum with costs here and below.

Appeal allowed.

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[*Reported by* W. C. Sandford, Esq., *Barrister-at-Law.*]

ORD *v.* ORD

[King's Bench Division (Lush and Salter, JJ.), April 12, 13, 23, 1923]

[Reported [1923] 2 K.B. 432; 92 L.J.K.B. 859; 129 L.T. 605; 39 T.L.R. 437]

Res Judicata—Same plea raised in defence in two actions—Admissibility of defence in second action dependent on proof of new facts—Actions for arrears of annuity under separation deed—Charges of adultery made in defence.

To an action by a wife for arrears of an annuity under a deed of separation the husband pleaded that he had been induced to enter into the deed by fraudulent concealment of the material fact that the wife had been guilty of adultery before its execution. The county court judge before whom the matter came rejected this plea and gave judgment for the wife. Later, the wife began a second action for further arrears, and the husband filed a plea which was substantially a repetition of the plea in the first action. In neither action were any particulars given of the acts of adultery alleged. The learned judge, without inquiring whether the acts of which evidence was proposed to be called in the second action were the same as those alleged in the first action, held that the matter was res judicata, and again gave judgment for the wife.

Held: although the husband's plea in the second action was the same as that which he put forward in the first he was not precluded from relying on it if the facts on which it was based were different from those regarding which evidence was given in the first action; the question was whether the offences sought to be charged at the second trial were the same as those which the husband had sought unsuccessfully to prove at the first trial; the learned county court judge had not dealt with that matter; and, therefore, his decision was wrong and a new trial of the second action would be ordered.

A *Husband and Wife—Separation deed—Income tax—Annuity under deed payable "without any deductions"—Payment of annuity by husband without deduction of tax—Right to recover amount of tax so paid.*

By a separation deed a husband agreed to pay to his wife an annuity "free of any deductions." Being ignorant of the fact that those words did not include deductions of income tax, he paid the instalments under the deed to B the wife in full. On discovering his mistake he sought to recover from the wife the amount of the tax he had failed to deduct.

Held: he had not paid the tax on behalf of the wife or at her request, but had paid it voluntarily and under a mistake of law, and, therefore, he was not entitled to recover it.

Practice—Trial—Adjournment—Right of litigant unable to call material witness.

C A litigant who, through no fault of his, is prevented from calling a material witness is entitled, subject to terms as to costs, to an adjournment as a matter of justice.

Notes. Considered: *Lindsay* v. *Lindsay*, [1934] All E.R.Rep. 149; *Whittaker* v. *Whittaker*, [1939] 3 All E.R. 833; *Davies* v. *Davies* (1946), 62 T.L.R. 680. Referred to: *Dick* v. *Piller*, [1943] 1 All E.R. 627; *Duchesne* v. *Duchesne*, [1950] D 2 All E.R. 784.

As to res judicata, see 15 Halsbury's Laws (3rd Edn.) 184 et seq.; and as to payment of tax on an annuity under a separation deed, see ibid., vol. 19, p. 884. For cases see 21 Digest 159 et seq.; 27 Digest (Repl.) 233, 234; and 28 Digest (Repl.) 186, 187.

E Cases referred to:

(1) *Evans* v. *Carrington* (1860), 2 De G.F. & J. 481; 30 L.J.Ch. 364; 4 L.T. 65; 25 J.P. 195; 7 Jur.N.S. 197; 45 E.R. 707, L.C.; 27 Digest (Repl.) 222, *1774.*

(2) *Duchess of Kingston's Case* (1776), 1 Leach, 146; 1 East, P.C. 468; 20 State Tr. 355; 168 E.R. 175; 2 Smith, L.C. (12th Edn.) 754; 21 Digest F 159, *213.*

(3) *Boileau* v. *Rutlin* (1848), 2 Exch. 665; 12 Jur. 899; 154 E.R. 657; 21 Digest 165, *233.*

(4) *R.* v. *Hutchings* (1881), 6 Q.B.D. 300; 50 L.J.M.C. 35; 44 L.T. 364; 45 J.P. 504; 29 W.R. 724, C.A.; 21 Digest 232, *631.*

(5) *Barrs* v. *Jackson* (1842), 1 Y. & C.Ch. Cas. 585; 7 Jur. 54; 62 E.R. 1028; G on appeal (1845), 1 Ph. 582, L.C.; 21 Digest 165, *232.*

(6) *Heath* v. *Weaverham Overseers*, [1894] 2 Q.B. 108; 63 L.J.M.C. 187; 70 L.T. 729; 58 J.P. 557; 42 W.R. 478; 10 T.L.R. 414; 38 Sol. Jo. 400; 10 R. 274, D.C.; 21 Digest 179, *301.*

(7) *R.* v. *Heath* (1866), L.R. 1 Q.B. 218; 7 B. & S. 285; 35 L.J.M.C. 113; 13 L.T. 669; 30 J.P. 182; 14 W.R. 388; 26 Digest 370, *953.*

H (8) *Brunsden* v. *Humphrey* (1884), 14 Q.B.D. 141; 53 L.J.Q.B. 476; 51 L.T. 529; 49 J.P. 4; 32 W.R. 944, C.A.; 21 Digest 207, *480.*

(9) *Kitchen* v. *Campbell* (1772), 3 Wils. 304; 95 E.R. 1069; sub nom. *Hitchin* v. *Campbell*, 2 Wm. Bli. 779; 21 Digest 208, *489.*

(10) *Macdougall* v. *Knight* (1890), 25 Q.B.D. 1; 59 L.J.Q.B. 517; 63 L.T. 43; 54 J.P. 788; 38 W.R. 553; 6 T.L.R. 276, C.A.; 21 Digest 205, *473.*

I (11) *Concha* v. *Concha* (1886), 11 App. Cas. 541; 56 L.J.Ch. 257; 55 L.T. 522; 35 W.R. 477, H.L.; 21 Digest 170, *258.*

(12) *Re Allsop and Joy's Contract* (1889), 61 L.T. 213; 21 Digest 165, *237.*

(13) *Hunter* v. *Stewart* (1861), 4 De G.F. & J. 168; 31 L.J.Ch. 346; 5 L.T. 471; 8 Jur.N.S. 317; 10 W.R. 176; 45 E.R. 1148, L.C.; 21 Digest 201, *442.*

(14) *Seddon* v. *Tutop* (1796), 6 Term Rep. 607; 101 E.R. 729; 21 Digest 211, *505.*

(15) *Nelson* v. *Couch* (1863), 15 C.B.N.S. 99; 2 New Rep. 395; 33 L.J.C.P. 46; 8 L.T. 577; 10 Jur.N.S. 366; 11 W.R. 964; 1 Mar.L.C. 348; 143 E.R. 721; 21 Digest 201, *443.*

(16) *Re Hilton, Ex parte March* (1892), 67 L.T. 594; 9 Morr. 286; 21 Digest 177, *293.*

(17) *Agnew* v. *Ferguson* (1903), 5 F. (Ct. of Sess.) 879; 28 Digest (Repl.) 187, **507.*

Appeal from the Darlington County Court.

The plaintiff's claim was for arrears of an annuity under a deed of separation entered into by her and the defendant, her husband, in November, 1920. By the deed the husband covenanted to pay his wife an annuity of £104 8s., in equal monthly instalments free of any deductions. Payments under the deed being in arrear, the wife commenced an action in the county court to recover £15 2s. from her husband. The husband pleaded that the wife had fraudulently concealed the fact that she had committed adultery before the execution of the deed, and he counter-claimed for the cancellation of the deed on the ground that he had been induced to enter into it by that fraudulent concealment. The action came on for hearing on Nov. 1, 1922. The defendant's solicitor applied for an adjournment on the ground that his chief witness could not attend to give evidence. The learned judge refused to adjourn the case, and the defendant's solicitor, not having his chief witness there, was unable to satisfy the learned judge of the alleged act of adultery. The learned judge, accordingly, gave judgment for the wife, saying that the defendant had failed to prove that she had committed adultery as alleged. It was subsequently ascertained by the husband that the wife, as he alleged, had committed other acts, or another act, of adultery in addition to that which had been deposed to at the trial. The husband thereupon applied to have the judgment set aside, and for an order for a new trial. The county court judge refused the application. On Nov. 29 the wife commenced the present action for further arrears of the annuity. The husband filed a plea in this action also, repeating his plea in the first action. In neither action were any particulars given of the acts of adultery alleged. Fresh acts of adultery were relied on, and the husband was in a position to call fresh witnesses to prove them. When this action came on for hearing the learned judge held that the defence was not open to the husband on the ground that the matter was res judicata. In this action the husband also counter-claimed for the amount of income tax which he had paid on instalments of the annuity paid to the wife, being under the impression that the wife was entitled to the annuity free of tax by reason of the fact that the separation deed provided that it was to be paid free of any deductions whatsoever. The county court judge held that he was not entitled to recover the tax. He, accordingly, gave judgment for the plaintiff on the claim, and dismissed the counter-claim. The defendant appealed.

Wightman Powers for the defendant.

Willoughby Williams for the wife.

Cur. adv. vult.

April 23. **LUSH, J.**, read the following judgment.—This case raises two distinct and separate questions, each of some novelty and difficulty. The first relates to a claim by a wife against her husband for arrears of an annuity alleged to be due on a covenant by the husband in a deed of separation. The other relates to a claim by the husband to recover a sum of money paid to the revenue authorities for income tax in respect of past payments of the wife's annuity, which he omitted to deduct when he paid the instalments of the annuity. The proceedings were taken in the Darlington County Court. The learned judge gave judgment for the wife on both claims, and the husband has appealed.

I will deal first with the wife's claim for the annuity. The separation deed is dated Nov. 2, 1920, the husband and wife being the sole parties. It contains the usual clauses. The husband covenants to pay £104 8s. a year to his wife by equal monthly instalments. In 1922 the wife brought an action in the county court for unpaid arrears of her annuity. The husband had refused to pay it on the ground, as he alleged, that the wife had, prior to the execution of the deed, committed

adultery with one Fuller and had fraudulently concealed the fact from him. There is no doubt that if the adultery had been proved, and if it had been proved that the husband was ignorant of it when he executed the deed, he would not be bound by its provisions. A deed of separation can be avoided on that, among other grounds. A husband is not liable at all for the maintenance of an adulterous wife, and, if she has concealed the true facts from him and thereby induced him to agree to pay her an allowance and to her living apart from him on the terms contained in the deed, he can avoid it. There are, as I have said, other ways of avoiding a separation deed. If the wife, for example, obtained her husband's consent to it with a view to living in adulterous intercourse with another man, the husband could repudiate it and get it set aside, although no prior adultery had been proved: see *Evans* v. *Carrington* (1).

Before the case came on for trial the husband, the defendant, filed a plea in the following terms:

> "That he was induced to enter into the deed of separation by fraudulent concealment of the material facts, namely, that the plaintiff had been guilty of adultery previously to its execution with one Fuller. The defendant claims cancellation of the said deed of separation."

No particulars of the specific act or acts of adultery relied upon were asked for or given. When the case came on for hearing the defendant's solicitor applied for an adjournment on the ground that his chief witness could not attend to give evidence. The witness, so it appears, expecting her confinement, was unable to travel. Although this fact was not disputed the learned judge, for some reason which is not apparent, refused to adjourn the case and the defendant's solicitor had to proceed as best he could. He called witnesses, but, not having his chief witness there, he failed to satisfy the learned judge of the act of adultery to which this witness deposed, and the learned judge gave judgment for the wife, saying that the defendant had failed to prove that his wife had committed adultery as alleged. The husband subsequently ascertained, as he alleged, that other acts, or another act, of adultery had been committed in addition to that which had been deposed to at the trial, and applied to have the judgment set aside, and for an order for a new trial. This also the learned judge refused. The wife afterwards commenced the present action for subsequent arrears of the annuity. The husband filed a plea in this second action also, which is substantially a repetition of the plea in the first action. No particulars were asked for or delivered in this second action. There was nothing, therefore, to show that the husband was relying on the same act of adultery which had been negatived in the first action. We were told by counsel that fresh acts of adultery were relied on, and that the husband was in a position to call fresh witnesses to prove them. We were shown an affidavit which has been sworn in the appeal which bears this out. When this second action came on for hearing before a jury, the learned judge's attention was called to the plea, and, having read it, he held the defence was not open to the husband on the ground that the matter was res judicata, it having been held in the previous action that the wife had not committed adultery and that there had been no fraudulent concealment. His judgment on this point is very short and I will read it. The learned judge said this:

> "In such previous action the defendant called a mass of evidence with the object of establishing his allegation of fraud, but after hearing and considering such evidence, I held, on the facts, the defendant had failed altogether to prove that his wife had committed adultery as alleged, and gave judgment for the plaintiff upon both the claim and the counter-claim. I, accordingly, hold that this is a question of res judicata and decline to allow the question to be tried again in the second action."

The question we have to decide is whether that view of the learned judge was right. Before dealing with it I feel obliged to say this. I think it is greatly to be regretted that the learned judge refused to grant the adjournment that was asked

for at the first trial. There was no question as to the bona fides of the application. Through no fault of his the defendant was prevented from calling the evidence that he wished to call in support of his case, and he was forced to go to trial without. Everyone who knows the learned judge would be sure that he intended to do what was just, but there is no concealing the fact that it placed the defendant in a position of grave difficulty and has prevented him from ever presenting his real case to the court. It is not even as if the particular instalment there being sued upon was all that was in dispute. According to the learned judge's view, the question of the validity of the deed for all time was being decided, and he was debarring the defendant from ever contending that his wife had committed adultery, however conclusive the evidence that he might obtain might be. I think the learned judge made a mistake in dealing with the case as he did. A litigant who, through no fault of his, is prevented from calling his material witness is entitled, subject of course to terms as to costs, to an adjournment as a matter of justice, and this defendant was denied it, and his case has been tried and decided without being fully heard. I am not at all sure that we could not, if it were necessary, enlarge the time and entertain an appeal from the first order that the learned judge made, and also from his refusal to grant a new trial when the true position was brought to his notice.

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But, however that may be, in my opinion the learned judge was wrong in holding that the matter was res judicata, and we must order a new trial. There is no difficulty in seeing what, in its strict and proper sense, the plea of res judicata means. The words "res judicata" explain themselves. If the res—the thing actually and directly in dispute—has been already adjudicated upon, of course by a competent court, it cannot be litigated again. There is a wider principle which I will refer to in a moment which is often treated as covered by the plea of res judicata, which prevents a litigant from relying on a claim of defence which he had an opportunity of putting before the court in the earlier proceedings and which he chose not to put forward, but I am dealing for the moment with res judicata in its strict sense. As is said in the notes to the *Duchess of Kingston's Case* (2) in SMITH'S LEADING CASES (12th Edn.), vol. ii, at p. 767, if the truth has been ascertained, the party against whom it has been ascertained is taken as admitting it. This is what the learned author said:

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> "An estoppel, therefore, is an admission, or something which the law treats as equivalent to an admission, of an extremely high and conclusive nature—so high and so conclusive, that the party whom it affects is not permitted to aver against it or offer evidence to controvert it."

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The litigant must admit that which has been judicially declared to be the truth with regard to the dispute that he raised in order to see what is the fact of which he must admit the truth. One has always to see what is the precise question, the precise fact that has been disputed and decided. This has constantly been stated to be the law. It is not correct to say, as the learned judge evidently thought, that because the defendant pleaded that he had been induced to enter into the deed of separation by fraudulent concealment of the fact that his wife had committed adultery, and the first plea had failed at the previous trial that it was not competent for the defendant afterwards to prove a different offence from that which had been negatived at the trial. That he took that view is clear because he ruled that the matter was res judicata without inquiring into the question whether the offence or offences sought to be proved were the same or different offences from those which had been investigated at the former trial. All that the defendant was obliged to admit to be true was that his wife did not commit the specific act of misconduct which the witness who was called had spoken to. The question whether she committed the other offences has never been investigated or decided, and it has never, therefore, been decided to be true that she was not guilty of any act of misconduct. The plea only means that the defendant alleges a certain act, or acts, of misconduct specified in particulars, if any are given, if not, to be

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A specified in the evidence, and that he will ask the court to hold that, by reason of those acts which were concealed in fraud from him, he is not bound by the deed.

The effect of a judgment is thus stated by SIR J. FITZJAMES STEPHEN in his DIGEST OF THE LAWS OF EVIDENCE (10th Edn.), p. 53:

> "Every judgment is conclusive proof as against parties and privies of facts directly in issue in the case, actually decided by the court, and appearing from the judgment itself to be the ground on which it was based."

There was an exception as to evidence which is not material in the present case. Thus in *Boileau* v. *Rutlin* (3) (2 Exch. at p. 665) there was a question whether pleadings in equity as well as at common law were subject to this principle of res judicata, and the headnote states:

> "The facts actually decided by an issue in any suit cannot be again litigated between the same parties, and are conclusive evidence between them; so are the material facts alleged by one party which are directly admitted by the opposite party, or indirectly admitted by taking a traverse on some other facts, if the traverse is found against the party making it."

That was the principle laid down in *Boileau* v. *Rutlin* (3), and PARKE, B., says this (2 Exch. at p. 681):

> "The facts actually decided by an issue in any suit cannot be again litigated between the same parties, and are evidence between them, and that conclusive, upon a different principle, and for the purpose of terminating litigation."

Then PARKE, B., went on to deal with admissions and stated what in effect is set out in the headnote that I have read.

In *R.* v. *Hutchings* (4), LORD SELBORNE, L.C., says this (6 Q.B.D. at p. 304), after citing the judgment in the *Duchess of Kingston's Case* (2). He quotes KNIGHT BRUCE, V.-C., with approval, who, in his judgment in *Barrs* v. *Jackson* (5), said (1 Y. & C.Ch. at p. 597):

> "It is, I think, to be collected, that the rule against re-agitating matter adjudicated, is subject generally to this restriction—that however essential the establishment of particular facts may be to the soundness of a judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may, as to its immediate and direct object, be, those facts are not at all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose as to which they may come in question, provided the immediate subject of the decision be not attempted to be withdrawn from its operation, so as to defeat its direct object."

In *Heath* v. *Weaverham Overseers* (6), COLLINS, J., said ([1894] 2 Q.B. at p. 115):

> "Then it is said that the decision in *R.* v. *Heath* (7) prevents us from going into the matter. I do not think so. We are entitled to go behind that decision, and to see on what facts it was given in order to say whether it amounts to an estoppel or not."

Then the learned judge sets out what the facts were and decides that the appeal ought to be dismissed. It is often necessary to see what the evidence before the court at the previous trial was in order to see what the precise facts were that cannot afterwards be disputed. Thus in *Brunsden* v. *Humphrey* (8), BRETT, M.R., said (14 Q.B.D. at p. 145):

> "Different tests have been applied for the purpose of ascertaining whether the judgment recovered in one action is a bar to a subsequent action. I do not decide this case on the ground of any test which may be considered applicable to it; but I may mention one of them; it is whether the same sort of evidence would prove the plaintiff's case in the two actions. Apply that test to the present case."

Then the Master of the Rolls held that the evidence would be different in the two cases, and, therefore, the principle relied on, that is, estoppel, did not apply. BOWEN, L.J., says (14 Q.B.D. at p. 147), quoting the judgment of DE GREY, C.J., in *Hitchin* v. *Campbell* (9) (2 Wm. Bl. at p. 831):

> " 'The principal consideration is, whether it be precisely the same cause of action in both, appearing by proper averments, in a plea; or by proper facts stated, in a special verdict, or a special case. One great criterion of this identity is, that the same evidence will maintain both the actions.' "

Later on in his judgment the lord justice refers again to the fact that if the same evidence will support the action there is estoppel, and if it will not, there is no estoppel. So in *Macdougall* v. *Knight* (10) it was laid down that a second action can only be barred by a judgment in an earlier action when it is clear that the question for the jury is the same in both. In *Concha* v. *Concha* (11) the House of Lords held that estoppel by record does not operate necessarily as to all the facts which were decided in the previous litigation, but only as to matters necessary to be decided—a principle which CHITTY, J., in *Re Allsop and Joy's Contract* (12), ruled applies to estoppel inter partes as well as to estoppel by a judgment in rem. The last case that I need cite in this connection, and one that has a direct bearing on the present case, is *Hunter* v. *Stewart* (13). In that case LORD WESTBURY, quoting also from the judgment in the *Duchess of Kingston's Case* (2), says (4 De G.F. & J. at p. 178):

> "One of the criteria of the identity of two suits, in considering a plea of res judicata, is the inquiry whether the same evidence would support both."

It is clear, therefore, that if the defendant's claim to have the deed of separation cancelled is considered, there is nothing to prevent him relying on a different offence from that which he failed to establish at the first trial. His failure to prove the first offence charged cannot deprive him of his rights, on proof of a fresh offence entitling him to the same relief. The other, the wider principle to which I have referred and which is often treated as falling within the plea of res judicata is this. The maxim Nemo debet bis vexari prevents a litigant who has had an opportunity of proving a fact in support of his claim or defence and chosen not to rely on it from afterwards putting it before another tribunal. To do that would be unduly to harass his opponent, and if he endeavoured to do so he would be met by the objection that the judgment in the former action precluded him from raising that contention. It is not that it has been already decided, or that the record deals with it. The new fact has not been decided; it has never been in fact submitted to the tribunal and it is not really dealt with by the record. But it is, by reason of the principle I have stated, treated as if it had been. This is well illustrated in *Brunsden* v. *Humphrey* (8), to which I have already referred. BOWEN, L.J., said (14 Q.B.D. at p. 151):

> "The real test is not, I think, whether the plaintiff had the opportunity of recovering in the first action what he claims to recover in the second."

He is citing that from a passage in another case—*Seddon* v. *Tutop* (14). He proceeds:

> "With all respect, I do not see how it can be said that *Nelson* v. *Couch* (15) so decides. That case establishes only the converse rule, namely, that the maxim Nemo debet bis vexari cannot apply where in the first action the plaintiff had no such opportunity of satisfying his claim."

In *Nelson* v. *Couch* (15) what was laid down was that where the litigant has an opportunity of proving a fact and he does not choose to avail himself of it, he is afterwards precluded from raising it in a second action, not that it has been decided that he had the opportunity and he had chosen not to use it. In *Re Hilton, Ex parte March* (16) which my brother cited, VAUGHAN WILLIAMS, J., states the principle in substance as I have stated it. In the present case the learned judge, as I have said, never considered the question whether the offences sought to be

charged at the second trial were the same offences as those which the defendant sought unsuccessfully to prove at the first trial. He never considered whether the defendant had had the opportunity of proving them and that he had chosen not to do so. We were told in fact that they were new offences, and I understand that they have recently come to the defendant's knowledge. At all events these are matters which must be inquired into. The witness who was not in a position to give evidence at the first trial may, for aught that appears, be prepared to prove acts of misconduct not spoken to by the other witnesses who were called, and, as the learned judge refused to allow her an opportunity of giving evidence, it cannot be said that the defendant chose not to call her. The witnesses in the first action cannot be called to give evidence again for the purpose of proving that the acts of misconduct that were negatived were in fact committed, but their evidence would be admissible in corroboration of the evidence of the other witnesses as to the conduct of the plaintiff generally. The result is that this judgment must be set aside, and there must be a new trial as to misconduct.

The other question raised on the appeal can be briefly dealt with. It is this. The defendant has paid income tax on the instalments of the annuity which he paid to his wife, as he was obliged to do under the Income Tax Act, 1918. He was under the impression when he paid it that his wife was entitled to the annuity free of tax by reason of the fact that the separation deed provided that it was to be paid free of any deduction whatsoever. He, therefore, did not deduct the amount that he had paid for the tax, but paid the annuity in full. He has since discovered that this view was wrong and that the words "free of any deductions" do not include income tax, and he counter-claimed in his wife's action to recover what he had paid and failed to deduct. The learned county court judge decided against him and he has appealed against this part of the judgment also.

The position of the payer of an annuity is this. He is the only person assessed and he has to pay the tax, although it is in fact charged upon the annuitant: see DOWELL ON INCOME TAX (8th Edn.), pp. 397, 527. This is the effect of General Rules, r. 19 (1) [now Income Tax Act, 1952, s. 169]. This rule provides that the payer may deduct the tax. I need not cite it; it is a rule which allows the person who pays the annuity to deduct the amount of tax that he has paid from the amount of the annuity that he has paid, in respect to the period covered by the tax. The rule does not in terms say that if the payee must deduct tax, he must deduct it from the next instalment of the annuity as is provided in the case of a tenant paying property tax; but the language of the rule, in my opinion, shows that that is intended. Whether the rule means that the only remedy of the payer of the annuity is to deduct the tax is a difficult question as to which I think the authorities differ. If the defendant had not voluntarily paid to his wife the sum that he paid on her behalf by way of tax, it may be (it is not necessary to decide it) that he could maintain an action against her for money paid to her use. He, no doubt, is the only person assessed, but that is for purposes of collection. It may be said that, although the annuitant is not assessed, it is his debt that has been paid, and that an action can be maintained for money paid to his use. This was the view of the majority of the court in a Scottish case of *Agnew* v. *Ferguson* (17). But, as LORD MONCREIFF points out in his judgment, if the payer has voluntarily paid the amount to the annuitant, it may well be that he cannot recover it; and that is, I think, the true view. The defendant here paid this money voluntarily to his wife. He did not pay the tax on behalf of her or at her implied request. He is really and in substance claiming to recover back what he has paid under a mistake of law. That is, in substance, what his claim is, though not so in form. In my opinion and in the circumstances the defendant, having paid the money as he has done, is not entitled to recover it as money paid to his wife's use, or otherwise. This part of the judgment, therefore, was, I think, right, and in this respect the judgment must be affirmed. In the circumstances each party must pay his own costs of the appeal.

SALTER, J.—I agree. On the first point I will only add this. We are not deciding that the matter is not res judicata, but only that the learned judge held the res to be judicata without sufficient inquiry as to the nature of the res. It will be determined in due course whether the matter now in dispute has or has not been the subject of previous decision. On the second point I have nothing to add.

Appeal allowed in part.

Solicitors: *Smith, Rundell, Dods & Bockett*, for *Wooler & Wooler*, Darlington; *Howe & Rake*, for *Lucas, Hutchinson & Meek*, Darlington.

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

MITFORD *v.* MITFORD AND VON KUHLMANN

[Probate, Divorce and Admiralty Division (Sir Henry Duke, P.), February 26, 27, March 20, 1923]

[Reported [1923] P. 130; 92 L.J.P. 90; 129 L.T. 153; 39 T.L.R. 350]

Conflict of Laws—Marriage—Marriage celebrated abroad—Nullity—Decree by foreign court—Grounds not recognised by English law—Petitioner domiciled in England.

When the validity of a marriage arises for determination in a foreign court which has jurisdiction over the subject-matter and over the parties and proceeds in accordance with what in English law are deemed to be the requirements of natural justice, the judgment pronounced there is as conclusive as a like judgment in any other civil proceeding. The essentials and mode of coming into operation of a marriage contract are to be judged by the requirements of the law to which in the transaction the parties purport to conform, and are not necessarily uniform with those of our own law. An Englishman who contracts marriage abroad does not thereupon become necessarily and inevitably endued in relation to his wife with the same status and the same legal capacities and incapacities as an English husband who marries in England an English wife.

In January, 1914, the petitioner, a man domiciled in England, and the respondent were parties to a ceremony of marriage which took place in Berlin and was valid according to German law, but was not such as to constitute marriage according to English law. The parties never lived in England, nor did it appear that the wife ever intended to take up her abode with her husband in England as her permanent home. In October, 1914, a German court declared the marriage null and void on grounds which would not have formed grounds for a decree of nullity of marriage in English law. Subsequently, the respondent married the co-respondent. On a petition by the petitioner for dissolution of the marriage on the ground of the respondent's bigamy and adultery,

Held: the court was bound to conclude that the parties intended to contract marriage in accordance with German law; the fact that the petitioner was domiciled in England did not result in the marriage being capable of being nullified only on grounds recognised by English law; and, therefore, the annulment of the marriage by the German court was valid, and the petition must be dismissed.

Notes. Considered: *Inverclyde* v. *Inverclyde*, [1931] P. 29. Applied: *Corbett* v. *Corbett*, [1957] 1 All E.R. 621.

As to foreign decrees of nullity, see 7 HALSBURY'S LAWS (3rd Edn.) 117–119; and for cases see 11 DIGEST (Repl.) 485, 486.

Cases referred to:

(1) *Scrimshire* v. *Scrimshire* (1752), 2 Hag. Con. 395; 161 E.R. 782; 11 Digest (Repl.) 462, *955*.

(2) *Ogden* v. *Ogden*, [1908] P. 46; 77 L.J.P. 34; 97 L.T. 827; 24 T.L.R. 94, C.A.; 11 Digest (Repl.) 357, *260*.

(3) *Roberts* v. *Brennan*, [1902] P. 143; 71 L.J.P. 74; sub nom. *Brennan* (*otherwise Roberts*) v. *Brennan*, 86 L.T. 599; 50 W.R. 414; 18 T.L.R. 467; 11 Digest (Repl.) 478, *1068*.

(4) *Niboyet* v. *Niboyet* (1878), 4 P.D. 1; 48 L.J.P. 1; 39 L.T. 486; 43 J.P. 140; 27 W.R. 203, C.A.; 11 Digest (Repl.) 469, *1021*.

(5) *Anghinelli* v. *Anghinelli*, [1918] P. 247; 87 L.J.P. 175; 119 L.T. 227; 34 T.L.R. 438; 62 Sol. Jo. 548, C.A.; 11 Digest (Repl.) 475, *1053*.

(6) *Brook* v. *Brook* (1861), 9 H.L.Cas. 193; 4 L.T. 93; 25 J.P. 259; 7 Jur.N.S. 422; 9 W.R. 461; 11 E.R. 703, H.L.; 11 Digest (Repl.) 457, *915*.

(7) *Sottomayor* v. *De Barros* (1877), 3 P.D. 1; 47 L.J.P. 23; 37 L.T. 415; 26 W.R. 455, C.A.; 11 Digest (Repl.) 460, *945*.

(8) *Sinclair* v. *Sinclair* (1798), 1 Hag. Con. 294; 161 E.R. 557; 11 Digest (Repl.) 485, *1098*.

(9) *Pemberton* v. *Hughes*, [1899] 1 Ch. 781; 68 L.J.Ch. 281; 80 L.T. 369; 47 W.R. 354; 15 T.L.R. 211; 43 Sol. Jo. 365, C.A.; 11 Digest (Repl.) 487, *1115*.

(10) *Dalrymple* v. *Dalrymple* (1811), 2 Hag. Con. 54; 161 E.R. 665; on appeal (1814) 2 Hag. Con. 137, n.; 22 Digest (Repl.) 618, *7112*.

(11) *Turner* v. *Thompson* (1883), 13 P.D. 37; 58 L.T. 387; 52 J.P. 151; 36 W.R. 702; 4 T.L.R. 243; 11 Digest (Repl.) 355, *244*.

(12) *Chetti* v. *Chetti*, [1909] P. 67; sub nom. *Venugopal Chetti* v. *Venugopal Chetti*, 78 L.J.P. 23; 99 L.T. 885; 25 T.L.R. 146; 53 Sol. Jo. 163; 11 Digest (Repl.) 460, *941*.

Also referred to in argument:

Simonin v. *Mallac* (1860), 2 Sw. & Tr. 67; 29 L.J.P.M. & A. 97; 2 L.T. 327; 6 Jur.N.S. 561; 164 E.R. 917; 11 Digest (Repl.) 478, *1065*.

Middleton v. *Janverin* (1802), 2 Hag. Con. 437; 161 E.R. 797; 11 Digest (Repl.) 462, *956*.

Bater v. *Bater*, [1906] P. 209; 75 L.J.P. 60; 94 L.T. 835; 22 T.L.R. 408; 50 Sol. Jo. 389, C.A.; 11 Digest (Repl.) 482, *1087*.

Hay v. *Northcote*, [1900] 2 Ch. 262; 69 L.J.Ch. 586; 82 L.T. 656; 48 W.R. 615; 16 T.L.R. 418; 11 Digest (Repl.) 465, *991*.

Re Alison's Trusts (1874), 31 L.T. 638; 23 W.R. 226; 11 Digest (Repl.) 463, *964*.

Re Cooke's Trusts (1887), 56 L.J.Ch. 637; 56 L.T. 737; 35 W.R. 608; 3 T.L.R. 558; 11 Digest (Repl.) 331, *51*.

Cooper v. *Cooper* (1888), 13 App. Cas. 88; 59 L.T. 1, H.L.; 11 Digest (Repl.) 491, *1137*.

Moss v. *Moss*, [1897] P. 263; 66 L.J.P. 154; 77 L.T. 220; 45 W.R. 635; 13 T.L.R. 459; 27 Digest (Repl.) 36, *131*.

Scott v. *Sebright* (1886), 12 P.D. 21; 56 L.J.P. 11; 57 L.T. 421; 35 W.R. 258; sub nom. *Sebright* (*otherwise Scott*) v. *Sebright*, 3 T.L.R. 79; 27 Digest (Repl.) 38, *147*.

Petition of the husband, John Bertram Ogilvy Mitford, for dissolution of his marriage with his wife, Marie Anne Mitford, to whom he had been married in Berlin on Jan. 5, 1914, by reason of her bigamy and adultery in that she had, on Mar. 4, 1920, gone through a form of marriage with the co-respondent, Richard von Kuhlmann, in Germany, and had subsequently cohabited with him.

The respondent appeared under protest and by act on petition filed on Jan. 20, 1922, admitted having been married to the petitioner, as stated in the petition, but alleged that this marriage had been annulled on Oct. 23, 1914, by the decree of a competent German court, confirmed on appeal; that the petitioner was at all material times domiciled in Germany; and that, therefore, the decree of the German court was binding on him. She admitted having married the co-respondent, as alleged, but claimed that this was a lawful marriage, and that the English Divorce Court had no jurisdiction to entertain the petition against her. By his answer to the act on petition the petitioner claimed an English domicil, and denied the jurisdiction of the German court. By an amended act on petition filed on June 22, 1922 (after a change of solicitors) the respondent abandoned the contention that the petitioner's domicil was German, but maintained the validity of the German decree annulling her marriage to the petitioner alleging that she had always been domiciled in Germany, that the petitioner had been resident in Germany, and that the matrimonial residence of the parties had been in Germany at the time of the institution of her suit in the German court. The petitioner by his answer to the amended act on petition again set up his English domicil, and alleged that the respondent had by her marriage to him acquired an English domicil, and that the German court had no power to dissolve their marriage, and he also alleged that the grounds on which the German court had purported to dissolve their marriage were false, and its decision bad, because, owing to the late war (1914–18), he had had no opportunity of appearing in person to deny the allegations made against him. The respondent by her reply admitted that the decisions of the German courts had been pronounced during the war, but alleged that the petitioner had had the opportunity of giving his evidence and that of witnesses on his behalf by affidavit, and on the other points raised by the answer joined issue. Affidavits were filed by both parties, and the case came on for hearing of the act on petition. The co-respondent did not appear.

Sir Ernest Pollock, *K.C.*, and *Noel Middleton* for the wife.

Bayford, *K.C.*, and *T. Bucknill* for the petitioner.

Cur. adv. vult.

Mar. 20. **SIR HENRY DUKE** read the following judgment.—This is an act on petition in a suit for dissolution of marriage, in which the husband, the petitioner, is John Bertram Mitford, a British subject, and the respondent is of German birth, the daughter of a Privy Councillor of Commerce in Berlin—now deceased. A ceremony of marriage between the parties was solemnised in Berlin on Jan. 5, 1914, before the registrar of births, marriages, and deaths. On Oct. 23, 1914, the Thirty-Fourth Civil Chamber of the Royal Provincial Court I of Berlin, in a suit brought by the present respondent, and upon her application that the court should "annul the marriage of the parties from the beginning" gave judgment "that the marriage between the parties is null." This judgment was confirmed on appeal at Berlin, and subsequently was again confirmed on appeal by the Court of Final Appeal at Leipzig. Since the decision of the last-mentioned tribunal the respondent has married the co-respondent, and this marriage and the cohabitation of the respondent with the co-respondent following thereon are the grounds upon which the petitioner claims in the present suit a decree of dissolution of his marriage with the respondent.

The marriage ceremony of Jan. 5, 1914, before the registrar of marriages at Berlin was conducted in accordance with German law. The certificate, which is the proper evidence of the fact, recites that before the civil registrar "there appeared for the purpose of contracting marriage" the parties, whose identity is duly vouched, and that as witnesses there were invited and appeared named persons, whose identity is also duly vouched, and proceeds to this effect:

> "The Civil Registrar put to the bridegroom and to the bride individually and successively the questions whether they would contract marriage with each other. The affianced parties replied to the question in the affirmative, and

the Civil Registrar thereupon pronounced that by virtue of the Civil Code they were now lawfully married spouses."

The marriage, which purports to be contracted by the solemnity here described, is —it was conceded on both sides in argument—a duly solemnised marriage in accordance with the German Civil Code. No article of the Code on this subject was put in evidence, because no question arose which required proof. The one article cited was art. 1333, which—to quote from the authenticated translation of the record of proceedings in the court of first instance in the respondent's suit for nullity—enacts that:

> "The validity of a marriage may be disputed by a spouse, who at the time of contracting the marriage was mistaken as to the person of the other spouse, or as to such personal attributes of the other spouse as would have prevented him or her, with knowledge of the state of affairs and with intelligent appreciation of the essential significance of marriage, from contracting the marriage."

The plea of nullity, which the respondent set up in her proceedings in Berlin, made these allegations:

> "The conduct of the defendant during the short period of marriage proves him to be addicted to masculine indolence and unbearable selfishness. Had the plaintiff known of these characteristics of the defendant before contracting the marriage, she would never have consented to the marriage, for she would have realised that such characteristics must be incompatible with the marriage."

These allegations the German court, before which the cause came, held to be established, and thereupon pronounced the marriage between the parties to be null. At the original hearing of the respondent's suit in Berlin a mass of conflicting testimony was received, which was, it seems, supplemented during the successive appeals. Save as I shall presently state, however, no question was raised before me as to the procedure followed in the German courts, or as to the relevancy or sufficiency of the evidence which was received.

On the authority of a long series of decisions from *Scrimshire* v. *Scrimshire* (1), determined in the Consistory Court of London in 1752, to *Ogden* v. *Ogden* (2), decided in the Court of Appeal in 1908, counsel for the respondent supported the act on petition upon the broad grounds that the validity of a marriage solemnised in Germany according to German law is a matter properly cognisable by German tribunals; that the petitioner had not only appeared in the German tribunals, and submitted to the jurisdiction of the German courts, but had taken part in the three successive hearings of the cause; and that the result arrived at in those proceedings ought to be accepted here. Counsel for the petitioner contended that, although the judgment of a foreign court with regard to the validity or nullity of a marriage ceremony solemnised within its jurisdiction is, or may be, conclusive as to matters of mode and form, such judgment is open to review where there are questions of the competency of the parties, of the efficacy of the marriage ceremony, and of the effect upon the marriage contract of the law of the domicil of the parties or either of them. In particular, counsel for the petitioner relied upon domicil as a decisive fact in the case of an Englishman to determine the effect for him of a lawful contract of marriage, wherever celebrated. Shortly the argument amounted to this, that an Englishman, who contracts marriage abroad, becomes thereupon necessarily and inevitably endued in relation to his wife with the same status, and the same legal capacities and incapacities, as an English husband, who marries in England an English wife. It was, accordingly, contended that a decree of nullity of marriage could only be made in the case of an English husband for causes recognised by English law. Counsel for the petitioner also impugned the German decree of nullity on the ground of the prosecution of the respondent's suit during the war, when, as was said, the petitioner, by reason of his nationality, could not be heard in person before a German tribunal.

That the courts duly authorised by any State may determine the validity of the marriage of persons resident within and subject to their jurisdiction was not disputed. The law of England is, I think, clear to the effect that they may. An English civil tribunal is competent to determine in a dispute as to succession whether a claimant is the child of a lawful marriage contracted out of England. An English criminal court can try, upon an allegation of a bigamous marriage in England, the validity of a marriage previously contracted abroad. This court, also, by virtue of its jurisdiction conferred by the Matrimonial Causes Act, 1857, s. 6 [see now Supreme Court of Judicature (Consolidation) Act, 1925, s. 21], is empowered to adjudicate upon an allegation of nullity of marriage in the case of persons within its jurisdiction, and to pronounce finally thereon by a decree which concludes the matter between the parties here, and would, I think, be received in evidence elsewhere. As was said by LORD ST. HELIER in *Roberts* v. *Brennan* (3) ([1902] P. at p. 144):

> "Residence, not domicil, is the test of jurisdiction in a nullity case. The jurisdicition of the ecclesiastical courts was based on the residence of the parties, and in suits for nullity this court follows the practice of the ecclesiastical courts, as prescribed by s. 22 of the Matrimonial Causes Act, 1857: [see s. 32 of Act of 1925]."

The principle which is involved was discussed in *Niboyet* v. *Niboyet* (4) and in *Anghinelli* v. *Anghinelli* (5) in the Court of Appeal. Whether, and to what extent, a decree of nullity of marriage is binding outside the jurisdiction in which it is made is a matter on which divergent views have been expressed in our own courts. That the decree of a municipal tribunal applying the municipal law must necessarily be decisive of the validity or nullity of a marriage contracted within its jurisdiction is, I think, too wide a proposition, though a passage was cited from the judgment of SIR EDWARD SIMPSON in *Scrimshire* v. *Scrimshire* (1) that might seem to suggest such a conclusion. That learned judge said (2 Hag. Con. at p. 417):

> "All nations allow marriage contracts; they are juris gentium . . . and from the infinite mischief and confusion that must necessarily arise to the subjects of all nations . . . if the respective laws of different countries were only to be observed as to marriages contracted by the subjects of those countries abroad, all nations have consented, or must be presumed to consent, for the common benefit and advantage that such marriages should be good or not according to the laws of the country where they are made."

Reference to cases like *Brook* v. *Brook* (6), *Sottomayor* v. *De Barros* (7), and *Ogden* v. *Ogden* (2) show that the consent to SIR EDWARD SIMPSON'S proposition is less general than the language of his judgment suggests. LORD CRANWORTH, in *Brook* v. *Brook* (6), expressed the principle of the rule under our own law in these words (9 H.L.Cas. at p. 224):

> "Though in the case of marriages celebrated abroad the lex loci contractus must quoad solemnitates determine the validity of the contract, yet no law but our own can decide whether the contract is or is not one which the parties to it, being subjects of Her Majesty's domiciled in this country, might lawfully make."

The dicta cited from *Scrimshire* v. *Scrimshire* (1) are, I think, too wide, and the rationes decidendi in *Brook* v. *Brook* (6) too narrow, to be used textually to determine the main question in this case. As appears from the judgment in *Scrimshire* v. *Scrimshire* (1), and as was said by LORD STOWELL in *Sinclair* v. *Sinclair* (8), the sentence of nullity of a foreign court is not necessarily binding in all courts. Such a decree is, at any rate, examinable in other jurisdictions. But when the validity of a marriage arises for determination in a court which has jurisdiction over the subject-matter and over the parties, and which proceeds in accordance with what in English law are deemed to be the requirements of natural justice, the judgment pronounced there would seem to be as conclusive as a like

judgment in any other civil proceeding. LORD LINDLEY, in *Pemberton* v. *Hughes* (9) in the Court of Appeal, stated the law in these terms ([1897] 1 Ch. at p. 790):

> "All the court looks to is the finality of the judgment and the jurisdiction of the court in this sense, and to this extent, namely, its competence to entertain the sort of case which it dealt with, and its competence to require the defendant to appear before it. If the court had jurisdiction in this sense and to this extent, the courts of this country never inquire whether the jurisdiction has been properly exercised, provided that no substantial injustice, according to English notions, has been committed."

In the discussion before me marriage was sometimes spoken of as though every ceremony of marriage must necessarily and universally take effect with the same finality at the moment of solemnisation. It seems to me, however, that this assumption ignores the differences there are in the marriage ceremonies of different countries. The point of time at which marriage is definitely contracted, so that there is thenceforth union of the parties, as is said in the cases, "for life," must evidently be determined by the provisions of the law under which the ceremony is conducted. In the remarkable case of *Dalrymple* v. *Dalrymple* (10) which deals with Scottish marriages per verba de præsenti LORD STOWELL found it necessary to determine the point of time at which marriage would be contracted under various forms of Scottish marriage. The case arose between a man claiming English domicil and a woman domiciled in Scotland, but domicil was not, I think, a material consideration. The validity of the matrimonial rights claimed by the party, LORD STOWELL said (2 Hag. Con. at p. 59), "must be tried by reference to the law of the country where, if they existed at all, they had their origin." He proceeded to ascertain the requisites of Scottish law in respect of the consent of parties, the effect of mutual declarations of consent, and the time at which such declarations take effect so that marriage is deemed to be then contracted. Preparatory to his decision of the question whether there existed a valid and conclusive consent of each of the parties to the marriage contract which was alleged, LORD STOWELL said (ibid. at p. 104):

> "When I speak of a contract, I mean of course one that is attended with such qualifications as the law of Scotland requires for such a contract."

In the event he held that the mutual promises of the parties were unqualified, and that a valid marriage was concluded when the mutual promises were exchanged. The case illustrates the proposition that the essentials and mode of coming into operation of a marriage contract are to be judged by the requirements of the law to which in the transaction the parties purport to conform, and are not necessarily uniform with those of our own law.

The first question in the present case is that of the effect according to English law of the ceremony solemnised at Berlin between the petitioner and the respondent on Jan. 5, 1914. What was done appears by the certificate. The ceremony clearly was not such as to constitute marriage according to the English common law or under any English statute. Its validity depended upon the German Civil Code, and I am bound to conclude that the petitioner and respondent intended to contract marriage in accordance with the provisions of that code. Having regard to the language of art. 1333, which I have recited, one term incorporated by German law in the marriage contract—unless the law of the petitioner's domicil prevents it —was that the validity of the intended marriage might be disputed by either party if he or she at the time of the marriage was mistaken as to such "personal attributes of the other spouse as would have prevented him or her with knowledge of the state of affairs and with appreciation of the essential significance of marriage from contracting the marriage." The respondent has satisfied the German courts that she was so mistaken. In English law the mistake, if it existed, would be immaterial. Under German law it avoids the contract as effectually as a mistake of identity. It is said on the petitioner's behalf that this effect is excluded in his case by the law of his domicil, and at the hearing the observation was added, citing

in a popular sense some words of COTTON, L.J., in *Sottomayor* v. *De Barros* (7) (3 P.D. at p. 7): "No country is bound to recognise the laws of a foreign country when they inflict injustice upon its own subjects." A

Reliance was placed by counsel not only upon the effect of the petitioner's English domicil, but upon a contention that the respondent's domicil at the time she commenced her suit was, as a matter of law and in fact, that of the petitioner. As to domicil by operation of law, to say that the respondent on Jan. 5, 1914, became domiciled in England "by marriage" seems to me to beg the question. It assumes in the petitioner's favour the subject-matter of the controversy. As to domicil in fact, some observations of LORD HANNEN in *Turner* v. *Thompson* (11) were relied upon. LORD HANNEN said there (13 P.D. at p. 41) with regard to a voidable marriage: B

> ". . . a woman when she marries a man not only by construction of law, but absolutely as a matter of fact, does acquire the domicil of her husband, if she lives with him in the country of his domicil." C

Issues of fact must, I suppose, be decided in every case upon what is there alleged and proved. In this case the respondent never lived with the petitioner in the country of his domicil. Nor can I say with confidence as to the respondent, as was said by LORD HANNEN of the petitioner in *Turner* v. *Thompson* (11) and her husband: "She had the intention of taking up her abode with him and of making his country her permanent home." D

So far as domicil is concerned, the question of the national law to be applied arises only in respect of the domicil of the petitioner, and the facts are less strong in favour of the petitioner's argument than were the facts in *Scrimshire* v. *Scrimshire* (1), where both the parties were domiciled in England. Yet SIR EDWARD SIMPSON, speaking in that case with direct regard to the French prohibition of clandestine marriages, but expressing his opinion in general terms, said this (2 Hag. Con. at p. 412): E

> "As both the parties by celebrating the marriage in France have subjected themselves to the law of that country relating to marriage, as their mutual intention must be presumed to be that it should be a marriage or not according to the laws of France, I apprehend it is not in the power of one of the parties by leaving the place to draw the question of the marriage or contract ad aliud examen, to be tried by different laws than those of the place where the parties contracted." F

The reasons of the conclusion thus expressed seem to me to apply with full force in the present case. G

LORD GORELL in *Chetti* v. *Chetti* (12) dealt with a case which is in some respects the converse of this. The petition there was that of an English woman married in London to a native of India. The respondent sought to control the marriage contract, into which he had entered here, by what he alleged to be the law of his domicil. Dealing with that attempt LORD GORELL used this language ([1909] P. at p. 87): H

> "Ought he to be allowed to do so? Ought a foreigner domiciled abroad, who comes to this country, and here marries in due form according to English law another person domiciled in England, to be allowed to assert that he carries about with him, whilst here, the burden of an incapacity imposed by the laws of the foreign domicil to do that which he has done voluntarily and in due form according to the laws of England or to repudiate his marriage on the ground that he is incapable of doing what he has done, and ought our courts to support such an assertion and repudiation? . . . To my mind the answer should be 'no.' " I

There what was in question was a condition alleged to attach to the marriage contract by virtue of the Indian domicil of the husband. English marriage law was held to exclude it. Here the petitioner claims that a German marriage con-

tract must be governed by the provisions of the law of his English domicil. He says truly that to make this marriage depend for its validity upon the conformity or disconformity of one of the spouses to the ideals of the other is repugnant to English law. Doubtless a promise to such an effect upon the occasion of an English marriage would be void, whether the marriage should take place in this country or be solemnised abroad, under the provisions of the Foreign Marriage Act, 1892. The marriage in this case, however, must be judged by the German law, under whose sanction it was made.

What remains for consideration is whether the judgment given in the respondent's favour in the court at Berlin, and confirmed upon successive appeals, is of binding effect here. This inquiry depends upon the compliance or non-compliance of the judgment with the three conditions stated by LORD LINDLEY in *Pemberton* v. *Hughes* (9). As to the general competence of the court in Berlin to deal with a suit for nullity no question was raised. As to the validity of its summons to the petitioner, it can only be said now that, having been served within the jurisdiction, he appeared and defended the suit. As to observance of the requirements of natural justice, two grounds of objection were insisted on before me: the application of the German code to the matrimonial affairs of an Englishman, and the refusal of the tribunals to adjourn the proceedings during the war until, upon the restoration of peace, the petitioner could be personally heard. The first of these topics, is, I think, outside the meaning of LORD LINDLEY's declaration. It relates to the grounds in law of the judgment. The second is a weighty complaint in respect of procedure, but nothing was adduced which satisfies me that the procedure followed was not within the competence of the court in Berlin under the law and practice by which it is—or was—governed; and it must further be said that when adjournment was refused the petitioner proceeded with the defence of the suit, and that his averments as to matters of fact which were in question, and the evidence of various witnesses whom he tendered, form parts of the material upon which the judgments of the German courts expressly purport to proceed. The petitioner's real ground of challenge seems to me to be that embodied in the contention put forward on his behalf that the decision was wrong on the merits. Into that question I am, as I think, not entitled to go. According to what I suppose to be well-established principles, I must hold the judgment to be a conclusive adjudication between the parties as to the validity of the marriage of Jan. 5, 1914. I, therefore, find for the respondent upon the act on petition, and declare that no marriage was at the commencement of the suit, or now is, subsisting between the petitioner and the respondent.

Solicitors: *Francis & Johnson*; *Lewis & Lewis*.

[*Reported by* J. A. C. SKINNER, ESQ., *Barrister-at-Law*.]

CHESTER CORPORATION *v.* BRIGGS AND OTHERS

[KING'S BENCH DIVISION (Lord Hewart, C.J., Sankey and Salter, JJ.), October 30, 31, 1923]

[Reported [1924] 1 K.B. 239; 93 L.J.K.B. 69; 130 L.T. 221; 88 J.P. 1; 40 T.L.R. 85; 68 Sol. Jo. 276; 21 L.G.R. 807]

Street—Private street works—Expenses—Contribution by urban authority—Matter solely for urban authority—No power in justices hearing objections to amend resolution of authority approving apportionment of cost of proposed works—Objection to proposals—"Unreasonable"—Unreasonable that works should be done at frontagers' expense—Private Street Works Act, 1892 (55 & 56 *Vict.*, *c.* 57), *ss.* 6 (2), 7, 8 (1), 15.

By s. 6 (2) of the Private Street Works Act, 1892, an urban authority may by resolution approve a specification of proposed private street works, an estimate of their cost, and a provisional apportionment of that cost among the premises liable to be charged. By s. 7 an owner of such premises can object to the proposals on the grounds there specified. By s. 8 (1) a court of summary jurisdiction may, on the application of the urban authority, hear and determine any objections, and on such hearing the court may "quash in whole or in part or may amend the resolution, plans, sections, estimates, and provisional apportionments, or any of them." By s. 15: "The urban authority, if they think fit, may at any time resolve to contribute the whole or a portion of the expenses of any private street works."

Held: it was a condition precedent to the contribution by the urban authority of the whole or a portion of the expenses of any street works that they should have passed a resolution to that effect as contemplated in s. 15; the decision on that matter was one solely for the urban authority, and justices acting under s. 8 (1) could not fetter the exercise by the urban authority of their discretion or compel them to pass a resolution in any particular terms; therefore, such justices had power only to deal with the objections which had been made, and could not amend the resolution of the urban authority under s. 6 (2) by providing that the authority should contribute a certain portion of the expenses of the works.

Per SALTER, J.: In considering an objection under s. 7 (d), that the proposed works are unreasonable, the justices are entitled to consider whether these works are reasonable in the sense that it is reasonable that the work should be done at the frontagers' expense.

Notes. Followed: *Chatham Corpn.* v. *Wright*, [1929] All E.R.Rep. 654. Referred to: *Hornchurch U.D.C.* v. *Webber*, [1938] 1 All E.R. 309; *Hornchurch U.D.C.* v. *Allen*, [1938] 2 All E.R. 431; *Southgate Corpn.* v. *Park Estates (Southgate), Ltd.*, [1953] 2 All E.R. 1008.

As to private street works, see 19 HALSBURY'S LAWS (3rd Edn.) 437 et seq.; and for cases see 26 DIGEST 539 et seq. For Private Street Works Act, 1892, see 11 HALSBURY'S STATUTES (2nd Edn.) 181.

Case Stated by justices for Chester.

The mayor, aldermen, and citizens of the city of Chester, hereinafter called the appellants, as the urban sanitary authority for the city, in pursuance of the Private Street Works Act, 1892, resolved to do certain private street works with respect to a street known as Grange Road in the city. In pursuance of s. 7 of the Act objections were lodged by the respondents, owners of premises shown in the provisional apportionment, prepared by the appellants, as liable to be charged with part of the expenses of executing the works in the said street. On May 18, 1923, pursuant to s. 8 of the Act, the justices heard and determined the matter of the objections, the appellants and respondents being represented. The justices were of opinion (i) that the proposed street works were necessary; (ii) that, having regard to the designed object of the road as a relief road, it was unreasonable that

the owners (including the respondents) should bear the whole expense of the works, and that a portion of the expense of the works should be borne by the appellants; (iii) that under s. 15 of the Act the appellants could, had they chosen, have resolved at any time to contribute a portion of the expense of the proposed works; (iv) that s. 8 (1) of the Act conferred upon the justices (amongst other powers) the power to amend any resolution of the appellants passed by the appellants as the urban authority under the Act. The justices, therefore, held and determined that (i) the specification and estimate of the appellants' surveyor be approved, and (ii) the resolution of the appellants be amended so as to include the words "that the council contribute 15 per cent. of the total cost of the said works." The question upon which the opinion of the court was desired was whether the justices came to a correct determination and decision in point of law.

Montgomery, K.C., and *Roland Burrows* for the appellants.

Greaves-Lord, K.C., and *Heathcote Williams* for the respondents other than one Cullimore.

H. Sidebotham for the respondent Cullimore.

LORD HEWART, C.J.—This is a Case stated by justices, and the question arises under the Private Street Works Act, 1892. The appellants, the corporation of the city of Chester and the urban sanitary authority for the city, resolved some time ago, in pursuance of the statute, to do private street works in relation to a street in Chester, and in pursuance of s. 7 of the Act objections were lodged by certain owners of premises, that is to say, the respondents who were shown in the provisional apportionment as liable to be charged with part of the expenses of executing the works. Under the provisions of s. 8 of the Act the court of summary jurisdiction, on May 18, 1923, heard and determined the matter of those objections. In the result the justices found, if I may quote their own words: (i) that the proposed street works were necessary; (ii) that having regard to the designed object of the road as a relief road it was unreasonable that the owners (including the respondents) should bear the whole expense of the works, and that a portion of the expense of the works should be borne by the appellants; (iii) that under s. 15 of the Act the appellants could, had they chosen, have resolved at any time to contribute a portion of the expense of the proposed works; and (iv) that s. 8 (1) of the Act conferred upon the justices (among other powers) the power to amend any resolution of the appellants passed by the appellants as the urban authority under the Act. Accordingly, the justices decided that the resolution of the appellants be amended so as to include the words "that the council contribute 15 per cent. of the total cost of the said works," and the question for this court is whether upon those facts the justices came to a correct determination and decision in point of law.

The real question is whether in the absence of such a resolution as is contemplated by s. 15 the justices, engaged in the task of hearing and determining objections as provided by s. 8, can amend a resolution which is before them by inserting, in substance, a resolution under s. 15. In my opinion, the justices have no such power. Under s. 15 the discretion upon the question whether the urban authority shall contribute the whole or a part of the expenses of any private street works is, as might be expected, left to the urban authority itself. It would be a strange result if those who have control of the finances of the city are to abstain from passing a resolution putting a charge upon the ratepayers as a whole, and yet the justices, dealing with a different, though similar, matter, should take a course for the urban authority which the urban authority had declined to take for itself. I am satisfied that it is a condition precedent to the contribution of the whole or a part of the expenses of any private street works that the urban authority should at some time pass a resolution to that effect, and it is not an amendment of another resolution which is before the justices to insert apt words to give effect to a resolution under s. 15. That is either to amend a resolution not before the justices or in effect to pass a resolution for the urban authority.

In this case the urban authority has not passed a resolution under s. 15. What, then, was the question for the justices to decide? It was, in the absence of such a resolution, and the justices having no power indirectly to secure the effect of such a resolution, to decide among other things whether the proposed works were unreasonable. Their findings as they stand are a little ambiguous. It is true that they find, if one looks at the first statement alone, that the works were necessary, but they go on to say that, having regard to the designed object—that seems to be something in futuro—of the road as a relief road, it was unreasonable that the owners (including the respondents) should bear the whole expense of the works, and that a portion of the expense of the works should be borne by the appellants. Then they go on to insert in the resolution by way of purported amendment the stipulation that the council shall contribute 15 per cent. of the total cost. What precise meaning is to be attributed to those statements, taken together, may be a matter of some controversy. One person may take one view, and another person may take another. For myself, I do not propose to make any conjecture. I think the case must go back to the justices with the direction that s. 15 of the Act gives to the urban authority, and to the urban authority alone, the discretion upon the question whether there shall be a contribution on the part of the urban authority to the expense of the works, and the justices have the duty of considering the questions raised by the objections with the knowledge that, whatever else they may lawfully do, they cannot act as if a resolution under s. 15 had been passed. They must consider the matter as it stands before them in the absence of a resolution under s. 15. I think, therefore, that this appeal to that extent succeeds.

SANKEY, J.—I agree. I think that the spirit and scope of the Private Street Works Act, 1892, gives jurisdiction as to the making of private streets to the local authority, subject to some check and control by the justices. Section 15 of that Act, as it appears to me, gives a discretion to the urban authority to decide whether they will contribute the whole or any portion of the expense of any private street works. I do not think that the justices have power by any decision to embarrass or fetter the exercise of such discretion of the urban authority, or any power either to compel the authority to pass any resolution on the subject, or to pass a resolution for them, as in effect they have purported to do in this case. The justices can, under s. 7, decide, on proper objection taken, that certain works are unreasonable, but they cannot directly compel the performance of works which they think are reasonable. I do not for a moment think or say that they would wish to do indirectly what they have no power to do directly. I agree with my Lord that this appeal should be allowed and the case remitted in the way suggested.

SALTER, J.—I am of the same opinion. The justices sit under s. 8 (1) to hear objections under s. 7. The only resolution which they have power to amend under s. 8 is the resolution made under s. 6 (2). The only amendments to that resolution which they can make are such amendments as are necessary to give effect to the frontagers' objections so far as the justices think the objections are valid. The justices have no power to amend a resolution made under s. 6 (2) so as to turn it in effect into a resolution made partly under s. 6 (2), and partly under s. 15. Having regard to the arguments addressed to this court, I think it right to add that this is a statute which imposes on individuals the cost of works which are partly for their own benefit and partly for the benefit of others. In considering an objection under s. 7 (d), that the proposed works are unreasonable, the justices are entitled to consider, among other things, whether the proposed works are reasonable in the sense that it is reasonable that such work should be done at the frontagers' expense.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, for *J. H. Dickson*, Chester; *Lovell, Son & Pitfield*, for *Walker, Smith & Way*, Chester; *Rider, Heaton & Co.*, for *Birch, Cullimore & Co.*, Chester.

[*Reported by* J. F. WALKER, ESQ., *Barrister-at-Law.*]

COLLINS *v.* HOPKINS

[KING'S BENCH DIVISION (McCardie, J.), June 4, 5, 6, 20, 1923]

[Reported [1923] 2 K.B. 617; 92 L.J.K.B. 820; 130 L.T. 21; 39 T.L.R. 616; 21 L.G.R. 773]

Landlord and Tenant—Furnished house—Warranty of fitness for habitation—Recent occupation by person suffering from infectious disease—Actual and appreciable risk to tenant—Right of tenant to repudiate contract and to damages.

There is an absolute warranty in the nature of a condition by the person who lets a furnished house or lodging that the premises and furniture are fit for habitation. What is "fit for habitation" must depend on the circumstances to which it is applied. Lack of fitness for habitation may arise through the house having lately been occupied by a person suffering from an infectious disease, as, e.g., pulmonary tuberculosis. It is not enough for the owner to say that he honestly believes that the house is fit and proper for safe habitation. It must in fact be fit and safe. The tenant cannot renounce his contract because of mere apprehension of risk or through mere dislike of the premises through the fact, for example, that a person has died on them from some infectious disease. He must show an actual and appreciable risk to himself, his family, or household by entering or occupying the house.

Where, therefore, the defendant let to the plaintiff a furnished house which had recently been occupied by her husband while he was suffering from pulmonary tuberculosis, and the learned judge found that when the defendant placed the house at the disposal of the plaintiff it was "in a state which rendered it a dangerous harbour and asylum for tubercle bacilli,"

Held: the plaintiff was entitled to repudiate the contract, to the return to him of rent paid in advance, and to damages for breach of warranty.

Notes. As to the warranty of fitness of a furnished house, see 23 HALSBURY'S LAWS (3rd Edn.) 577, 578; and for cases see 31 DIGEST (Repl.) 195 et seq.

Cases referred to:

(1) *Bunn* v. *Harrison* (1886), 3 T.L.R. 146, C.A.; 31 Digest (Repl.) 193, *3235.*

(2) *Smith* v. *Marrable* (1843), 11 M. & W. 5; Car. & M. 479; 12 L.J.Ex. 223; 7 Jur. 70; 152 E.R. 693; 31 Digest (Repl.) 195, *3266.*

(3) *Wilson* v. *Finch Hatton* (1877), 2 Ex.D. 336; 46 L.J.Q.B. 489; 36 L.T. 473; 41 J.P. 583; 25 W.R. 537; 31 Digest (Repl.) 196, *3268.*

(4) *Bird* v. *Lord Greville* (1884), Cab. & El. 317; 31 Digest (Repl.) 197, *3281.*

(5) *Charsley* v. *Jones* (1889), 53 J.P. 280; 5 T.L.R. 412; 31 Digest (Repl.) 197, *3288.*

(6) *Sarson* v. *Roberts*, [1895] 2 Q.B. 395; 65 L.J.Q.B. 37; 73 L.T. 174; 59 J.P. 643; 43 W.R. 690; 11 T.L.R. 515; 14 R. 616, C.A.; 31 Digest (Repl.) 196, *3275.*

(7) *Humphreys* v. *Miller*, [1917] 2 K.B. 122; 86 L.J.K.B. 1111; 116 L.T. 668; 33 T.L.R. 115, C.A.; 30 Digest (Repl.) 547, *1808.*

(8) *Heilbut, Symons & Co.* v. *Buckleton*, [1913] A.C. 30; 82 L.J.K.B. 245; 107 L.T. 769; 20 Mans. 54, H.L.; 35 Digest 54, *486.*

(9) *De Lassalle* v. *Guildford*, [1901] 2 K.B. 215; 70 L.J.K.B. 533; 84 L.T. 549; 49 W.R. 467; 17 T.L.R. 384, C.A.; 35 Digest 14, *79.*

(10) *Armstrong* v. *Jackson*, [1917] 2 K.B. 822; 86 L.J.K.B. 1375; 117 L.T. 479; 33 T.L.R. 444; 61 Sol. Jo. 631; 35 Digest 68, *645.*

(11) *Udell* v. *Atherton* (1861), 7 H. & N. 172; 30 L.J.Ex. 337; 4 L.T. 797; 7 Jur.N.S. 777; 1 Digest 589, *2253.*

(12) *Brady* v. *Todd* (1861), 9 C.B.N.S. 592; 30 L.J.C.P. 223; 4 L.T. 212; 25 J.P. 598; 7 Jur.N.S. 827; 9 W.R. 483; 142 E.R. 233; 1 Digest 381, *850.*

(13) *Kettlewell* v. *Refuge Assurance Co., Ltd.*, [1908] 1 K.B. 545; 77 L.J.K.B. 421; 97 L.T. 896; 24 T.L.R. 216; 52 Sol. Jo. 158, C.A.; affirmed sub nom. *Refuge Assurance Co., Ltd.* v. *Kettlewell*, [1909] A.C. 243; 78 L.J.K.B. 519; 100 L.T. 306; 25 T.L.R. 395; sub nom. *Kettlewell* v. *Refuge Assurance Co., Ltd.*, 53 Sol. Jo. 339, H.L.; 35 Digest 71, *690*.

Action tried by McCardie, J., without a jury.

The plaintiff claimed the return of a sum of £88 paid by him for one quarter's rent in advance of a furnished house let to him by the defendant, and damages for breach of an implied warranty that the house was reasonably fit for human habitation.

By an agreement dated Oct. 14, 1922, the defendant, Mrs. Hopkins, let to the plaintiff, Mr. Collins, a furnished house known as "The Poplars," St. Albans, for twenty-six weeks at a rent of 6½ guineas a week from Oct. 26, 1922. On that day the plaintiff entered into residence with his wife and daughter, aged fifteen, and his servants. He had paid the rent for the first thirteen weeks in advance. On the following day, Oct. 27, the plaintiff discovered that the defendant's husband, while suffering from pulmonary consumption, had recently resided in the house and was then in Switzerland under treatment for that complaint. The plaintiff immediately repudiated the agreement of tenancy and quitted the house on the ground that it was not reasonably fit for human habitation and that the defendant had, therefore, broken her implied warranty.

Barrington-Ward, *K.C.*, and *W. Blake Odgers* for the plaintiff.

Thorn Drury, *K.C.*, and *P. B. Morle* for the defendant.

Cur. adv. vult.

June 20. **McCARDIE, J.,** read the following judgment.—This action is important alike to the parties and to the public. By an agreement dated Oct. 14, 1922, the defendant let to the plaintiff a furnished house known as "The Poplars," St. Albans, for twenty-six weeks at a rent of 6½ guineas a week. The tenancy was to begin on Oct. 26, 1922. On that day the plaintiff entered into residence with his wife, his daughter, aged fifteen, and his domestic servants. He had previously paid £88 for the first thirteen weeks. On Oct. 27 (the day after he entered) he discovered that the defendant's husband, while suffering from pulmonary consumption, had recently resided in the house, and was then in Switzerland under treatment for that complaint. The plaintiff at once repudiated the agreement of tenancy and quitted the house on the ground that it was not reasonably fit for habitation, and that the defendant had, therefore, broken her implied warranty. He now claims damages, including the £88 he had paid. As a further ground of claim he relies upon an express verbal warranty asserted to have been made by the defendant's agents (a firm of surveyors) that the defendant's husband was not suffering from consumption. I will postpone the question of express warranty until I have considered the implied warranty and the breach alleged. Much evidence was given before me. Several questions of fact require decision. It will be convenient, however, to set out briefly the rules of law which I deem applicable. I shall then be able to indicate my view as to the relation between the facts found and the relevant law.

In the case of an unfurnished house there is ordinarily no warranty of fitness for occupation. Special circumstances may create such a warranty, and with respect to working-class houses particular provision is made by statute. Normally, however, no warranty exists. It is important, however, to point out that in *Bunn* v. *Harrison* (1) the Court of Appeal expressly left open the question whether there is an implied warranty of fitness in the case of an unfurnished house if it be let for immediate occupation. The rule is different with respect to furnished houses or apartments. In such a case the law implies, in the absence of agreement to the contrary, a warranty by the landlord as to the state and fitness of the premises.

What is the nature and extent of that warranty? Different phrases have been used in different judgments. In *Smith* v. *Marrable* (2) the defendant had repudi-

ated the tenancy of a furnished house on the ground that it was infested with insects. The court held that he was justified in so doing. Parke, B., (11 M. & W. at p. 7), referred to the implied condition that a furnished house is in a state fit for "decent and comfortable habitation." Lord Abinger, C.B., said (ibid. at p. 9):

> "A man who lets a ready-furnished house surely does so under the implied condition or obligation—call it which you will—that the house is in a fit state to be inhabited. Suppose, instead of the particular nuisance which existed in this case, the tenant discovered the fact—unknown perhaps to the landlord—that lodgers had previously quitted the house in consequence of having ascertained that a person had recently died in it of the plague or scarlet fever; would not the law imply that he ought or ought not to be compelled to stay in it? I entertain no doubt whatever on the subject and think the defendant was fully justified in leaving these premises as he did."

The learned Chief Baron obviously took a strong view as to the extent of the warranty. In *Wilson* v. *Finch Hatton* (3) (a case of defective drainage) Kelly, C.B., referred (2 Ex.D. at p. 340) to

> "an implied condition that the house is reasonably fit for habitation, so that the intending tenant can safely enter into his tenancy on the day on which that tenancy begins."

Later he said:

> "Is it not, then, clear, that the tenant is entitled to find the drains in such a condition that she and her family and servants can safely enter and live in the house?"

Huddleston, B. (ibid. at p. 345), said:

> "I think it is clear that there is in such a contract as this an implied condition that the furnished house agreed to be let and taken shall be reasonably and decently fit for occupation."

In *Bird* v. *Lord Greville* (4) the furnished house was taken by the tenant on and from Mar. 28, 1889. The tenant heard, a few days before Mar. 28, that a child had been suffering from measles in the house, and in fact a child had so suffered from Mar. 10 to Mar. 19, when it was removed. Field, J., who tried the case, asked this question:

> "Was the house in a good and tenantable condition and reasonably fit for occupation from the day on which the tenancy was to begin?"

Although it was proved that certain steps had been taken to disinfect the premises, yet the learned judge held that the tenant was entitled to repudiate because (i) the best disinfecting processes had not been used, and (ii) the house was not free from infection on Mar. 28. In *Charsley* v. *Jones* (5) (a case of defective drains) Manisty, J., said that in the case of a furnished house there was an implied undertaking that the house was fit for human habitation. In *Sarson* v. *Roberts* (6) the Court of Appeal held, for reasons which they deemed adequate, that the warranty is confined to the state of the premises when the tenant enters, and that there is no implied warranty that they shall continue fit for habitation during the term. I need not discuss the judgments. They throw no fresh light on the point here at issue. The observation of Kay, L.J. ([1895] 2 Q.B. at p. 399), that the "rule at best is extremely artificial" is one to which I am unable to assent. I venture to say, with all respect, that the contrary is the case. Not only is the implied warranty on the letting of a furnished house one which, in my own view, springs by just and necessary implication from the contract but it is a warranty which tends in the most striking fashion to the public good and the preservation of public health. It is a warranty to be extended rather than restricted. Here I feel bound, with deep respect, to observe of *Humphreys* v. *Miller* (7) (a decision which deals with a converse case to the present) that I venture to hope that it will be considered by the highest appellate tribunal. There it was held by the

court that there is no implied warranty on the taking of furnished lodgings that the intending tenant is a fit and proper person to occupy them, and that he is not suffering from an infectious disease. The decision is one which, in my humble view, is opposed alike to sound policy and to legal principle. I make no further comment on it, nor need I point out the consequences it involves now. I only say that if the common law cannot be developed it will perish.

The result of the decisions as a whole seems to be that there is an absolute contractual warranty in the nature of a condition by the person who lets a furnished house or lodging to the effect that the premises and furniture are fit for habitation. What is the meaning of "fit for habitation"? The meaning of the phrase must vary with the circumstances to which it is applied. In the case of unclean furniture or defective drains or a nuisance by vermin the matter is not, as a rule, one of difficulty. The eye or the nostrils can detect the fault and measure its extent. But in the case of a house lately occupied by a person suffering from an infectious disease, the eye and other senses are of no avail. The bacilli of infection are not apparent to the eye. Yet a peril is none the less grave because it is hidden.

This case before me definitely raises the question as to the contractual duty of a person who lets a furnished house lately occupied by one suffering from an infectious disease. It is not, of course, enough for the landlord to say that he honestly believes that the house is fit and proper for safe habitation. It must in fact be fit and safe. The mere belief of the landlord is not the point. Nor, on the other hand, can a tenant renounce his contract because of mere apprehension of risk or through mere dislike of the premises, through the fact, for example, that a person has died upon the premises of smallpox or scarlet fever. He must show more than mere apprehension or dislike. In my view, the question in such a case as the present is this. Was there an actual and appreciable risk to the tenant, his family or household, by entering and occupying the house in which the infectious disorder had occurred? If the risk be serious no one, I think, could doubt that the tenant may renounce. But in dealing with bacilli which may mean illness and death, I think, further, that an appreciable measure of actual risk justifies the tenant in throwing up his contract. A man should not be called on to expose his wife and children, household or himself to peril. Among the matters to be considered are the nature of the disease, the degree and persistence of its infectivity, the date when the sufferer resided in the house, the steps taken to prevent risk of infection, and the like. Let me illustrate the matter further by taking a case where the landlord says to an incoming tenant of a furnished house "I admit that my child died in the house but a short time ago of a contagious disease. I admit it to be doubtful whether the bacilli of the disease are still in the house or not, but I require you to fulfil your bargain." Surely, in such a case the tenant could rightly refuse to enter and could renounce his agreement of tenancy. I should so hold. The law would be in a regrettable state if it were otherwise. It would be gravely opposed to the elementary requirements of public health. I should respectfully but firmly dissent from any doctrine which suggested that in the case I put, the law would enable the landlord to enforce the bargain of tenancy.

I must now consider the facts of this case. There has been a serious conflict of testimony, quite apart from the medical witnesses. Apart from the medical evidence it is clear that I must decide between the evidence of the plaintiff and his wife and Mr. Thorpe, on the one hand, and the evidence of the defendant and Mr. Brading and Miss Perry, on the other. Distasteful though the duty is, I must express my view. I have no doubt whatever that the evidence of the plaintiff and his wife and Mr. Thorpe is correct. They are the witnesses of truth. I need say no more.

Now, what are the facts as I find them to be? The earlier facts are there. "The Poplars" is a house at St. Albans with the ordinary accommodation. There the defendant lived with her husband (Mr. Hopkins) and several children. Mr. Hopkins was engaged in the hosiery business in London. In January, 1922, he was attacked

by influenza. He was attended by a Dr. Lipscombe. Other symptoms developed. In February, 1922, his sputum was examined. It showed the bacilli of pulmonary consumption. He saw a specialist. Then he went for several months to a sanatorium in Norfolk. He was in the grip of the disease. I have heard the evidence as to his history in Norfolk. I have examined the medical records. The disease was progressive. In July, 1922, he was residing again at "The Poplars," and he regularly went to business, although, as his medical adviser, Dr. Lipscombe, told me in the witness-box, he (Mr. Hopkins), when he spat or sneezed or coughed in the train or the office, sent the poisonous bacilli into the air and was a peril to those around him. His condition did not improve. In August he went to Norfolk again and was examined by the sanatorium doctor, Dr. Pearson. The disease had advanced still farther. At the end of August he returned to "The Poplars" again and also resumed his business visits to London. He still caused anxiety. The doctors decided that he should go to Switzerland for treatment. The disease was still more progressive. On Sept. 11 he left "The Poplars" and went to Switzerland. There he died on Dec. 24, 1922. The agreement between the plaintiff and the defendant was made on Oct. 14. The date fixed for the commencement of the plaintiff's tenancy was Oct. 26. The agreement and inventory between the parties covered everything in the house except cutlery and certain linen. It included all carpets, curtains, hangings, cushions, covers, and bedding, including eiderdowns, quilts and bedspreads. It will be seen that the last date on which the sufferer occupied the house was about six weeks before the day fixed for the entry of the plaintiff and his family. The defendant's counsel ably and vigorously contended that the risk of infection had passed.

Here there arise questions of importance, as to the extent to which pulmonary tuberculosis (commonly known as consumption) is infectious, and as to the modes, the risk, and the area of infection as to time and circumstance. I doubt whether the terrible prevalence of consumption in this country is fully realised. It is an appalling scourge. One person in seven dies from it. It is the largest single cause of death to those between thirty-five and forty-five. All classes suffer. In recent years science has made rapid progress. Yet I must point out that up to the day of the trial before me the medical profession had failed to find a serum that would prevent the assaults of infection or a drug that would kill the germs of the disease. The failure has been conspicuous. I hope, however, that the resources of the State may even now be achieving a success which past efforts have grievously failed to secure. What is the cause of this terrible measure of suffering and death from consumption? The answer is in one word, infection. The tragedy is in two words, preventable infection. The disease of pulmonary consumption is one in which the lung tissues are invaded by a parasitic organism (the bacillus tuberculosis) under the attacks of which they undergo alterations, become inflamed and then (unless the progress of the disease can be stopped) they perish. It is fortunate that methods of treatment exist which will, in many cases, arrest the progress of the disease and may restore the sufferer to health. Congenital infection (that is, transmitted from the body of the mother to the child ere birth) is comparatively rare. Infection by milk, however, is not uncommon, but is actually confined to children of tender years. It is clear that pulmonary tuberculosis in the adult (which causes nearly 80 per cent. of the deaths from all forms of tuberculosis) is the result of infection through direct or indirect contact with human beings already suffering from the disease. All infection is caused by tubercle bacilli. A sufferer has untold numbers of them in his body. When he spits he ejects them in millions, and so too when he coughs or sneezes, or even, in some cases, speaks loudly or excitedly. The sputum (that which is expectorated or ejected from the chest) is the most deadly asylum of the bacilli. It is a main source of danger. It is dangerous when wet. It is even more dangerous after it has become dry. For when, after discharge from the mouth, the sputum dries, then the bacilli becomes free in countless millions. Invincible, sinister, and often unsuspected, they pollute the air. They are the instruments of infection. They are the seeds of

death to those who cannot resist them. The other and obvious methods of infection, for example, through a diseased mother embracing her child, are not material in this case, though it is deplorable that such methods are of wide and constant occurrence. The sputum or other ejection from the mouth of the sufferer may fix on and adhere to the walls or the floors or carpets or rugs, curtains, cushions, bedding, coverings or any kind of article. There the process of drying will proceed, with the results I have stated. I deem it probable that the majority of cases of the disease are due to what may be called direct personal infection inflicted by the sufferer on those who live or work or associate with him. The insidious nature of the malady induces lack of care both by the sufferer and those who are with him. The public has not been made sufficiently aware of the perils.

I feel no hesitation in coming to the conclusion that a large number of persons are infected by other means than personal association with those who suffer from the disease. In the accepted textbook by SIR DOUGLASS POWELL and SIR PERCIVAL HORTON SMITH HARTLEY [DISEASES OF THE LUNG AND PLEURAE, ETC.] (which was put in evidence before me) it is said (6th Edn.):

> "In the upper classes tuberculosis is as a rule acquired rather by the inhalation of dust from the public waiting rooms, railway carriages, trains, omnibuses, and the like, in which tubercle bacilli, derived from infected sputum, have not infrequently been found."

This is a serious and most significant statement. It illustrates the ease with which infection is spread. One or two virulent doses of the bacilli are enough to cause the disease. If less virulent, then a few doses will not suffice for infection. In the case now before me, however, I am not dealing with public places and the like, but with a private house. In such case, however, the method of infection may be the same. But it is clear that if the patient has been properly trained as to his habits and carries out the medical instructions, and if full regard is paid to ventilation, sunlight, cleanliness, removal of dust and dirt and the like, then the risk of infection may not be serious even to those who reside with him. Still less is the risk to those who enter the house after the patient has left if proper methods of disinfection have been adopted, particularly under medical supervision, by the use of carbolic acid or lysol or formalin, and by adequate washing, ventilation, exposure to sunlight, and the like steps. At this point I must say a word or two upon an important point in the case—namely, the life of the tubercle bacillus. It has a direct bearing on the issues in the action. The bacillus has the dangerous characteristic of a most tenacious vitality. It is persistent in its power for evil. When present in animal refuse stored in a dark cellar it will retain its life and virulence for twelve months. When present in such refuse spread in the open upon pasture land it yet may retain its life and deadly properties for five months. In decomposing sputum it can maintain its virulence and capacity for development for six weeks or longer. If the sputum be allowed to dry, then the bacillus may preserve its virulence and capacity for six months. It can, however, be destroyed in a few days or even hours by open exposure to the direct rays of the sun, and several antiseptics are fatal to it, as, for example, carbolic acid, lysol, and formalin. I should add that I am satisfied that if the bacilli are only exposed to the light and air of an ordinary room (that is, apart from direct sunlight), their life and danger may last for no less than five or six months.

I have now stated in what I hope is simple language the main scientific aspects of the case. There now arise the serious questions of fact as to the habits of life of the defendant's husband, and as to the steps taken by the defendant after her husband had left the house. I shall deal with this briefly. Broadly speaking, the defendant stated that her husband slept on a balcony only; that he used a particular room only as a dressing room; that he only used the ordinary rooms of the house to a small extent, and that he adopted the well-known precautions such as spitting into a receptacle, coughing into a handkerchief and the like. She also stated that before the plaintiff entered the house various steps were taken by her

in the way of disinfection, cleaning, washing, and the like, and that the house was made clean and free from dust and dirt. It is not suggested that any fumigation took place. Fumigation, however, is a matter as to the value of which opinions differ. If I could rely on the defendant's evidence it would have an important bearing on my decision. I am unable to accept her evidence. The defendant I regret to say was a most unsatisfactory witness. I cannot act upon her testimony at all. She stated (inter alia) that she left the house free from dust and dirt. I have no doubt that the house was left in a most dusty and dirty condition. Dust and dirt were everywhere. Carpets, cushions, and curtains, &c., were in the same unsatisfactory state, and some of the kitchen utensils were particularly dirty. I accept without hesitation the statement of Mr. Thorpe (the agent who checked the inventory for the plaintiff), that the house was one of the dustiest and dirtiest he had ever visited. I draw serious inferences against the defendant from that state of affairs, and I may here mention the admission of Dr. Lipscombe (a witness for the defence) that if he had known that the house was dirty he would strongly have advised the plaintiff not to enter it. There is an even more regrettable feature of the defendant's evidence. She said in the witness-box that if the plaintiff had asked her what was the matter with her husband she would have answered, "Slight lung trouble only." I need only say that she was, therefore, prepared to state an absolute falsehood. She knew perfectly well that her husband was suffering from serious tuberculosis of the lungs. I may add that the defendant also stated that she was assisted in her alleged cleaning and disinfecting operations by her mother and two servants. None of them was called to corroborate her. Rejecting as I do, the evidence of the defendant, I next point out that the defendant's medical witnesses in substance rested their opinion in favour of the defendant on the basis that her evidence was correct. I hold that evidence to be incorrect, and thus the weight of the defendant's medical witnesses is dissipated. I think that the house was, and was left, in a state which rendered it a dangerous harbour and asylum for the tubercle bacilli. I regret that I must add a word as to Dr. Lipscombe. He attended the defendant's husband for this grave disease for a long period. He knew quite well that the disease ought to have been notified to the medical officer of health, under the regulations made by the Local Government Board pursuant to the Public Health Acts. Yet, unfortunately, he failed to give any notification at all. He informs me that the omission was due to an oversight. It is, I may also add, a matter of regret that after the husband's departure for Switzerland no doctor visited the house or gave any directions or advice as to the need and the methods of disinfection. Weighing the whole circumstances, I come to the conclusion that I ought to accept the evidence for and on behalf of the plaintiff not only on disputed questions of fact but also on the medical aspects of the matter. I agree with Dr. Fenton, the witness for the plaintiff. I also agree with the view expressed by the able and experienced medical officer of health (to whom Dr. Lipscombe should have notified the disease), and who, when asked by the plaintiff for his advice whether he should stay in the house, said: "If in your place I should get out as quickly as possible." This, I think, was sound and wise advice. In my view the plaintiff rightly acted upon it, and certainly none the less so because his wife, as he told me, had a horror of consumption.

I state my conclusions in the following order: (i) I am not satisfied that the house and its contents were free from tubercle bacilli on Oct. 26, 1922. (ii) I am satisfied that there was a substantial risk that the house and its contents were so infected with tubercle bacilli on Oct. 26, 1922, as to constitute an actual danger to the plaintiff and his household. (iii) While recognising the difficulties of inference on the point, I should hold (if necessary) that in fact the house and its contents were so infected with tubercle bacilli on Oct. 26, 1922, as to render it unsafe for occupation. I, therefore, rule that the house was not reasonably fit for habitation. It follows that the plaintiff was entitled to renounce the tenancy and to quit the house. It also follows that he is entitled to damages. I assess them at £130.

In view of what I have said, it is not needed that I should deal fully with the further claim of the plaintiff upon an express warranty. I say a few words only upon it. Accepting, as I do, the evidence by and on behalf of the plaintiff, the facts are these. When inspecting the house with a view to a possible tenancy the plaintiff's wife saw the defendant. The defendant incidently mentioned that her husband was in Switzerland. This disturbed the plaintiff's wife, although for reasons of delicacy she refrained from putting questions to the defendant herself. But she went straight to the firm of estate agents who had been entrusted by the defendant with the letting of the house. She saw one of the partners for the express purpose of asking whether Mr. Hopkins was suffering from consumption. She told him that the defendant had mentioned that her husband was in Switzerland, and she bluntly asked: "Is he there for consumption?" Thereupon the agent said: "No, he is not suffering from consumption. He is away on business, and he is often away." The plaintiff's wife accepted this statement. But for it she would not have entertained for a moment the idea of a tenancy. She relied on the statement and so the agreement of tenancy was ultimately made. In my view the statement should be treated as a warranty. I need not cite the body of decisions. They will be found in *Heilbut Symons & Co.* v. *Buckleton* (8) and *De Lassalle* v. *Guildford* (9) and the well-known textbooks. I shall not deal with the question whether that warranty is in the nature of a condition or as to the measure of damages for breach. The points do not call for decision in view of my earlier ruling. Nor do I deal with the points on the question of rescission if the agent's statement is to be regarded as a misrepresentation only. Several of the relevant cases are cited in *Armstrong* v. *Jackson* (10). It is proper to add that no charge of fraud was made against the agent, although I am bound to say that he acted carelessly in giving an answer when devoid of information as to the facts. Upon the question as to the extent to which a principal may be bound by the warranty of an agent, reference may be made to *Udell* v. *Atherton* (11) and the later cases in which that decision is discussed, *Brady* v. *Todd* (12) and to *Kettlewell* v. *Refuge Assurance Co., Ltd.* (13).

Judgment for plaintiff.

Solicitors: *W. G. A. Edwards*; *Stanley Robinson & Commin.*

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

R. *v.* SUSSEX JUSTICES. Ex parte McCARTHY

[King's Bench Division (Lord Hewart, C.J., Lush and Sankey, JJ.), November 9, 1923]

[Reported [1924] 1 K.B. 256; 93 L.J.K.B. 129; 130 L.T. 510; 88 J.P. 3; 40 T.L.R. 80; 68 Sol. Jo. 253; 22 L.G.R. 46; 27 Cox, C.C. 590]

Magistrates—Clerk—Clerk member of solicitors' firm acting in civil proceedings arising out of same subject-matter as prosecution—Clerk present when justices retired.

Arising out of a collision between a motor vehicle driven by the applicant and a motor vehicle belonging to W. the applicant was convicted on a charge of dangerous driving. At the hearing, the acting clerk to the justices was a member of a firm of solicitors who were acting for W. in an action against the applicant for damages received in the collision. When the justices retired for consultation at the conclusion of the hearing, the acting clerk retired with them in case they should wish to refer to his notes of the evidence or to be advised on the law, but the justices did not consult him and he abstained from referring to the case.

Held: it was of fundamental importance that justice should not only be done, but that it should also be manifestly seen to be done; the question was not whether the acting clerk, when with the justices, made any observation or offered any criticism which he could not properly make or offer, but whether he was so related to the case by reason of the civil action as to be unfit to act for the justices in the criminal proceedings, and the answer to that question depended, not on what was actually done, but on what might appear to be done; what he did might have created a suspicion that there had been an improper interference with the course of justice; and, therefore, the conviction of the applicant must be quashed.

Notes. Applied: *R.* v. *Essex Justices, Ex parte Perkins*, [1927] All E.R.Rep. 393. Considered: *Cottle* v. *Cottle*, [1939] 2 All E.R. 535; *R.* v. *Camborne Justices, Ex parte Pearce*, [1954] 2 All E.R. 850. Referred to: *Cooper* v. *Wilson*, [1937] 2 All E.R. 726; *R.* v. *Salford Assessment Committee*, [1937] 2 All E.R. 98; *R.* v. *Architects' Registration Tribunal, Ex parte Jaggar*, [1945] 2 All E.R. 131; *Franklin* v. *Minister of Town and Country Planning*, [1947] 2 All E.R. 289; *R.* v. *Caernarvon Licensing Justices, Ex parte Benson* (1948), 113 J.P. 23.

As to disqualification for office of justices' clerks, see 25 Halsbury's Laws (3rd Edn.) 149, 150; and for cases see 33 Digest 372.

Rule Nisi for a writ of certiorari to bring up and quash a conviction of the applicant by justices for Hastings for driving a motor car in a manner dangerous to the public.

The affidavit of the applicant's solicitor, who appeared for him before the justices, stated as follows. The clerk to the justices of the Hastings Division was Col. F. G. Langham, of the firm of Langham, Son, and Douglas, but he had appointed a deputy for the day. The deponent had no opportunity, till the acting clerk retired with the justices, of ascertaining that the acting clerk was Major Langham, a brother of Col. Langham, and a member of the same firm. When the justices returned and convicted the applicant, the deponent took objection to the position of Major Langham on the ground that the firm of which the acting clerk was a member were solicitors to John Whitworth, the proposed plaintiff in an action to recover from the applicant damages received in the same collision which was the subject-matter of the prosecution. In an affidavit showing cause, the justices stated that, when they retired, the acting clerk retired with them in case they should wish to refer to his notes of the evidence or to be advised on the law, but that they did not consult him and he abstained from referring to the case.

Russell Davies showed cause for the justices.
H. D. Samuels in support of the rule.
W. T. Monckton for the superintendent of police.

LORD HEWART, C.J.—The facts of the case have been stated in the affidavits in the one side and the other, and it is not necessary to reiterate them. It appears to be quite clear that the gentleman who acted as clerk to the justices on this occasion was a member of the firm of solicitors engaged in the conduct of proceedings for damages against the applicant in respect of the same collision as that which gave rise to the charge before the justices. It is said, and, no doubt, said quite truly, that when that gentleman retired in the usual way, taking with him the notes of the evidence in case the justices might desire to consult him, the justices came to their conclusion without consulting him, and that he scrupulously abstained from referring to the case in any way.

There is no doubt, as has been said in a long line of cases, that it is not merely of some importance, but of fundamental importance, that justice should both be done and be manifestly seen to be done. The question is not whether in this case this gentleman, when with the justices, made any observation or offered any criticism which he could not properly make or offer; the question is whether he was so related to the case by reason of the civil action as to be unfit to act for the justices in the criminal proceedings. The answer to that question depends not on what actually was done, but on what might appear to be done. The rule is that nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice. Speaking for myself, I accept the statements in the affidavits in answer to the rule. But those statements show very clearly that the gentleman acting as clerk to the justices on this occasion was connected with the case in a capacity which made it right that he should scrupulously abstain from referring to the case in any way, although he retired with the justices. In other words, his one position was such that he could not, if he had been required to do so, discharge the duties which his other position involved. His twofold position was a manifest contradiction. In those circumstances, in accordance with a long line of authorities, I am satisfied that this conviction must be quashed, unless it can be shown that there was a waiver on the part of the applicant's solicitor—that is to say, unless it can be shown that the applicant himself or his representative, being well aware of the point that might be taken, refrained from taking it, took his chance of being acquitted on the facts, and then, being convicted, decided to take the point. I am satisfied on the facts stated in the affidavit that there was no waiver. That being so, the rule must be made absolute and the conviction quashed.

LUSH, J.—I agree. It must be clearly understood that, if justices allow their clerk to be present at their consultations when the clerk is, or his firm are, professionally engaged, either in those proceedings or in other proceedings involving the same subject-matter, it is irrelevant to inquire whether the clerk did or did not give advice and influence the justices. What is objectionable is his presence there at all when he is in a position which necessarily makes it impossible for him to give absolutely impartial advice. I have no doubt that the justices here did not intend to do anything irregular or wrong, but they placed themselves in an impossible position, and allowed their clerk in those circumstances to retire with them into their consultation room. The result, there being no waiver, is that the conviction must be quashed.

SANKEY, J.—I entirely agree.

Conviction quashed.

Solicitors: *Pettitt & Ramsay*, for *Langham, Son & Douglas*, Hastings; *Taylor, Wilcocks & Co.*; *F. Lawson Lewis*, Eastbourne.

[*Reported by* J. F. Walker, Esq., *Barrister-at-Law.*]

CHAMPSEY BHARA & CO., *v.* JIVRAJ BALLOO SPINNING AND WEAVING CO., LTD.

[PRIVY COUNCIL (Lord Dunedin, Lord Atkinson and Lord Wrenbury), February 8, 9, Mar. 6, 1923]

[Reported [1923] A.C. 480; 92 L.J.P.C. 163; 129 L.T. 166; 39 T.L.R. 253]

Arbitration—Setting aside award—Error of law on its face—Need to prove award based on erroneous legal proposition.

An error in law on the face of an award means that there is to be found in the award, or a document actually incorporated therein, as, for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and is erroneous. The award will stand unless, on the face of it, the arbitrator has tied himself down to some special legal proposition, which, when examined, appears to be unsound.

Notes. Followed: *John Gill Contractors, Ltd.* v. *Bromley Trading Co.* (1936), 52 T.L.R. 452. Considered: *David Taylor & Son* v. *Barnett*, [1953] 1 All E.R. 843. Referred to: *Absalom, Ltd.* v. *Great Western (London) Garden Village Society, Ltd.*, [1933] A.C. 592; *Heyman* v. *Darwins, Ltd.*, [1942] 1 All E.R. 337.

As to setting aside an award for error of law, see 2 HALSBURY'S LAWS (3rd Edn.) 60, 61; and for cases see 2 DIGEST 649–661, 676 et seq.

Cases referred to:

(1) *Landauer* v. *Asser*, [1905] 2 K.B. 184; 74 L.J.K.B. 659; 93 L.T. 20; 53 W.R. 534; 21 T.L.R. 429; 10 Com. Cas. 265; 2 Digest (Repl.) 649, *1708*.

(2) *Hodgkinson* v. *Fernie* (1857), 3 C.B.N.S. 189; 27 L.J.C.P. 66; 6 W.R. 181; 140 E.R. 712; 2 Digest (Repl.) 656, *1762*.

(3) *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways Co. of London*, [1912] A.C. 673; 81 L.J.K.B. 1132; 107 L.T. 325; 56 Sol. Jo. 734, H.L.; 2 Digest (Repl.) 650, *1712*.

(4) *Sanderson & Son* v. *Armour & Co., Ltd.* (1922), 91 L.J.P.C. 167; 127 L.T. 597; [1922] S.C. (H.L.) 117; 59 Sc.L.R. 268; 2 Digest (Repl.) 447, **125*.

Appeal and Cross-Appeal from a decision of the High Court at Bombay.

The appellants sold certain parcels of cotton to the respondents under contracts which incorporated the rules of the Bombay Cotton Trade Association, r. 12 of which provided that disputes as to quality should be referred to arbitrators whose award was to be final, subject to a right of appeal to the appeal committee. By r. 13 all other disputes "arising out of, or in relation to" the contract were to be referred to arbitrators whose award was to be final subject to a right of appeal. The cotton which was delivered by the appellants was objected to by the respondents, and in arbitration proceedings under r. 12 the respondents were awarded Rs. 10½ per candy for inferiority of quality and thereupon rejected the cotton. The appellants having made a claim for damages, the matter was referred to arbitration under r. 13, and the arbitrators made an award in favour of the appellants for Rs. 25,000. The award recited that the contracts were subject to the rules of the association and that the respondents had rejected the cotton "on the grounds stated in their letters" which were that "the arbitrators have by their award allowed Rs. 10½ off." The award was affirmed by the appellate tribunal. An application by the respondents to the High Court to set aside the award having been rejected the respondents appealed to the Appellate Division which reversed the order and set aside the award. The appellants appealed and there was also a cross-appeal.

Upjohn, K.C., and *Wallach* for the appellants.

Sir George Lowndes, K.C., E. B. Raikes and *Claughton Scott* for the respondents.

The facts appear from the judgment.

Mar. 6. **LORD DUNEDIN.**—In these consolidated appeals it will be convenient to consider the first case by itself. The appellants, as sellers, entered into two contracts with the respondents as buyers of certain bales of cotton. The contracts were made subject to the rules and regulations of the Bombay Cotton Trade Association, Ltd. Rule 12 of the association provides:

"All questions or disputes as to quality between buyer and seller shall be referred to the arbitration of two disinterested persons, one to be chosen by each disputant, such arbitrators having the power to call in a third arbitrator. The award made by such arbitrators or any two of them shall be final and binding subject only to the right of appeal to the appeal committee. All arbitrations held under this rule must be held in accordance with r. 5, and only shareholders and/or directors shall be eligible to act on arbitrations held in the rooms of the association. Associate members, however, shall be eligible to act as arbitrators when the arbitration is held in the seller's jetha and/or godown as provided under r. 5."

Rule 13 provides:

"All questions in dispute (other than that of quality) arising out of, or in relation to, contracts made subject to the rules and regulations of the Bombay Cotton Trade Association, Ltd., provided one of the parties of the contract is a member or associate member of the association, shall be referred to the arbitration of two disinterested persons being shareholders or directors of the association, one to be chosen by each disputant; such arbitrators having the power to call in a third arbitrator who must also be a shareholder or director of the association. The award made by such arbitrators or any two of them shall be final and binding on both parties, subject only to the right of appeal to the Board within fifteen days of the date of the arbitrators' award on payment of Rs. 100."

The cotton was delivered, but objected to by the respondents as being not up to contract. Upon this an arbitration was entered into between the parties, and the arbitrators under r. 12 made an award as to quality. Thereupon the respondents rejected the cotton. The appellants retorted by claiming damages. This dispute was referred to arbitrators under r. 13. They issued their award as follows:

"To all to whom these presents shall come, we, Purshotamdas Thakoredas of Bombay, Hindu inhabitant, and Vincent Alpe Grantham, also of Bombay, European inhabitant, send greeting. Whereas by a contract dated Aug. 17, 1918, Messrs. Champsey Bhara & Co. had agreed to sell to the Jivraj Balloo Spinning and Weaving Co., Ltd., 100 bales of Mundra M. G. fully good staple cotton on the terms and conditions mentioned in the contract. And whereas by another contract, dated Sept. 14, 1918, the said Messrs. Champsey Bhara & Co. had also agreed to sell to the said Jivraj Balloo Spinning and Weaving Co., Ltd., 100 bales of new M. G. Mundra Cotton fully good staple on the terms and conditions therein contained. And whereas both the said contracts were made subject to the rules and regulations of the Bombay Cotton Trade Association, Ltd. And whereas the goods tendered under the said contracts by the said Messrs. Champsey Bhara & Co. were rejected by the Jivraj Balloo Spinning and Weaving Co., Ltd., on the grounds contained in their letters dated Nov. 25, 1918, and Nov. 11, 1918, respectively. And whereas the said Messrs. Champsey Bhara & Co. claimed from the said Jivraj Balloo Spinning and Weaving Co., Ltd., the sum of Rs. 25,000 (rupees twenty-five thousand) in respect of the aforesaid contracts. And whereas the said Jivraj Balloo Spinning and Weaving Co., Ltd., denied liability in respect of the said sum or any part thereof. And whereas the said disputes were referred to the arbitration of us, Purshotamdas Thakoredas and Vincent Alpe Grantham, who were appointed arbitrators by the deputy chairman of the Bombay Cotton Trade Association, Ltd. And whereas on Dec. 12 the time for making our

award was extended by the deputy chairman to Dec. 27, 1918. Now know ye that we, the said Purshotamdas Thakoredas and Vincent Alpe Grantham, having taken upon ourselves the burden of the said reference, and having done all acts necessary to enable us to make a valid award, hereby make our award as follows, that is to say:—We award and direct that the said Jivraj Balloo Spinning and Weaving Co., Ltd., do pay to the said Messrs. Champsey Bhara & Co. the sum of Rs. 25,000 (rupees twenty-five thousand), and we do further award and direct that the said Jivraj Balloo Spinning and Weaving Co., Ltd., do pay the costs of this our award, which we assess at the sum of Rs. 55 (rupees fifty-five)."

An appeal was made to the Appeal Committee, who confirmed the award. The respondents then presented a petition to the court asking that the award should be set aside. They alleged two grounds (i) that there was no question referable to the arbitrators under s. 13; (ii) that there was an error of law on the face of the award. The case came before Pratt, J., who dismissed the petition. Appeal was taken to the Appellant Division of the High Court, and they reversed the judgment, holding that there was an error in law on the face of the award. The way that the learned judges arrived at that conclusion was this. They said that the recital that the respondents had rejected the cotton on the grounds mentioned in the letters of Nov. 11 and 25, 1918, respectively, allowed them to look at the letters. The letter of Nov. 11 is as follows:

"To Messrs. Champsey Bhara & Co. Dear Sirs,—Re: D/Order No. 27 dated 6.11.18 for 100 bales N. M. G. Mundra.—Please note that at the survey held this day on the above lot tendered by you against contract No. 56, dated 4.9.18 as the arbitrators have in their award allowed Rs. 10½ off, we hereby reject the said lot and refuse to take delivery thereof.—The Jivraj Balloo Spinning and Weaving Co., Ltd."

The letter of Nov. 25 is in identical terms referring to the other contract. The learned judges then held that if r. 52 is looked at—it being the rule which deals with what is to happen when arbitrators as to quality make certain findings—it becomes apparent that the arbitrators here could only have arrived at their judgment if they entirely misinterpreted r. 52. They based their opinion upon *Landauer* v. *Asser* (1).

The law on the subject has never been more clearly stated than by Williams, J., in *Hodgkinson* v. *Fernie* (2) (3 C.B.N.S. at p. 202):

"The law has for many years been settled, and remains so at this day, that where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact. . . . The only exceptions to that rule, are cases where the award is the result of corruption or fraud, and one other, which though it is to be regretted, is now, I think, firmly established, viz., where the question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted I think it may be considered as established."

This view has been adhered to in many subsequent cases, and, in particular, in the House of Lords in *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways Co. of London* (3).

The question to be decided is: Does the error in law appear on the face of the award? In the *British Westinghouse Case* (3) it clearly did. The arbitrator had stated a Special Case and got an opinion of the Divisional Court; in making his award he stated that opinion and founded his award upon it. The opinion as given was held to be erroneous, and so there was an error in law on the face of the award. In *Landauer* v. *Asser* (1) the state of affairs was different. The question was as to liability and interest on a policy of insurance effected by sellers for and on account of buyers, and the arbitrator framed his award thus:

"I decide that as the parties to the contract dated Nov. 3, 1903, were by the terms thereof principals thereto, their interest and liability in insurance is defined to be the value of the invoice plus five per cent., and that the buyers are therefore entitled to, and only to, the said amount, the balance one way or the other being due from or to the sellers." A

The Court of Appeal held that this entitled them to look at the contract and to come to the conclusion that the decision was erroneous in law. *Landauer* v. *Asser* (1) is not binding on their Lordships, and it was contended that it was wrongly decided, but in their Lordships' opinion it is not necessary to consider that point, for the present case differs from *Landauer's Case* (1) in an essential particular. In that case the legal proposition was stated in terms on which the award proceeded. In the present case, no legal proposition at all is stated as a ground of the award. The reference to the letters is only in the narrative, and even when the letters are looked at they only contain the view of one party. To make this case equiparate with that of *Landauer* (1) the award would have to run somewhat thus: "In respect of the ground of rejection contained in the letters of Nov. 11 and 25, and in respect of r. 52, I decide that, &c." B C

The regret expressed by WILLIAMS, J., in *Hodgkinson* v. *Fernie* (2) has been repeated by more than one learned judge, and it is certainly not to be desired that the exception should be in any way extended. An error in law on the face of the award means, in their Lordships' view, that one can find in the award, or a document actually incorporated thereto, as, for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which one can then say is erroneous. It does not mean if in a narrative a reference is made to a contention of one party that opens the door to seeing, first, what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound. Here it is impossible to say, from what is shown on the face of the award, what mistake the arbitrators made. The only way that the learned judges have arrived at finding what the mistake was is by saying: "Inasmuch as the arbitrators awarded so-and-so, and inasmuch as the letter shows that the buyer rejected the cotton, the arbitrators can only have arrived at that result by totally misinterpreting r. 52." But they were entitled to give their own interpretation to r. 52 or any other rule, and the award will still stand unless, on the face of it, they have tied themselves down to some special legal proposition which then, when examined, appears to be unsound. Upon this point, therefore, their Lordships think that the judgment of PRATT, J., was right and the conclusion of the learned judges of the Court of Appeal erroneous. D E F G

Counsel for the respondents then argued the other point, which the learned judges of the Court of Appeal found it unnecessary to decide, and which the trial judge decided against them. He said that upon a proper construction of the contract the moment his client rejected the cotton in virtue of the decision by the arbitrators as to quality, he was entitled to do so, and the contract was repudiated or came to an end, and that then the arbitration clause could no longer be appealed to, and he said that, inasmuch as this was a plea to jurisdiction, the court ought to decide it. Their Lordships think that this argument is based upon a confusion of thought. The question whether an arbitrator acts within his jurisdiction is, of course, for the court to decide, but whether the arbitrator acts within his jurisdiction or not depends solely upon the clause of reference. It is, therefore, for the court to decide in this case whether the dispute which has arisen is a dispute covered by r. 13. It clearly is so, because it is undoubtedly a dispute arising out of or in relation to a contract made subject to the rules and regulations of the Cotton Trade Association. That clause refers to the arbitrator the whole question, whether it depends on law or on fact, with the exception only of dispute as to quality. It is, therefore, for the arbitrator and not for the court to decide what is the effect of a rejection based on an award as to quality. In truth, this point is H I

A decided in terms by *Sanderson & Son* v. *Armour & Co., Ltd.* (4). It was a Scottish case, but in no way depended upon any peculiarity of the law of Scotland.

The decision of the first appeal in this sense disposes of the second appeal without further argument, as it is obvious that in that case even the reference in the narrative to the grounds of defence in the letters is absent, and there is nothing but the bare statement that a certain sum was awarded. It follows that in the B first appeal the appeal must be allowed and the judgment of the trial judge restored. The appellants must have their costs here and in the courts below. The second appeal must be dismissed and the respondents will have their costs. Their Lordships will humbly advise His Majesty accordingly.

Solicitors: *T. L. Wilson & Co.*; *Hughes & Sons.*

C [*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

D

STEINBERG *v.* SCALA (LEEDS), LTD.

[COURT OF APPEAL (Lord Sterndale, M.R., Warrington and Younger, L.JJ.), May 31, 1923]

E [Reported [1923] 2 Ch. 452; 92 L.J.K.B. 944; 129 L.T. 624; 39 T.L.R. 542; 67 Sol. Jo. 656]

Infant—Contract—Voidable contract—Repudiation—Need to prove failure of consideration—Purchase of shares—Shares having market failure at previous time.

F The infant plaintiff applied for shares in the defendant company and paid the amounts due on application and allotment. No dividend was paid on the shares, which were only half-paid up and at one time had a marketable value. Eighteen months later, being unable to pay calls as they were made, the plaintiff repudiated the contract and claimed the return of the money she had paid in respect of the shares as money paid for a consideration which G had wholly failed.

Held: the plaintiff, being an infant, was entitled to repudiate the contract, but in order to recover the money which she had paid for the shares she must prove that there had been a total failure of the consideration for which the money had been paid; as at one period the shares had a marketable value, so that the plaintiff could have disposed of her rights in them, it could not be H said that there had been a total failure of consideration; and, therefore, the action failed.

Hamilton v. *Vaughan-Sherrin Electrical Engineering Co.* (1), [1894] 3 Ch. 589, not applied.

Notes. As to recovery by infant of sums paid under a voidable contract, see 21 HALSBURY'S LAWS (3rd Edn.) 140; and for cases see 28 DIGEST (Repl.) 500 et seq.

I Cases referred to:

(1) *Hamilton* v. *Vaughan-Sherrin Electrical Engineering Co.*, [1894] 3 Ch. 589; 63 L.J.Ch. 795; 71 L.T. 325; 43 W.R. 126; 10 T.L.R. 642; 38 Sol. Jo. 663; 8 R. 750; 9 Digest (Repl.) 285, *1783.*

(2) *Re Burrows, Ex parte Taylor* (1856), 8 De G.M. & G. 254; 25 L.J.Bcy. 35; 26 L.T.O.S. 266; 2 Jur.N.S. 220; 4 W.R. 305; 44 E.R. 338, L.JJ.; 28 Digest (Repl.) 508, *212.*

(3) *Corpe* v. *Overton* (1833), 10 Bing. 252; 3 Moo. & S. 738; 3 L.J.C.P. 24; 131 E.R. 901; 28 Digest (Repl.) 508, *216.*

(4) *Holmes* v. *Blogg* (1818), 8 Taunt. 508; 2 Moore, C.P. 552; 129 E.R. 481; 28 Digest (Repl.) 508, *211.* A

Also referred to in argument:

Re Laxon & Co. (2), [1892] 3 Ch. 555; 67 L.T. 85; 40 W.R. 621; 8 T.L.R. 666; 36 Sol. Jo. 609; 28 Digest (Repl.) 500, *169.*

Appeal by the defendant company from a decision of ROCHE, J., holding that, having regard to the decision in *Hamilton* v. *Vaughan-Sherrin Electrical Engineering Co.* (1), the plaintiff was entitled to the relief claimed by her. The facts are stated in the judgments. B

T. P. Perks for the defendant company.

Compston, K.C., and *Frankland* for the plaintiff.

C

LORD STERNDALE, M.R.—I think the appeal must be allowed and judgment must be entered for the defendants. In saying this I think I am agreeing with what would have been the learned judge's (ROCHE, J.'s) own feeling if he had not felt himself bound by the decision of STIRLING, J., in *Hamilton* v. *Vaughan-Sherrin Electrical Engineering Co.* (1). I think I see a possible distinction between this case and that before STIRLING, J. If that be not a valid distinction I am afraid I should have to say that I do not agree with that decision. D

The action is brought for two things: a rectification of the register by the removal of the plaintiff's name from the register of the defendant company, as to which no question arises now because it is not opposed, and, secondly, for judgment for the recovery of money which the plaintiff has paid in order to become a shareholder in the company. The plaintiff is still an infant, and, some year or two ago, she paid £50 as a payment on application for shares in the defendant company and subsequently paid another £200 for calls to be paid up after the shares had been allotted to her in the company. There was a question of some further calls being made and the plaintiff, who had found the £250 out of money given to her by an uncle, for the purpose of providing her with a dowry and could not find any more money, awoke to the position that she had shares in a company on which calls would be made and that she did not have the money to meet the calls. She became aware of the fact that as she was an infant she could rescind the contract and she did so. There is no doubt that she was entitled to do so, and entitled to have the register rectified by taking her name off it. But then there came another question. She wanted the £250 back, and, to a certain extent, I think the argument for the plaintiff has rather proceeded on the assumption that the question whether she can rescind and the question whether she can recover her money are the same questions. They are two quite different questions, as is stated by TURNER, L.J., in his judgment in *Ex parte Taylor* (2). He says (8 De G.M. & G. at p. 257): E F G

> "It is clear that an infant cannot be absolutely bound by a contract entered into during his minority. He must have a right upon his attaining his majority to elect whether he will adopt the contract or not." H

Then he goes on:

> "It is, however, a different question whether, if an infant pays money on the footing of a contract, he can afterwards recover it back. If an infant buys an article which is not a necessary, he cannot be compelled to pay for it, but if he does pay for it during his minority he cannot on attaining his majority recover the money back." I

That seems to me to be only stating in other words the principle which is laid down in a number of other cases that, although the contract may be rescinded the money paid cannot be recovered unless there has been an entire failure of the consideration for which the money has been paid. Therefore, it seems to me, that is the question to which we have to address ourselves: Has there been here a total failure of the consideration for which the money was paid?

A The plaintiff has the shares; I do not mean to say she has the certificates; she could have had them at any time if she had applied for them; she has had the shares allotted to her, and there is evidence that the shares were of some value, that they had been dealt in at from 9s. to 10s. a share. Her shares were only half-paid up and, therefore, if she had attempted to sell them she would only have got half of that money, but that is quite a tangible and substantial sum.

B In those circumstances is it possible to say that there is a total failure of consideration? If the plaintiff were a person of full age suing to recover the money back on the ground, and the sole ground, that there had been a failure to consideration, it seems to me it would have been impossible for the plaintiff to succeed because he or she would have got the very thing for which the money was paid and would have got a thing of tangible value. The argument for the C plaintiff is to this effect: That it is necessary, in order to show that the consideration has not entirely failed, to show that the plaintiff has not only had something which was worth value in the market and for which she could have got value, but that she has, in fact, received that value. It was admitted that if she had sold the shares and received the £125 which would have been receivable according to one of the prices mentioned in evidence, she could not have recovered the money, D but it is said that as she did not in fact do that, and had only an opportunity of receiving that benefit, there has been a total failure of consideration. I cannot see that. If she has something which has money's worth, then she has received some consideration; received the very thing for which she paid her money, and the fact that, although it has money's worth, she has not turned that money's worth into money does not seem to me to prevent it being some valuable consideration E for the money which she has paid. I cannot see any difference, when one comes to consider whether there has been consideration or not, between the position of a person of full age and an infant. The question whether there has been consideration or not must, I think, be the same in the two cases. That is, on the face of it, an opinion opposed to the decision of STIRLING, J., in *Hamilton* v. *Vaughan-Sherrin Electrical Engineering Co.* (1) unless there is a distinction, that in that case there F was no evidence at all that the shares had any marketable value. I do not mean to say they had none, but there is no evidence one way or the other, and the learned judge does not seem to have addressed himself to the question of whether that would make any difference. He seems, as far as I can make out, rather to have put as a test whether the company was a prosperous one out of which money could be made or whether it was not. I cannot think that that is the true test, G and I am not quite sure that he applied it, but it looks to me rather as if he did. If the fact that these shares had a marketable value, whereas there was no such evidence in the case before STIRLING, J., is a valid distinction between the two cases, then that is not an authority. If that be not a valid distinction then, although I say it with great trepidation, I am afraid I do not agree with that decision of STIRLING, J., in *Hamilton* v. *Vaughan-Sherrin Electrical Engineering* H *Co.* (1).

There is only one other thing I wish to say. It was argued for the plaintiff that this decision is contrary to the judgment of the Court of Common Pleas in *Corpe* v. *Overton* (3). I do not think it is at all. The £100 that was sought to be recovered in that case was in quite a different position from the money which the plaintiff sues to recover in this case. In that case there was an agreement that I the infant and another person should enter into partnership and there was also beyond that—the consideration for that agreement being, as it seems to me, the mutual promises of the parties—a further agreement that to secure the proper fulfilment of the contract when it was made, because it was for a future contract, the infant should deposit £100 as a sort of security for the performance by him of the contract. That £100 seems to me to be in a totally different position from the money which was paid in this case. It is quite true that in that case, in addition to the fact of it being a deposit in the way I have mentioned, the court did say that it was recoverable as on a total failure of consideration. I think that is quite right,

The promise of the partnership was not got by the payment of the £100. The £100 was paid down as a deposit for the due performance of the contract by the plaintiff, and when that contract was once rescinded, of course, there was no consideration for that £100 having been paid, and it had to be paid back. I do not think that my judgment in any way conflicts with *Corpe* v. *Overton* (3). It may conflict with *Hamilton* v. *Vaughan-Sherrin Electrical Engineering Co.* (1). If it does, as I say, I regret to say that I do not agree with that case, and I think, for the reasons I have stated, that this appeal should be allowed and judgment should be entered for the defendant company with costs here and below.

WARRINGTON, L.J.—I am of the same opinion. This is an action brought by an infant suing by her next friend, first for rectification of the register of the defendant company by removing her name from the register of shareholders, and, secondly, to recover the money which she has paid on application, on allotment, and by way of first call. With regard to rectification of the register it is unnecessary to say anything because the defendants agree that the register must be rectified by the striking off of her name and that she would be thereby relieved of the liability for the payment of any future calls. The only question with which we have to deal is the repayment of the money she has already paid on those shares. The ground, and the only ground, on which she asserts that she is entitled to have the money repaid, is that there has been a total failure of consideration, and that she is therefore entitled to be repaid that money just as in the ordinary case where a man has paid money and the consideration for that payment has wholly failed. In my judgment it cannot be said in this case that there has been a total failure of consideration. She has, in fact, got the very thing she bargained for, and not only the thing she bargained for, but the thing which every other applicant for shares in this company bargained for. She was placed in exactly the same position as every other shareholder, except that, being an infant, she was entitled if she pleased to repudiate the contract and so get off any future liability. So far as the company is concerned she has received neither more nor less than any other shareholder in the company. In those circumstances it seems to me impossible to say that there has been a total failure of consideration.

But then it is contended that in the case of an infant as distinct from other people suing for the recovery of money paid on the ground of failure of consideration, the question which has really to be determined is not whether there has been a total failure of consideration, but, using the expression used by STIRLING, J., in *Hamilton* v. *Vaughan-Sherrin Electrical Engineering Co.* (1), whether the infant has derived any real advantage under the contract, and, on the authority of that case, it is said that unless the infant has derived some real advantage from the contract then she is entitled to recover the money. In the first place the shares here are shown to have been of real substantial value, not merely of a nominal value. There were sales of fully paid up shares from £1 down to 9s. or 10s. These shares were not fully paid up, but still that indicates that the shares were of substantial value, and therefore she has actually obtained a real advantage from having these shares. Although she did not sell them, she was in a position to sell them. That distinguishes the case, if it is necessary to distinguish it, from *Hamilton* v. *Vaughan-Sherrin Electrical Engineering Co.* (1) to which I have already referred, but I am bound to say that, with the greatest respect for the very learned judge who decided that case, in my view he was not justified in the opinion he expressed that in the case before him, that is to say, an infant plaintiff seeking to recover money paid, the question was whether the infant had derived any real advantage from the contract. With all respect to him, I do not think that is the question. I, myself, cannot see, in the case of an action to recover money actually paid, any difference between the position of an infant and an adult, and an adult can only recover money actually paid if there has been a total failure of consideration. I repeat what I have already said, that the infant in the present case has received consideration and has received consideration which,

A from the evidence, is of value. But, whether it was valuable or not, she has received consideration, that being the very consideration for which she bargained.

I have nothing to add to what the Master of the Rolls has said about *Corpe* v. *Overton* (3). Nothing I have said in this case in the least conflicts with the decision in that case, which was founded on a consideration of a totally different state of facts. I agree that the judgment on appeal ought to be allowed and

B judgment entered for the defendant company.

YOUNGER, L.J.—The plaintiff, while still an infant, applied on the prospectus of the defendant company for allotment to herself of 500 shares of £1 each. These shares were allotted to her and her name was placed on the register in respect of them, and she paid the instalments fixed by the prospectus to the amount of 10s. on

C every share. In respect of these payments so made by her the infant plaintiff was placed in possession of something available for herself. She has, as she was entitled to do, repudiated her contract to take these shares, so that she is not liable to pay on them the calls which she has not paid. But the question which has to be determined on this appeal is whether, although she has received, and until she repudiated her contract was in possession of something available for

D herself as all other shareholders in this company who stood in the same position that she did, she is nevertheless entitled to recover the £250 which she paid. During that period in respect of which this plaintiff had something available, namely, the shares which were allotted to her and registered in her name, the company was deprived of something: they were precluded from allotting those shares to anybody else or from dealing with them in any way; they had disposed

E of them out and out to the plaintiff and therefore they were prevented from utilising for their own advantage those shares which were in her name. So that during the period of time with which we are concerned the plaintiff was in possession of something available and the company was deprived of certain privileges. It is in these circumstances that we have to ask and answer the question whether this lady who has repudiated her contract is entitled to have her money back.

F Apart from the case before STIRLING, J., the authorities appear to me to establish that, in a case where there has been something made available under the contract for the infant during the period within which she has not sought to avoid it, money paid cannot be recovered even although the contract itself may be avoided by the infant, and all liability in respect of further payments may disappear, and I think the cases show that that which must be received by an infant to preclude

G her from having the right to have her money back need not be much; it must only be tangible; it does not really matter how small it is; in other words there must be a total absence of consideration before the infant can be entitled to get back money which she has paid. I think that is shown in *Corpe* v. *Overton* (3), and particularly in the judgment of BOSANQUET, J., where, dealing with *Holmes* v. *Blogg* (4), and distinguishing *Corpe* v. *Overton* (3) from *Holmes* v. *Blogg* (4), he

H says that in *Holmes* v. *Blogg* (4)

> "The premises were, in fact, occupied for twelve weeks; but if they had been occupied for any other period [that is to say for any other period however short] there would have been no difference in principle, and the plaintiff could not recover back sums from the outlay of which he had derived an advantage."

I Then he goes on by way of contrast in the present case: "Here, the infant has derived no benefit whatever from the contract, the consideration of which has wholly failed."

I think we have to ask ourselves in this case the question whether, during the period when the plaintiff did not elect to repudiate her contract, the consideration for that contract as between herself and the company had wholly failed. To my mind it had not in any sense failed. There was a most adequate and ample consideration being enjoyed by her, either actually or in possibility, during the whole of that period. She could have, if she had chosen, attended meetings of the

company; she had the tangible advantage of being in a position to sell and transfer, if she had been so minded, these shares for a consideration which would at least, have been substantial. In these circumstances I think that the condition, which is a necessary condition imposed upon one in her position before she can recover this money, has not been complied with. I agree with the lord justice, and I think in that respect STIRLING, J., did not correctly interpret the earlier authorities which he professes to follow in *Hamilton* v. *Vaughan-Sherrin Electrical Engineering Co.* (1), where he said that the question was not (he did not put it in the negative form, but I do so) whether the consideration had wholly failed, but whether the infant had derived any real advantage. I think the question is not, Has the infant derived any real advantage? but the question is, Has the consideration wholly failed? In my judgment in this case the consideration has not wholly failed, and accordingly the action, as my lord has said, must be dismissed and judgment entered for the defendants.

Appeal allowed.

Solicitors: *W. J. & E. H. Tremellen* for *Emsley & Son*, Leeds; *Corbin, Greene & Cook*, for *Pullan, Davies & Burrows*, Leeds.

[*Reported by* J. L. DENISON, ESQ., *Barrister-at-Law.*]

BECK & CO. *v.* SZYMANOWSKI & CO.

[HOUSE OF LORDS (Lord Buckmaster, Lord Atkinson, Lord Shaw and Lord Wrenbury), July 2, 3, November 5, 1923]

[Reported [1924] A.C. 43; 93 L.J.K.B. 25; 130 L.T. 387; 29 Com. Cas. 50]

Sale of Goods—Condition—Notice that goods not in accordance with contract to be given within fourteen days of delivery—Goods of contract quality, but in short quantity—Applicability of condition.

By a contract dated Jan. 23, 1920, the appellants agreed to sell and the respondents to buy 2,000 gross of "200-yard reels of sewing cotton f.o.b. English port." Clause 5 of the contract provided: "The goods delivered shall be deemed to be in all respects in accordance with the contract, and the buyers shall be bound to accept and pay for same accordingly, unless the sellers shall within fourteen days after arrival of the goods at their destination receive from the buyers notice of any matter or thing by reason whereof they may allege that the goods are not in accordance with the contract." On Feb. 5, 1920, the buyers purchased from the sellers a further quantity of cotton subject to the same terms and conditions. At the buyers' request the goods were delivered into warehouse pending shipment instead of on board ship, the last delivery being made in May, 1920. The buyers did not examine the goods which remained in warehouse unsold until May, 1921, when the buyers sold 186 gross. Owing to complaints received from customers the buyers examined the bulk remaining in warehouse and discovered that the reels varied in length from 184–190 yards. In October, 1921, the buyers complained to the sellers who refused to acknowledge liability, whereupon the buyers brought an action for damages for breach of contract.

Held (per LORD ATKINSON, LORD SHAW and LORD WRENBURY, LORD BUCKMASTER dissentiente): cl. 5 only applied to the quality of the goods delivered and did not apply to goods which had not been delivered, and, therefore, the buyers were entitled to damages.

Per LORD WRENBURY: If the condition did extend to quantity, although it excluded the right to reject, it did not extend to exclude the right to damages.

Decision of Court of Appeal, [1923] 1 K.B. 457, affirmed.

Notes. For rules as to delivery of goods and rights of buyer when wrong quantity is delivered, see Sale of Goods Act, 1893, ss. 29, 30 [22 HALSBURY'S LAWS (2nd Edn.) 1003, 1004].

Considered: *Wilkinson* v. *Barclay*, [1946] 1 All E.R. 387. Referred to: *Lancaster* v. *Turner*, [1924] 2 K.B. 222; *Minister of Materials* v. *Steel Bros. & Co.*, [1952] 1 All E.R. 522.

As to delivery of goods, delivery of goods less than contracted for and exclusion of right of rejection, see 29 HALSBURY'S LAWS 120 et seq., 126 et seq., 149; and for cases see 29 DIGEST 542 et seq., 559, 556, 464 et seq.

Appeal by the defendants (the sellers) from the decision of the Court of Appeal, reported [1923] 1 K.B. 457.

The plaintiffs carried on business as merchants at Petrograd and at Manchester. The defendants were manufacturers at Manchester. By a contract of Jan. 23, 1920, the defendants sold to the plaintiffs 2,000 gross of "200-yard reels of sewing cotton, f.o.b. English port." The contract contained (inter alia) the following conditions:

> "5. The goods delivered shall be deemed to be in all respects in accordance with the contract, and the buyers shall be bound to accept and pay for the same accordingly unless the sellers shall within fourteen days after arrival of the goods at their destination receive from the buyers notice of any matter or thing by reason whereof they may allege that the goods are not in accordance with the contract."

On Feb. 5, 1920, the plaintiffs entered into a second contract with the defendants for the purchase from them of a further quantity of 3,000 gross of 200-yard reels upon the same terms and conditions. Subsequently the plaintiffs requested the defendants to deliver the goods at certain warehouses in Manchester instead of delivering them on board ship, as provided by the contract. The defendants accordingly, in the earlier months of 1920, delivered them at the warehouses specified where, owing to the general depression of trade, the plaintiffs allowed them to remain until May, 1921, when they shipped 186 gross to customers in Russia. The reels, as received from the defendants and as provided by the contracts, were packed in cases each containing twenty gross. Each reel had a label pasted on the end of it, bearing the words "200 yards." The plaintiffs had not examined the contents of the cases while they were in the warehouse to ascertain whether they corresponded with the contracts. Soon after the arrival of the goods in Russia the plaintiffs received complaints from their customers that the reels delivered to them were only of an average of 188 yards. They then caused the bulk remaining in the warehouses at Manchester to be tested, with the result that the test showed that none of the reels were of a length of 200 yards, but varied from 184 to 190 yards. The plaintiffs thereupon brought an action for damages for breach of contract. The defendants relied in their defence on cl. 5 of the conditions, to which the plaintiffs replied (inter alia) that the effect of the clause was only to take away the right to reject and did not preclude the buyers from suing for damages. The Court of Appeal held that the clause did not deprive the buyers of their right to claim damages for breach of contract.

The defendants (the sellers) appealed.

Merriman, K.C., and *Sir Harold Smith, K.C.*, for the appellants.

Cyril Atkinson, K.C., and *Lustgarten* for the respondents.

The House took time for consideration.

Nov. 5. The following opinions were read.

LORD BUCKMASTER (read by LORD ATKINSON).—In January and February, 1920, the appellants sold to the respondents 2,000 gross of six-cord sewing thread

of a certain defined character and at agreed prices; upon these elements no question arises in this appeal. The material terms of the contract, for the present purpose, are contained in a written document dated Jan. 23, 1920. It takes the form of a sold note, sent to the respondents and states that the sale is subject to the general conditions at the back of the contract. The descriptions of the goods is that of "6-cord sewing cotton 200 yards reel"; place of delivery is f.o.b. an English port. Clauses 3, 4, and 5 of the contract as contained in the general conditions were as follows:

"3. Should any deliveries under this contract be suspended under the last preceding clause, the buyers shall nevertheless accept delivery and pay for such of the goods as the sellers shall be able to deliver.

4. The sellers only bind themselves to deliver goods in accordance with the general descriptions under which they are sold, and they do not guarantee their suitability for any special purpose."

5. The goods delivered shall be deemed to be in all respects in accordance with the contract and the buyers shall be bound to accept and pay for the same accordingly unless the sellers shall within fourteen days after arrival of the goods at their destination receive from the buyers notice of any matter or thing by reason whereof they may allege that the goods are not in accordance with the contract."

By a subsequent arrangement it was agreed that the appellants should deliver the goods to warehouses in England specified by the respondents, instead of f.o.b. an English port. The goods, so far as quantity and quality were concerned, were so delivered, the last delivery being made in May, 1920. The reels did not, however, contain the stipulated length of cotton, but were short by an amount of, roughly speaking, 6 per cent. In October, 1921, for the first time, the respondents made a complaint to this effect, and as the appellants refused to recognise liability, the proceedings under which this appeal has arisen were instituted by them claiming damages for short delivery. The Lord Chief Justice, before whom the case was first heard, decided that the appellants were protected by virtue of cl. 5 and that judgment has been reversed by the unanimous opinion of the Court of Appeal.

Two questions arise upon this clause; the first whether it applies at all in the circumstances of the case, and the other whether the goods had in fact reached their destination in October, 1921, when the complaint was made. The latter point may be disposed of first. I entertain no doubt that in the circumstances of this case the destination of the goods for the purposes of the contract was the substituted place of delivery—namely, the warehouses specified by the respondents. The sole question, and it is one of some difficulty, is whether the general provisions of the clause apply to the particular breach? I agree with what was said by Scrutton, L.J., that in a contract from which ordinary rights to buy and to sell ensue, an attempt to exclude either party from those rights by general terms applicable to all contracts, can only be effected by the use of plain language. But I cannot avoid the conclusion that the language in cl. 5 is substantially clear for the present purpose. The difference between myself and the Court of Appeal as well as the other members of your Lordships' House, from whom I am reluctant to differ, is that I think the difficulty is not so much due to the meaning of the words in cl. 5 as the subject-matter on which they operate. Scrutton, L.J., regards the contract as one which concerns a shortage of cotton on the reels. He suggests that the delivery is as different from the material contracted to be sold as peas from beans. I find myself unable to see why this distinction should be effected by a mere shortage in length, and not also by a defect in quality. But a defect in quality in goods sold, though in one sense it renders them different from the goods contracted to be sold, does not make them into something outside the contract altogether. The peas would still be peas though they were inferior in quality, and would not become beans because the measure by which they were sold according to the contract was deficient in capacity. The real question arises

upon the meaning of the official description of the articles in the contract note. If it be regarded merely as a contract for the sale of a total length of cotton, then that cotton has not be delivered and the contract is no more satisfied than it would have been had there not been delivery of the total number of reels. But I regard the contract as a contract for the sale of reels of cotton, each reel to contain cotton of a certain quality and of a certain length, and failure to make complaint within the fourteen days, in my opinion, accepts the reels so delivered as satisfying the condition the contract imposes.

It is urged that cl. 5 merely relates to the actual acceptance of the goods, but its introductory words appear to me to go further than that. "The goods delivered shall be deemed to be in all respects in accordance with the contract," have a wider and more far-reaching significance than mere conditions as to acceptance. There ensues the consideration that the goods may not be in accordance with the contract, but they must, none the less, be taken as though they were, unless complaint be made within fourteen days. A reel, containing 185 yards, is not in accordance with the contract, but it is none the less, in my opinion, a delivery of goods under the contract, and not as in the case of the delivery of a totally different article, the delivery of goods outside. I think, therefore, that the appellants are right in saying that in the circumstances the respondents have no claim against them. It is with more than usual hesitation and regret that I find this view opposed to that of other learned judges of such great experience in commercial matters as those who differ from me in this opinion; but the difference is, no doubt, due to the different meanings conveyed to different minds by a phrase such as that on which this controversy depends, and I find myself unable to give it any other meaning than that which I have attempted to explain.

LORD ATKINSON concurred in the opinion read by Lord Wrenbury.

LORD SHAW.—I think that this was a transaction in the cotton trade and that this was a contract for the sale of cotton thread. The make-up of the thread was agreed to be in lengths of 200 yards, wound on reels. The number of reels delivered was correct, but it is admitted that large quantities of the reels delivered contained lengths not of 200 yards but of about 188 yards. The average shortage was 6 per cent., amounting to millions of yards of cotton thread. Payment of damages for short delivery is refused by the sellers because of cl. 5 of the printed conditions incorporated into the contract. I note the terms of that clause again only that I may indicate the exact words which, in my humble opinion, make the clause inapplicable as a bar to the present claim. The clause applies to "the goods delivered," saying that they shall be deemed to be in all respects according to contract. But one may stop there, for the damages are claimed not in respect of the goods delivered but in respect of goods which were not delivered. And when fourteen days are given for notice of any "matter or thing by reason whereof they may allege that the goods are not in accordance with the contract" the expression "the goods" can only mean "the goods delivered" to which alone the clause applies. Anything else would mean that the sale was in substance a sale of reels and was not in substance a sale of cotton thread. I think this is to confound make-up with substance. And the results would be extraordinary; if a seller innocently sent forward the number of reels with only half the thread that should be upon them, the clause would cover that portion and the seller would, barring objection within fourteen days, keep the price for the whole thread although he had only supplied half. Learned counsel admitted this. Primâ facie, such a construction seems unreasonable. The contract itself does not, it is granted, expressly provide for the case of short delivery. It can, however, and very properly, apply with regard to actual deliveries and to objections to these on the points, say, of quality, colour, weight or tensile strength. But, in my opinion, the clause can never be used so as to convert goods undelivered into goods delivered or to warrant an implication to the effect that non-delivery in length or small measure was included in the objections which should, within the time fixed, be made to goods delivered. I am

totally unable to make such an implication out of anything in the bargain between these parties—an implication which would seriously affect the security of business dealings. I move that the appeal be dismissed with costs.

LORD WRENBURY.—The letter of Jan. 23 is an offer to buy. It contains the words "With tickets." The letter of the same date, and the official contract, No. 186, enclosed in it, is an acceptance by the vendor on the terms of the official contract. That official contract does not contain the words "With tickets." The reels were supplied with tickets bearing the words "200 yards," but in the facts above stated there was no stipulation in the contract that there should be a label, and therefore of course no stipulation that, by reason of the label, the reels should be deemed to contain 200 yards, whether they did or not. The offer was to buy 2,000 gross "Six-cord Sewing Thread—length 200 yards—on reels." The official contract was to sell that number of gross "Six-cord Sewing Cotton—200 yards reels." This was, I think, a contract to sell and buy a certain yardage of cotton to be put up on reels, each of which was to contain 200 yards. In fact the yardage which would result from 2,000 gross of reels each containing 200 yards was not supplied. There was a shortage of about twelve yards, or 6 per cent., per reel. The question is, what under these circumstances is the effect of cl. 5 of the general conditions in the contract?

The whole question is, to my mind, governed by the words "the goods delivered" in that condition. For simplicity and clearness of statement let me assume that the contract was confined to one reel and was for 200 yards of cotton—on reel. The "goods delivered" were 188 yards of cotton on a reel. Condition 5 will then read "188 yards of cotton on a reel shall be deemed to be in all respects in accordance with the contract." These words do not convey that 188 yards shall be deemed to be 200 yards, but at most that the buyer is to be bound to admit that the goods delivered—the 188 yards sent him—are such thread as he ordered, and that he is not to be heard to complain that the stipulation to wind 200 yards on a reel has not been complied with. This does not go at all to shortage of cotton. I say "at most" because I do not intend by anything I say to prejudice any question which may be thought material on the question of damages. By way of illustration of the above proposition, suppose the contract were to deliver 100 tons of goods, and that only 96 tons were delivered, a condition such as condition 5 would not compel the buyer to admit that he had received 100 tons, but only that the "goods delivered," viz., 96 tons, were in all respects in accordance with the contract. The proposition may be compendiously stated by saying that the condition applies to quality, not to quantity. The contractual quantity has not been mentioned or referred to in the condition. The only mention of or reference to quantity to be found in the condition lies in the words "the goods delivered," and they, ex hypothesi, are less than the contractual quantity. The condition does not provide that the deficient quantity shall be deemed to be the contractual quantity. Further, if the condition did extend, as I think it does not, to quantity, I agree with the Court of Appeal, that while the condition excludes the right to reject, it does not extend to the right to claim damages. The appeal must, I think, be dismissed.

Appeal dismissed.

Solicitors: *Dehn & Lauderdale*; *Pritchard, Englefield & Co.*

[*Reported by* Edward J. M. Chaplin, Esq., *Barrister-at-Law.*]

ST. HELENS COLLIERY CO., LTD. *v.* HEWITSON

[House of Lords (Lord Buckmaster, Lord Atkinson, Lord Shaw, Lord Wrenbury and Lord Carson), June 28, July 2, November 22, 1923]

[Reported [1924] A.C. 59; 93 L.J.K.B. 177; 130 L.T. 291; 40 T.L.R. 125; 68 Sol. Jo. 163; 16 B.W.C.C. 230]

Workmen's Compensation—Accident "arising out of and in course of employment"—Tests to be applied—Accident to workman while travelling to work—Special train provided by employers—Workman not compelled to travel by it—Workmen's Compensation Act, 1906 (6 *& 7 Edw.* 7, *c.* 58), *s.* 1 (1).

A workman is acting in the course of his employment within s. 1 (1) of the Workmen's Compensation Act, 1906, when he is doing something in discharge of a duty to his employer, directly or indirectly imposed on him by his contract of service. The true ground on which should be based the test whether or not a case falls within the subsection is a duty to the employer arising out of the contract of employment, but it is to be borne in mind that the word "employment," as here used, covers and includes things belonging to or arising out of it, e.g., the obtaining by a workman of food or drink to enable him to continue his work. The words "arising out of" suggest the idea of cause and effect, the injury by accident being the effect, and the employment, i.e., the discharge of the duties of the workman's service, the cause of that effect; the words "in the course of the employment" mean while the workman is doing what he is employed to do, i.e., discharging the duties to his employer imposed on him by his contract of service, "employment" in this connection covering and including the things necessary and incident to the employment: per Lord Atkinson.

The expression "arising out of the employment" is not confined to the mere nature of the employment. The expression applies to the employment as such—to its nature, its conditions, its obligations, and its incidents. If by reason of any of these the workman is brought within the zone of special danger and so injured or killed, the broad words of the statute "arising out of the employment" apply: per Lord Shaw.

The words "out of" connote origin, a source, or a cause. I am disposed to agree that the expression "arising out of the employment" applies to the employment as such—to its nature, its conditions, its obligations, and its incidents—if the wideness of the language does not lead to uncertainty in the meaning. A first step is to ascertain whether the accident had its origin in the employment, and, therefore, arose out of it. The words "in the course of" are not equivalent to "during." The employment may be to do some defined manual work, e.g., hewing coal, but the accident need not arise when the workman is actually using his pick. He may be going down in the cage. He may be resting between shifts. He may be taking a meal. He may be merely standing by, waiting for the next job. "They also serve who only stand and wait." A useful test in many cases is whether, at the moment of the accident, the employer would have been entitled to give the workman an order, and the workman would have owed the duty to obey it. The mere fact that he is going to or from his work does not raise any right in the employer, then and there, to give him an order, or any duty in the man to obey it. The man is not at that moment in the course of his employment: per Lord Wrenbury.

The appellants, who were colliery owners, entered into a contract with a railway company by which the company agreed to provide special trains for the conveyance of certain of the appellants' workmen to and from the colliery and M., the appellants agreeing to indemnify the company against claims for damages by the passengers in case of accident. The appellants then provided each of these workmen with a pass upon the railway, and charged him for it

a sum which did not represent the full amount of the agreed fare, and this sum was deducted weekly from the workman's wages. A workman who desired to avail himself of this means of transport signed an agreement with the railway company releasing them from all claims in respect of accident. The respondent, while travelling by virtue of the pass thus obtained, was injured in a railway accident.

Held (LORD SHAW dissentiente): a workman was not in the course of his employment unless in performance of a duty under his contract of service he was found in the place where the accident occurred; when a workman wished to avail himself of the arrangement with regard to special trains, and agreed to the deduction from his wages, and gave the indemnity to the railway company, there arose a new contract which formed no part of the workman's contract of service; there was no obligation on the part of the appellants to provide or on the workman to use a special train, and so, when the workman was using a special train, he was exercising a privilege and not performing a duty; and, therefore, the accident did not arise out of and in the course of the employment.

Per LORD BUCKMASTER: I think that it was an implied term of the workman's contract of service that the employers should provide the special trains, but it does not seem to me that this conclusion determines the case in the workman's favour. He had a right to travel by the train, but he was not directed to do so.

Per LORD WRENBURY: I am content to deal with the case as if the train were a special train for which the employees paid, and in which the workman was, by virtue of a term in his contract of service, at liberty to travel if he wished to do so.

Cremins v. *Guest, Keen, and Nettlefold, Ltd.* (1), [1908] 1 K.B. 469, and *Walton* v. *Tredegar Iron and Coal Co.* (2) (1913), 6 B.W.C.C. 592, criticised.

Notes. The Workmen's Compensation Act, 1906, was repealed by the Workmen's Compensation Act, 1925, itself repealed by the National Insurance (Industrial Injuries) Act, 1946, which prescribes a system of insurance against injuries caused by industrial accidents, but s. 1 (1) of the Act of 1946 provides that the insurance shall be "against personal injury caused . . . by accident arising out of and in the course of" employment, thus adopting the language of the Act of 1906. See also s. 7 (1).

Followed: *Taylor* v. *McAlpine & Sons, and Southern Rail. Co.* (1924), 130 L.T. 793. Considered: *Williams* v. *Guest, Keen and Nettlefolds* (1925), 133 L.T. 111. Distinguished: *Howells* v. *Powell Duffryn Steam Coal Co.*, [1926] 1 K.B. 472. Followed: *Newton* v. *Guest, Keen and Nettlefolds* (1926), 135 L.T. 386. Applied: *M'Pherson* v. *Reid M'Farlane* (1926), 19 B.W.C.C. 575; *Pruce* v. *Davey* (1926), 136 L.T. 601; *Robertson* v. *Steamship Appalachee, Rovira* v. *Same* (1926), 136 L.T. 488. Considered: *Lyre* v. *British and Argentine Meat Co.* (*1923*), *Ltd.* (1927), 20 B.W.C.C. 341; *Moule* v. *Marmite Food Extracts Co.* (1927), 20 B.W.C.C. 446; *Howells* v. *Great Western Rail. Co.* (1928), 97 L.J.K.B. 183; *Black* v. *Hesperides* (*Owners*) (1929), 22 B.W.C.C. 295; *Sparey* v. *Bath R.D.C.* (1931), 48 T.L.R. 87. Applied: *Medler* v. *Medler* (1931), 24 B.W.C.C. 345. Considered: *Dunning* v. *Binding* (1932), 147 L.T. 520; *Brentnall* v. *London and North Eastern Rail. Co.* (1932), 25 B.W.C.C. 265. Applied: *Dunning* v. *Binding* (*No. 2*), [1932] All E.R.Rep. 777. Considered: *Brentnall* v. *London and North Eastern Rail. Co.*, [1933] A.C. 489. Applied: *Gaskell* v. *St. Helen's Colliery Co.*, [1934] All E.R.Rep. 633. Considered: *Foster* v. *Edwin Penhold & Co.* (1934), 27 B.W.C.C. 240; *Weaver* v. *Tredegar Iron and Coal Co., Ltd.*, [1940] 3 All E.R. 157. Applied: *Gray* v. *Cape Asbestos, Ltd.* (*No. 2*) (1949), 41 B.W.C.C. 170. Referred to: *Clark* v. *Southwark Corpn.* (1925), 133 L.T. 753; *Anderson* v. *Hickman H. & Co.* (1928), 21 B.W.C.C. 369; *Allen* v. *Siddons* (1932), 25 B.W.C.C. 350; *Alderman* v. *Great Western Rail. Co.*, [1936] 1 All E.R. 571; *Izzard* v. *Universal Insurance Co.*, [1936] 2 All E.R. 1565; *Blee* v. *London and North Eastern Rail. Co.*, [1937] 4

All E.R. 270; *Lucas* v. *Postmaster General*, [1939] 2 K.B. 808; *Noble* v. *Southern Rail. Co.*, [1940] 2 All E.R. 383; *Edwards* v. *London Passenger Transport Board*, [1943] 2 All E.R. 241. *McGovern* v. *London Midland and Scottish Rail. Co.*, [1944] 1 All E.R. 730; *Netherton* v. *Coles*, [1945] 1 All E.R. 227; *Harvey* v. *R. G. O'Dell, Ltd.*, [1958] 1 All E.R. 657.

As to accidents arising out of and in the course of employment, see 34 HALSBURY'S LAWS (2nd Edn.) 822 et seq.; and for cases see 34 DIGEST 276 et seq. For National Insurance (Industrial Injuries) Act, 1946, see 16 HALSBURY'S STATUTES (2nd Edn.) 797.

Cases referred to:

(1) *Cremins* v. *Guest, Keen and Nettlefold, Ltd.*, [1908] 1 K.B. 469; 77 L.J.K.B. 326; 98 L.T. 335; 24 T.L.R. 189; 52 Sol. Jo. 146; 1 B.W.C.C. 160, C.A.; 34 Digest 280, *2361*.

(2) *Walton* v. *Tredegar Iron & Coal Co.* (1913), 6 B.W.C.C. 592, C.A.; 34 Digest 280, *2362*.

(3) *John Stewart & Son (1912), Ltd.* v. *Longhurst*, [1917] A.C. 249; 86 L.J.K.B. 729; 116 L.T. 763; 33 T.L.R. 285; 61 Sol. Jo. 414; 10 B.W.C.C. 266, H.L.; 34 Digest 279, *2357*.

(4) *Holmes* v. *Great Northern Rail. Co.*, [1900] 2 Q.B. 409; 69 L.J.Q.B. 854; 83 L.T. 44; 64 J.P. 532; 48 W.R. 681; 16 T.L.R. 412; 2 W.C.C. 19, C.A.; 34 Digest 279, *2359*.

(5) *Davies* v. *Rhymney Iron Co., Ltd.* (1900), 16 T.L.R. 329; 2 W.C.C. 22, C.A.; 34 Digest 279, *2358*.

(6) *Richards* v. *Morris*, [1915] 1 K.B. 221; 84 L.J.K.B. 621; 110 L.T. 496; 7 B.W.C.C. 130, C.A.; 34 Digest 282, *2370*.

(7) *Parker* v. *Black Rock (Owners)*, [1915] A.C. 725; 83 L.J.K.B. 1373; 113 L.T. 515; 31 T.L.R. 432; 59 Sol. Jo. 475; 8 B.W.C.C. 327; 13 Asp.M.L.C. 137, H.L.; 34 Digest 295, *2456*.

(8) *Moore* v. *Manchester Liners, Ltd.*, [1910] A.C. 498; 79 L.J.K.B. 1175; 103 L.T. 226; 26 T.L.R. 618; 54 Sol. Jo. 703; 3 B.W.C.C. 527, H.L.; 34 Digest 309, *2547*.

(9) *Kitchenham* v. *Johannesburg (Owners)*, [1911] A.C. 417; 80 L.J.K.B. 1102; 105 L.T. 118; 27 T.L.R. 504; 55 Sol. Jo. 599; 4 B.W.C.C. 311, H.L.; 34 Digest 309, *2548*.

(10) *Charles R. Davidson & Co.* v. *M'Robb or Officer*, [1918] A.C. 304; 87 L.J.P.C. 58; 118 L.T. 451; 34 T.L.R. 213; 62 Sol. Jo. 347; 10 B.W.C.C. 673, H.L.; 34 Digest 276, *2339*.

(11) *Thom (or Simpson)* v. *Sinclair*, [1917] A.C. 127; 86 L.J.P.C. 102; 116 L.T. 609; 33 T.L.R. 247; 61 Sol. Jo. 350; 10 B.W.C.C. 220, H.L.; 34 Digest 320, *2619*.

(12) *Armstrong, Whitworth & Co.* v. *Redford*, [1920] A.C. 757; 89 L.J.K.B. 495; 123 L.T. 114; 36 T.L.R. 451; 64 Sol. Jo. 388; 13 B.W.C.C. 68, H.L.; 34 Digest 314, *2579*.

(13) *Bell* v. *Armstrong, Whitworth & Co.* (1919), 88 L.J.K.B. 844; 121 L.T. 258; 35 T.L.R. 479; 63 Sol. Jo. 533; 12 B.W.C.C. 138, C.A.; 34 Digest 314, *2578*.

(14) *Hutchinson* v. *M'Kinnon*, [1916] 1 A.C. 471; 85 L.J.P.C. 98; 114 L.T. 570; 32 T.L.R. 283; 60 Sol. Jo. 320; 9 B.W.C.C. 147, H.L.; 34 Digest 319, *2614*.

(15) *Herbert* v. *Samuel Fox & Co., Ltd.*, [1916] 1 A.C. 405; 85 L.J.K.B. 441; 114 L.T. 426; 32 T.L.R. 261; 60 Sol. Jo. 237; 9 B.W.C.C. 164, H.L.; 34 Digest 300, *2494*.

(16) *Gane* v. *Norton Hill Colliery Co.*, [1909] 2 K.B. 539; 78 L.J.K.B. 921; 100 L.T. 979; 25 T.L.R. 640; 2 B.W.C.C. 42, C.A.; 34 Digest 311, *2559*.

(17) *Lancashire and Yorkshire Rail. Co.* v. *Highley*, [1917] A.C. 352; 86 L.J.K.B. 715; 116 L.T. 767; 33 T.L.R. 286; 61 Sol. Jo. 397; 10 B.W.C.C. 241; 34 Digest 290, *2425*.

(18) *Andrew* v. *Failsworth Industrial Society*, [1904] 2 K.B. 32; 73 L.J.K.B. 510; 90 L.T. 611; 68 J.P. 409; 52 W.R. 451; 20 T.L.R. 429; 48 Sol. Jo. 415; 6 W.C.C. 11, C.A.; 34 Digest 318, *2605*.

(19) *Philbin* v. *Hayes* (1918), 87 L.J.K.B. 779; 119 L.T. 133; 34 T.L.R. 403; 62 Sol. Jo. 519; 11 B.W.C.C. 85, C.A.; 34 Digest 284, *2380*.

(20) *Nolan* v. *Porter & Sons* (1909), 2 B.W.C.C. 106, C.A.; 34 Digest 281, *2367*.

Also referred to in argument:

W. Baird & Co., Ltd. v. *M'Graw* (1920), 89 L.J.P.C. 188; 124 L.T. 38; 64 Sol. Jo. 650; 13 B.W.C.C. 233, H.L.; 34 Digest 313, *2569*.

Cook v. *Montreal (Owners)* (1913), 108 L.T. 164; 29 T.L.R. 233; 57 Sol. Jo. 282; 6 B.W.C.C. 220, C.A.; 34 Digest 279, *2355*.

Dennis v. *A. J. White & Co.*, [1917] A.C. 479; 86 L.J.K.B. 1074; 116 L.T. 774; 33 T.L.R. 434; 61 Sol. Jo. 558; 10 B.W.C.C. 280, H.L.; 34 Digest 321, *2627*.

Edwards v. *Wingham Agricultural Implements Co., Ltd.*, [1913] 3 K.B. 596; 82 L.J.K.B. 998; 109 L.T. 50; 57 Sol. Jo. 701; 6 B.W.C.C. 511, C.A.; 34 Digest 282, *2371*.

Appeal from an order of the Court of Appeal affirming an award made by His Honour Judge Gawan Taylor, at Workington, in favour of the applicant in an arbitration under the Workmen's Compensation Act, 1906.

At the arbitration the following facts were proved or admitted: The respondent was, on Oct. 10, 1921, a coal hewer in the employment of the appellants; the appellants were the owners of a colliery situate near the Siddick station on the line of the London and North-Western Rail. Co.; by agreements made between the appellants and the railway company the appellants' workmen were permitted to travel between Maryport and Siddick; by the agreements the appellants indemnified the railway company against claims by the appellants' workmen in respect of accident, injury, or loss incurred while using the trains referred to in the agreements; each workman intending to use the trains signed a form in which he indemnified the railway company against any claim for damage or accidental injury; after signing the indemnity form each workman received from the appellants a ticket, on production of which to the railway company's servants he was permitted to travel on the trains referred to in the agreements; the trains were in the charge and control of the railway company's servants. The appellants' workmen were carried to and from a private platform at Siddick on the land of the railway company and maintained by them, and on Saturdays they were allowed to travel to and from Siddick passenger station by ordinary passenger train for the purpose of drawing their pay. Some of the workmen were allowed to travel to and from their work by the ordinary trains—five travelled by the ordinary train leaving Maryport at 7.50 a.m. and returned by the ordinary train leaving Siddick at 4.29 p.m.; two travelled from Maryport by the 8.55 p.m. ordinary train and returned by the colliers' special train at 6.5 a.m.; the appellants' workmen were not paid for the time spent in travelling to and from their work. All the workmen did not use the trains. Some walked, some cycled, and some travelled by 'bus to and from their work; workmen other than those employed by the appellants used the trains referred to in the agreements, and ordinary workmen's tickets were issued to them by the railway company; the amounts payable to the railway company by the appellants under the agreements were paid monthly, and the appellants reimbursed themselves by deducting from the wages of those workmen who used the trains the sum of 1s. 8d. per week. On Oct. 10, 1921, the respondent was travelling from his work to his home on one of the trains referred to in the agreements. At a distance of about four miles from the appellants' colliery, and on the main line of the railway company, the engine fouled the points leading to Maryport docks and was derailed. The carriage in which the respondent was riding was overturned, and he suffered severe shock and was totally incapacitated for work for 21 weeks. Upon these facts it was contended, on behalf of the respondent,

A that the accident arose out of and in the course of his employment. On behalf of the appellants it was submitted that the accident did not so arise. An award was made by the arbitrator in favour of the respondent. The Court of Appeal (LORD STERNDALE, M.R., WARRINGTON and YOUNGER, L.JJ.) dismissed the appeal by the employers, who now appealed to the House of Lords. The appellants gave (inter alia) the following reasons for the appeal: The accident to the respondent did not B arise out of and in the course of his employment; the respondent was not in the employment of the appellants at the time of the accident; it was not an implied term of the contract of service that the train in which the respondent was injured should be provided by the appellants or that the respondent should travel therein; the contract of service did not include the journey during which the accident occurred; the appellants in making the agreements with the railway company were C acting in the interests and for the benefit and convenience of their workmen and were not under any contractual duty or obligation to provide trains for their workmen to travel to or from their work. The respondent supported the judgment of the Court of Appeal (inter alia) on the grounds that the case was governed by the principles laid down in *John Stewart & Son (1912), Ltd.* v. *Longhurst* (3), and the judgments in *Cremins* v. *Guest, Keen, and Nettlefold, Ltd.* (1) and *Walton* v. D *Tredegar Iron and Coal Co.* (2) were in law correct and applied to this case.

Sir Leslie Scott, K.C., Holman Gregory, K.C., and *W. Procter* for the appellants. *Eastham, K.C.*, and *J. W. Cremlyn* for the respondent.

Their Lordships took time for consideration.

Nov. 22. The following opinions were read.

E **LORD BUCKMASTER.**—This appeal is brought by the St. Helens Colliery Co., Ltd., against a judgment of the Court of Appeal, who have decided that the respondent, a miner in the appellants' service, is entitled to compensation under the Workmen's Compensation Act, 1906, for injuries sustained by him when travelling in a train from his place of residence at Maryport to the colliery. Such a claim can, of course, only be maintained if the injury befell the workman "in the F course of and arising out of his employment." It is useless to lament the obscurity of these words, and wrong to inquire what was the intention behind the Act, except so far as such intention is disclosed in the language of the statute construed in accordance with certain fixed and well-known principles.

The facts of the case, according to my view, are these. The workman lived at Maryport, some five miles distant from the colliery. A number of other colliery G workers were in like case, and the appellants, recognising no doubt the importance of securing transport for their men to and from the pits, entered into a contract with the London and North-Western Rail. Co., by which the company agreed to provide special trains for the conveyance of the workmen to and from the colliery and Maryport. By this contract the appellants agreed to indemnify the railway company against claims for damages by the passengers in case of accident. The H appellants then provided each workman with a pass upon the railway and charged him for it a sum which did not represent the full amount of the agreed fare, and this sum was deducted week by week from their wages. On entering the employment of the colliery company, the workmen who desired to avail himself of this means of transport signed an agreement with the railway company releasing them from all claims in case of accident. On Oct. 10, 1921, the respondent, while I travelling by virtue of the pass thus obtained as a workman, was injured through a railway accident. He has been deprived of his claims against the railway company; if he has no claims against his employers, he is left wholly unprotected. The county court judge found that it was an implied term of the contract of service that the train should be provided by the employers. I entirely agree with that conclusion. It was as a workman entering the service of the employers that he obtained a pass enabling him to travel and released his rights against the railway company. It was, I think, an inseparable part of his contract of employment. It does not, however, seem to me that this conclusion determines the case in his

favour. He had undoubtedly a right to travel by the train—a right enjoyed by him as a miner in the service of the appellants; but he was not directed to travel by such train. Had he found it convenient or desirable, he could have travelled by other means.

The real question, to my mind, is whether, when he entered the train in the morning, it was in the course of his employment within the meaning of the Act. I find it difficult to fix the test by which this question can be answered in favour of the respondent. In *Cremins* v. *Guest, Keen, and Nettlefold, Ltd.* (1) the circumstances are, as the Court of Appeal thought, indistinguishable from the present, and it is there stated that the phrase "in the course of his employment" is satisfied if the workman is in the place where the accident occurred by reason of an implied term of the contract of service that he should have the right, if not the obligation, to use the train. I find it difficult to accept this test. A man entitled by virtue of his contract of service to a holiday and a free ticket will equally be on his journey by virtue of a right obtained by his contract of service; but it seems to me difficult to say that an accident occurring to him in the train must be in the course of his employment. The workman was under no control in the present case, nor bound in any way either to use the train, or, when he left, to obey directions. Although he was where he was in consequence of his employment, I do not think it was in its course that the accident occurred. *Holmes* v. *Great Northern Rail. Co.* (4) is a different case, for there a railway man, working at King's Cross, was told to go to Hornsey, and a train was provided for him at King's Cross. A. L. SMITH, L.J., held that it was as a workman in the course of his employment that he entered the train at King's Cross; but I cannot see that those are the circumstances here. *John Stewart & Son (1912), Ltd.* v. *Longhurst* (3) does not really offer much assistance. There the access to the work was dangerous, and was the only means by which the work could be approached or left. The man was bound by the terms of his employment to be where he was. I think that it would be wrong, having regard to the purpose of this statute, as disclosed both in its construction and in its history, to narrow the meaning of the words used. They are general words intended, as I regard them, for a wide and general application; but I find myself unable so to construe them as to include in their operation the right of travelling by a train which the workman was under no obligation and no proved necessity to use.

LORD ATKINSON.—I share the difficulty which the late Master of the Rolls said, in this case, that he felt in reconciling *Davies* v. *Rhymney Iron Co., Ltd.* (5) with *Cremins* v. *Guest, Keen, and Nettlefold, Ltd.* (1), and also in reconciling all the authorities on the point as to when and in what circumstances an injury by accident can properly be held to have been sustained in the course of a workman's employment within the meaning of s. 1 (1) of the Workmen's Compensation Act, 1906. I do not wonder at his difficulty in reconciling the two cases mentioned, for this reason if for no other—that in the first of the two the facts and findings of the county court judge are clearly, distinctly, and unambiguously stated, while in the second these matters, as I shall presently show, are stated in such an incomplete, ambiguous and puzzling way that I think that the case must be misreported.

In the first of them, according to the report, the workman was a collier in the employment of the defendant company, the owners of a colliery and also of a little railway about one and a half miles in length leading from the colliery towards the workmen's homes. On this railway the company ran trains to take some of the colliers, including the sufferer, to and from the colliery in the direction of their homes. It was quite optional with the workmen whether they travelled in the train or not, and if they did travel in it they were not charged anything for the service. The company were not in any way bound to carry the colliers upon the train. The injured workman, in descending from the train when it was some distance from the colliery, fell and was injured. Although the accident occurred

before 1906, nothing turned upon the point of the scene of the accident being at some distance from the colliery. The county court judge found that it was not a condition of the workman's employment that he should be carried to and from his work in the train; that the company provided this train as a convenience for the workmen, and were not under any duty or obligation to provide it. COLLINS, M.R., in giving the judgment of the Court of Appeal, said that the appellant—that is, the workman—left his place of work and availed himself of the facilities given by the company. He went home by a route which he was not bound to take. He was under no duty to the company at the time of the accident, and in no sense could the accident be said to be connected with the employment. The county court judge, who held that the accident did not arise out of or in the course of the workman's employment, was, therefore, right. The court expressed no opinion upon the point of the distance of the scene of the accident from the colliery. When one reads this report, one is not left in any doubt on any point; the facts and findings of the county court judge, and the bases of the decision of the Court of Appeal, are all brought before one's mind most clearly and distinctly.

If one turns to the report of the second case the contrast is very marked. First, it does not appear from the report whether the workmen's train furnished the only means reasonably available by which the men could be brought to their employers' works, or whether other means equally available and convenient for that purpose were within their reach. Secondly, the county court judge is, in the statement of the facts, reported to have found that it was an implied term of the contract of service that the colliers residing at Dowlais should have a right to be carried from Dowlais to the platform at Bedlinog and back again free of charge, but when WARRINGTON, L.J., comes to give his recital of the county court judge's finding, he said that the finding was that "it was an implied term of the contract of service that these trains should be provided by the employers, and that the colliers should have the right, if not the obligation, to travel to and fro without charge" (128 L.T. at p. 244). I confess that I feel greatly puzzled, first, by the use of the word "right," and, secondly, by the use of the words "if not the obligation." If the owner of a carriage, or a train, or a house, gives permission to another person to ride in his carriage, or be carried in his train, or to enter his house, and the person to whom the permission is given should avail himself of it, the licensee or invitee, if he may be so styled, has against everyone but the person who gave the licence or the invitation a right to exercise the privilege given. If in *Cremins' Case* (1) it was established that the employer said to the collier: "I will provide a train to carry you to my works; you may avail yourself of it or not, just as you like," and other means of transit were available, while the collier was in the train he would have a right to be transported as against everyone but the employer, who might any day revoke the permission and discontinue the service. If the meaning of the word "right" be so ambiguous, what can one, with any confidence, say of the phrase "right, if not obligation"? Is the phrase to be read as if it ran: "right although not obligation," or does it mean that it is doubtful whether the right given was not something almost, if not altogether, amounting to an obligation? If each collier was bound by his contract to travel to his employer's colliery by this provided train, then cadit quaestio. The collier would be in the course of his employment when he was doing a thing which he was bound by his contract of service to do. But the conferring upon a collier a privilege of which he is free to avail himself or not, would, primâ facie, impose no duty whatever upon him to use it. It must, however, be borne in mind that if the physical features of the locality be such that the means of transit offered by the employer are the only means of transit available to transport the workman to his work, there may, in the workman's contract of service, be implied a term that there was an obligation on the employer to provide such means, and a reciprocal obligation on the workman to avail himself of them. *Richards* v. *Morris* (6) is a good illustration of this principle.

The difficulty of reconciling all the authorities on this question as to the course

of a workman's employment arises, I think, from the omission on the part of some of the courts to frame some test which must be satisfied in order to bring an accident within the course of a workman's employment, leaving the county court judge in each case to decide whether the evidence establishes that the test is satisfied. I myself have been rash enough to suggest a test, namely, that a workman is acting in the course of his employment when he is engaged "in doing something which he was employed to do"; or what is, in other and, I think, better words, in effect the same thing, namely, when he is doing something in discharge of a duty to his employer, directly or indirectly imposed upon him by his contract of service. The true ground upon which the test should be based is a duty to the employer arising out of the contract of employment, but it is to be borne in mind that the word "employment," as here used, covers and includes things belonging to or arising out of it. For instance, haymakers in a meadow on a very hot day are, I think, doing a thing in the course of their employment if they go for a short time to get some cool water to drink to enable them to continue the work which they are bound to do, without which water they could not do that work, and workmen are doing something in the course of their employment when they cease working for the moment to sit down in their employer's works to eat food to enable them to continue their labours.

In *Parker* v. *Steamship Black Rock (Owners)* (7) the decision of this House is distinctly based on the absence of this kind of duty to the employer which I have indicated. There a fireman on board a steamship went ashore with leave to buy some provisions for himself. His contract of service contained a clause that the crew should provide their own provisions. On returning to his ship, he fell off the pier where his ship was supposed to be, but in fact was not, as she had been moved, and was drowned. Lord Loreburn, in giving judgment, said ([1915] A.C. at p. 728):

> "Did this injury arise out of this man's employment as a seaman on board this ship; did his employment involve as one of the things belonging to the employment that he should come ashore to get food and then return the same evening? My Lords, I cannot think that the case can be regarded as one in which it was his duty to his employers to come ashore and to be ashore and to return to his ship."

Lord Parker said (ibid. at p. 729):

> "Now it is not sufficient in order to make this an accident arising out of employment that the accident happened during a period when the man was lawfully absent from the vessel. In order to make it an accident arising out of the employment the absence from the vessel must be in pursuance of a duty owed to the employer. It appears to me that that is, shortly stated, the result of the decided cases. It is a line of decisions which lays down a distinctly workable rule upon the construction of an Act, the obscurity of which is exceedingly great, and I should be unwilling in any way to interfere with it."

I think this last a most valuable judgment. I think it absolutely sound, and I only regret that the good working rule which Lord Parker indicates has not been resolutely applied subsequently. Lord Sumner, having dealt with the provisions of the seamen's contract about feeding himself, said (ibid. at p. 731):

> "There is no contractual obligation which made the deceased's errand on shore part of his employment in itself. It is suggested that as, in fact, he fed himself while on board, going ashore at a convenient port to get provisions constituted such a moral necessity arising specially from the terms upon which he was on board as places his errand on the same footing as though he had gone to discharge a duty to the ship. No authority is stated for that proposition, and I do not think it can be accepted."

Lord Parmoor said (ibid. at p. 732):

A "I think it is clear that Christopher Parker [the seaman on whose behalf the claim was made] was not absent from the ship in pursuance of any duty owed to the employer, and, in the absence of such a duty, no liability would arise under the provisions of the Workmen's Compensation Act."

LORD WRENBURY said (ibid. at p. 732):

B "The accident in question was that the man in returning to his ship from a lawful outing upon shore fell into the water and was drowned. In order to succeed it is not sufficient that he should show that but for his employment he would not have been at the scene of the accident. He must do more than that; he must show that it was the employment which took him to the place of accident. It seems to me that from the stipulation that he was to get C his own provisions this consequence ensued—that the master was bound to give him reasonable facilities from time to time for going to buy them, but it does not follow that when he was buying them he was discharging any duty towards his employer. The man was doing an act which under the circumstances he had to do, but he was not doing an act which he owed to his employer the duty to do, and between those two things it appears to me rests D the ground upon which this case is to be decided. It appears to me that this accident did not arise out of his employment, that it did not result from any obligation which had to be satisfied in order for him to perform the duty of his employment."

This, in my view, is a decision as helpful as it is clear and authoritative. It bases the workman's right to recover in respect of an injury by accident, arising E out of his employment, on the question whether he was, when the accident which injured him occurred, in the course of performing some duty arising out of the contract of service which he owed to his employer. At the time when this case was decided, it was, I think, assumed that it had been irrevocably established by *Moore* v. *Manchester Liners, Ltd.* (8) and *Kitchenham* v. *Johannesburg (Owners)* (9) that a sailor who, with the leave of the proper official, goes ashore is, while F he is on shore, to be taken to be in the course of his employment as a sailor upon his ship. That fact may account for why the question whether the accident which caused the death of the seaman in *Parker* v. *Black Rock (Owners)* (7) arose or did not arise in the course of the deceased's employment was not considered, and caused the learned Lords to deal exclusively with the question whether it arose out of his employment. Since *Charles R. Davidson & Co.* v. *M'Robb or Officer* (10) G was decided, I do not think that the decision in *Moore* v. *Manchester Liners, Ltd.* (8) can be taken as having the authority once claimed for it, but it would appear to me that the test as to the discharge by the workman of his duty to his employer laid down in *Parker* v. *Steamship Black Rock (Owners)* (7), necessarily applies to the question whether the injury by accident for which he seeks compensation was sustained by him in the course of his employment or not. That question must, H in my view, be determined in the one case as in the other by the same test, namely, whether the workman at the time when he sustained the injury by accident, was discharging a duty which he owed to his employer. In *Holmes* v. *Great Northern Rail. Co.* (4), A. L. SMITH, L.J., said ([1900] 2 Q.B. at p. 411):

"They [the employers] had started a new goods-shed at Hornsey, and he [the workman] was ordered to go there and clean engines; it was his duty to I obey the order."

In *Charles R. Davidson & Co.* v. *M'Robb or Officer* (10), LORD FINLAY, L.C., contrasted the two questions as to an accident occurring in the course of a workman's employment, and arising out of his employment. In both he says the word "employment" must bear the same meaning. His exact expression was ([1918] A.C. at p. 314):

"The word 'employment' must mean the same thing when in apposition with 'the course of' as it means when in apposition with 'out of.' 'Arising out of

the employment' obviously means arising out of the work which the man is employed to do and what is incident to it—in other words, out of his service. 'In the course of the employment' must mean, similarly, in the course of the work which the man is employed to do, and what is incident to it—in other words, in the course of his service. In the case of a domestic servant who sleeps and takes his meals in his master's house he is in the course of his service all the time—his service is interrupted if he goes out on his own business or pleasure. A workman who by the terms of his employment takes his meals in his employer's premises, is in the course of his service in being there at meal-times. In either case the master or employer would be liable for damage caused by such an accident as happened in *Thom (or Simpson)* v. *Sinclair* (11), as it would arise out of the employment, an incident of which is the presence of the servant or workman upon the premises when partaking of his meals. . . . 'In the course of the employment' does not mean 'during the currency of the time of the engagement.' ''

LORD DUNEDIN said (ibid. at p. 321):

''It is obvious that the addition of the words 'and in the course of' are meant in some way either to qualify or further explain the words 'out of.' My own view is that they do the latter. It is in one sense difficult to imagine that there could be any injury held as arising out of the employment which would not also be in the course of the employment. But it may well be that the determination of the question whether at the moment of the injury the workman was in the course of his employment may go to solve the question of whether the injury arose out of the employment. Let me instance the case of a domestic servant who is run over in the street. Given but the two facts that the man is, e.g., a butler, and that he is run over in the street, you would not be able to decide whether the injury arose out of the employment or not. The facts are consistent with either supposition. But given the further fact that either (1) he has been sent by the master on a message, or (2) that he is enjoying an evening out, then you can determine whether he is in the course of his employment or not, and from that, if being run over is one of the inherent dangers of the street, you will be able to determine whether the injury arose out of the employment or not. . . . In my view, 'in the course of employment' is a different thing from 'during the period of employment.' It connotes, to my mind, the idea that the workman or servant is doing something which is part of his service to his employer or master. No doubt it need not be actual work, but it must, I think, be work, or the natural incidents connected with the class of work in the workman's case—e.g., the taking of meals during the hours of labour; in the servant's, not only the taking of meals, but resting and sleeping, which follow from the fact that domestic servants generally live and sleep under the master's roof.''

I adhere to the opinion which I myself expressed (ibid. at p. 326). I think that the words ''arising out of'' suggest the idea of cause and effect, the injury by accident being the effect, and the employment, that is, the discharge of the duties of the workman's service, the cause of that effect, and that the words ''in the course of the employment'' mean while the workman is doing what he is employed to do, that is, discharging the duties to his employer imposed upon him by his contract of service. The word ''employment'' in this connection must cover and include the things necessary and incident to the employment which I then mentioned.

I am unable to find any decision of this House qualifying or disapproving of the test laid down by *Parker* v. *Steamship Black Rock (Owners)* (7), unless indeed it be *Armstrong, Whitworth & Co., Ltd.* v. *Redford* (12). In that case LORD FINLAY, dissenting, applied the test which I have already mentioned as furnished by *Parker* v. *Steamship Black Rock (Owners)* (7). He said ([1920] A.C. at p. 765):

A "It was not in pursuance of any duty to her employer that the claimant went into the canteen and the accident did not result from any obligation which had to be satisfied in order to perform the duties of her employment."

He then points out that the accident was wholly different from the accident in *Bell* v. *Armstrong, Whitworth & Co.* (13), which occurred in the public street, and was an ordinary street accident. LORD DUNEDIN ([1920] A.C. at p. 778):

B "The canteen here might just as well have been in another place altogether, separate from the plot upon which the works stood. If so, it would have been, I think, quite impossible to say that a girl going there instead of going to her own home was doing something so connected with the employer's work as to be in the course of her employment. The test seems to me to be, not the situation of the premises, but whether resort to the premises is part of the C duty owed to the employer."

Both these learned Lords rest their judgments on what, in my opinion, the decisions of this House establish as to the true test, namely, the duty of the employee to the employer. I assume that LORD SUMNER and LORD PARMOOR did not apply this test. If they did, I apologise for my error, but I am quite certain that LORD WRENBURY, as reported, did apply it. He said (ibid. at p. 780):

D "In the present case I say no more than that I think that the girl was in the course of her employment when, in hurrying down the stairs to achieve punctuality in 'clocking on,' she was endeavouring to comply with the duty of punctuality which she owed to her employer, and that the stairs being 'very slippery,' she was exposed to the danger which resulted in the accident by the E fact that it was incidental that she was allowed to be and was in that place. On these grounds I think that the appeal should be dismissed."

If at least three of the five learned Lords who heard this case applied, as they evidently did, the test laid down in *Parker* v. *Steamship Black Rock (Owners)* (7), it is impossible to hold that the decision in that case is in any way qualified or weakened by the decision in *Armstrong, Whitworth & Co., Ltd.* v. *Redford* (12).

F I now turn to the evidence, and ask myself if there is any evidence to show that there was an obligation upon the appellants arising out of their contract of service with their colliers to provide this train service, and any correlative obligation upon the miners arising from the same source to use it. If all that has occurred is this, that the coal owner, the master and employer of a number of colliers, of whom Hewitson was one, has arranged with the London and North-Western Rail. Co. to G run trains from Flimby station to Siddick station on the days and hours named, and to carry in them any of the colliers who might choose to travel in them without exacting any payment from these men, but merely requiring a guarantee from them against seeking to recover any damages for breach of the common law duty to carry their passengers with reasonable care, on receiving from the colliery payment of certain fares for those of the colliers who have used the trains—a certain H number being guaranteed—and that, upon the other side, the collier owner said to his workmen: "I, by arrangement with the railway company, have secured that trains will be run for your convenience to bring you to your work. You are free to travel by them or not just as you please, if you do travel by them you must guarantee the railway company against seeking damages for any breach of their common law liability in the event of your being injured by reason of their neglect I to carry you with due care, and I will deduct from your wages one-half the sum which I pay to them for carrying you." If that were substantially all that occurred, and the train was not, as was the boat in *Richards* v. *Morris* (6), the only means by which these colliers could gain access to the colliery, it would only be a case of a privilege being offered to the colliers of which they might avail themselves or not as it them pleased, in which case they, in travelling by the train, would not be discharging any duty to their employers imposed on them by their contract of service, and consequently could not recover damages in respect of injury by accident sustained en route. If, on the contrary, the colliers were by

their contracts of service bound to travel to and fro by these trains, they would, in travelling by them, be discharging a duty imposed upon them by their contracts, and an injury by accident such as Hewitson has sustained would be an injury by accident arising out of and in the course of his employment, entitling him to receive damages under the Workmen's Compensation Act, 1906. The county court judge finds in favour of neither of these alternatives, but, with apparently a passion for ambiguity, he copies the phrase occurring in the judgment of LORD COZENS-HARDY in *Cremins' Case* (1) and finds as a fact that it was an implied term of Hewitson's contract of service that the trains should be provided by the employers, and that the colliers should have the right, if not the obligation, to travel to and fro by them. What is the meaning of such a finding as this? Does it mean that the workman might go by train or not go by it as he pleased, or does it mean that the colliers were by this implied term bound to go by it? So much for the finding on facts. Then one comes to his finding on law. He finds, so far as it is a question of law, whatever that may mean, that the contract of service implied included the time at which the accident occurred, that is to say, the employment began when the man entered the train and ceased when he left it. He also thinks that it was obligatory on this man, who lived six miles away and had to be at his work at 5.45 a.m. when on the day shift to use the train if he wished to continue in his employers' service. I have endeavoured—see *Hutchinson* v. *M'Kinnon* (14)—to suggest to county court judges how they should shape their awards, and have pointed out the objection to finding in the words of the statute in *Herbert* v. *Fox & Co., Ltd.* (15). This award shows that it was labour thrown away. This last passage of the statement is unintelligible to me. It can hardly be that the county court judge considered that a finding of a question of fact becomes, when there is no evidence to support it, a finding of law. It is clear that no contract was entered into between the respondent and the London and North-Western Rail. Co., save the contract of indemnity already mentioned. The contract as to running these trains and carrying the colliers in them was made between the appellants and the railway company, and the appellants only deducted from the wages of their employees half the fares which they paid the railway company.

Tickets, incorrectly styled railway tickets, were obviously used to identify the colliers who availed themselves of the privilege or contractual right, whichever it may truly be, of travelling in these trains. For this reason the ticket bears the number of the workman and the number of his pit, but the railway company does not take any part in the issue of these tickets. Hewitson, the respondent, proves that the rear van of the colliery trains had painted on it the words "Siddick Colliery train." He explains how the trains are timed to answer the shifts and states that he got his ticket from the colliery pay office, that 1s. 8d. per week is deducted from his pay under the head of off-takes, that he does not pay anything to the railway company, that 75 per cent. of the men who travel by these Siddick trains are miners in the colliery in which he works, and that men belonging to other works, such as the respondent's son who works in the Gillhead Firebrick Co., at Trimley, also travel on these trains. Some of the men working in his own colliery go there by omnibus. The railway company allow them to go by the 11.45 ordinary train on Saturdays to Siddick platform to draw their pay. There are four trains: 5.20 a.m., 6.55 a.m., 12.45 p.m., and for night shifts 10.20 p.m. The respondent would walk if there were no trains, or, perhaps, get work nearer home. It is an advantage to go by the train for 1s. 8d. It would be 3s. 9d. for the ordinary workmen's fare. John Barker, who is a miners' agent, states that he has worked at the Siddick Colliery for sixteen years. He practically repeats Hewitson's evidence, says that 90 per cent. of the passengers on these trains are miners, and that the servants of the railway company manage the trains. That is the whole of the case made on behalf of the claimant Hewitson. Thomas Banks, the respondent's agent, produces the agreement with the railway company already referred to. Says that trains are run under it by the latter company; 1s. 8d., is deducted from the men's wages, it used to be 9d.; both are less than the fare for ordinary

A tickets. The colliery company guarantee a minimum number of men travelling. There is a scale. "We [the colliery company] give the [railway] company weekly the number of men who are going to use the trains. Other men use the special as well [as the miners of Siddick Mine]. That is the railway company's own affair. The men are given a ticket. Before they get it they sign an indemnity form. We send this to the company. The men pay 6d. stamp for it. We also B indemnify the railway company. The agreements can be terminated at any time. There is no joint committee or conciliation board record of any agreement to provide trains. There is no such agreement by the men in the office of [the appellant] company. The railway company sends the train when we want it."

In these cases under the Workmen's Compensation Act, 1906, the workman claiming compensation must prove his case. In my view, the evidence in this C case does not establish that the colliery company was bound to provide these trains for their workmen to carry them to their work in the colliery, nor that the workmen were, on their side, bound to travel to their work by those trains, nor yet that there were no other means reasonably available by which they could travel to their work. I think that the legitimate conclusion to be drawn from the whole of the evidence is that the appellants, for the convenience of their workmen, give to them D the privilege of being carried on these trains to the colliery of the appellants on payment of a very small sum of 1s. 8d. per week, of which privilege the workmen—including Hewitson, the respondent—were free to avail themselves, or the contrary. In my opinion, the evidence does not establish that the workmen of the appellants, in travelling to or from the appellants' colliery in these provided trains, were discharging any duty to their employers which their contracts of service bound them E to discharge. I am, therefore, of opinion that the injury by accident which the respondent Hewitson unfortunately sustained did not arise out of and in the course of his employment. The evidence does not, in my view, justify or sustain the conclusions of law or fact which the learned county court judge has drawn from it. I am, therefore, of opinion that the appeal succeeds, that the decision appealed from was wrong and should be reversed, as also should the decision of the learned F county court judge.

LORD SHAW.—Your Lordships are of opinion that this appeal should succeed. I feel myself, with much respect, constrained to differ. It might be unnecessary for me to add anything by way of explanation of my dissent, but the case, in the view which I take of it, is one of far-reaching importance, and your Lordships will, G perhaps, forgive me for expressing my own view in some, though brief, detail. In these cases the authorities are legion, and the language of the statute is too apt to be submerged by them. It is the practice to cite over and over again large numbers of them, and very often to do so in violation of the canon that, when cases depend upon fact, then a variation in fact deprives the alleged precedent of value. A few general principles may, however, emerge from this mass of authority, H and, above all, the language of the statute must still be allowed to speak for itself. The question in this case is whether the accident to this unfortunate workman arose out of and in the course of his employment.

So far as the facts are concerned, the nearest analogies are found in *Cremins* v. *Guest, Keen, and Nettlefold, Ltd.* (1), *Walton* v. *Tredegar Iron and Coal Co.* (2) and *Gane* v. *Norton Hill Colliery Co.* (16). In *Cremins' Case* (1) a large number of I colliers, who resided six miles from the colliery where they were employed, were conveyed every morning by a train composed of carriages belonging to the employers, but driven by the railway company, to a platform a quarter of a mile away from the colliery. The colliers were conveyed free of charge, and it was an implied term of the contract of service that colliers residing at Dowlais should have a right to travel to and fro without charge. One of the colliers was knocked down and killed while waiting on the platform for the return train. It was held by the Court of Appeal "that the accident arose in the course of the employment, which began when the colliers entered the train in the morning and ceased when they left

the train in the evening." It was a powerful court which held that—consisting of COZENS-HARDY, M.R., FLETCHER MOULTON and FARWELL, L.JJ. But I need not give the details of these cases which I have cited, because the whole of the law of them is summed up in a passage by FARWELL, L.J., in *Gane* v. *Norton Hill Colliery Co.* (16). He says ([1909] 2 K.B. at pp. 544, 555):

> "It is well settled that the employment is not confined to the actual working whether in a pit or at any other trade in which the workman may be engaged. He is employed not only to work in the pit, but also to do other things that he is entitled to do by virtue of his contract of employment; for example, he is entitled to do, and therefore employed to do, such acts as coming on the employer's premises, passing and re-passing for all legitimate purposes connected with his work on the premises, such as getting to the pit's mouth, going to get his wages, going to make proper inquiries from proper officers, or taking a train which he is entitled to use by virtue of his contract of service, as in *Cremins* v. *Guest, Keen, and Nettlefold, Ltd.* (1) and *Holmes* v. *Great Northern Rail. Co.* (4). All those things that he is entitled to do by virtue of his contract he is for the purposes of the Act employed to do, and they are therefore within his contract of employment. I would qualify this by saying that he must make a reasonable user of the facilities and rights which are given to him in this way."

If this appeal is successful, all these cases must be held to have been wrongly decided. My own opinion is that these decisions, as well as the decisions of the Court of Appeal in this case, were all of them in accord not only with the good sense and justice of the position, but proceeded upon a correct interpretation of the statute, and were sound in law.

Thus far for analogies in fact. As to the main principle to be applied, I do not find that the able discussion on both sides of the Bar has led me to modify in any respect the statement of the point which I made to the House in the course of my address in *Thom (or Simpson)* v. *Sinclair* (11) ([1917] A.C. at p. 142). May I accordingly venture to repeat that my view of the statute is that the expression "arising out of the employment" is not confined to the mere "nature of the employment." The expression, in my opinion, applies to the employment as such —to its nature, its conditions, its obligations, and its incidents. If by reason of any of these the workman is brought within the zone of special danger and so injured or killed, it appears to me that the broad words of the statute "arising out of the employment" apply. That opinion substantially showed my estimate of what was the scope and meaning of the word "employment" under the statute. I respectfully adhere to that view—which applies equally to the phrase "in the course of the employment"—and I do not find that anything has happened in the decisions to weaken it. On the contrary, not a little has happened to confirm it. In *Charles R. Davidson & Co.* v. *M'Robb or Officer* (10), LORD FINLAY, L.C., said ([1918] A.C. at p. 314):

> "The word 'employment' must mean the same thing when in apposition with 'in the course of' as it means when in apposition with 'out of.' 'Arising out of the employment' obviously means arising out of the work which the man is employed to do and what is incident to it—in other words, out of his service. 'In the course of the employment' must mean, similarly, in the course of the work which the man is employed to do, and what is incident to it—in other words, in the course of his service."

LORD DUNEDIN in the same case, dealing with the expression "in the course of employment," says (ibid. at p. 321):

> "It connotes, to my mind, the idea that the workman or servant is doing something which is part of his service to his employer or master. No doubt it need not be actual work, but it must, I think, be work, or the natural incidents connected with the class of work. . . ."

Later on, he adds, referring to the authorities, a passage illustrating the kind of incidents to employment, and dealing with a topic very near to, if not identical with, the present case, namely, that of a provided access to the actual place of work. He says:

> "The upshot of it is that there is no case where liability has been found in which the accident has occurred at any place other than what may be termed the provided access to the ship. If an accident occurs there it may well be, and I agree it is involved in the decisions, that when a sailor is leaving his ship by the provided access, or has reached the provided access on his return, he has not left the course of his employment in the first case; in the second, he has returned to it. And obviously, if the provided access is defective, as was the case in *Moore's Case* (8), it is easy to come to the conclusion that the accident arose out of the employment."

Cremins (1), *Walton* (2), *Gane* (16) and the present case as decided in the Court of Appeal, appear to me to have been in entire accord with the definition of employment as including what is incidental to it, as affirmed thus repeatedly in the opinions delivered in the House of Lords as just referred to.

Let us inquire, accordingly, why this workman is held not to have been within the course of what was truly incidental to his employment on the occasion on which he was injured. He and other 500 men resided six miles from Siddick Colliery, namely, in Maryport. To promote, most properly, the interests of the colliery by the transport of suitable labour, the following arrangement was made. The colliery company agreed with the London and North-Western Rail. Co. that the latter should provide special trains to be timed to suit the beginnings and endings of the colliery shifts. Intimation was to be given periodically by the colliery to the railway company of the number of men to be provided for. Lump payments were to be made by the colliery company to the railway company. Further, the colliery undertook to absolve the railway company from their responsibility for safe carriage of the men. That matter of the carriage of the men was to be covered by the contract which the men were to make with their employers. So far of the relations between the colliery company and railway company. As between the colliery company and the men, the bargain was this: (i) A charge of 1s. 8d. a week was to be made on each man using the line; (ii) the man's payment to the employers for transport was to be made by way of "off-take" from his wages; (iii) the workman was to covenant to absolve the railway company from their responsibility to him for safe carriage. I attach great importance to this. It differentiates this case entirely from all those in which the workman going to his work did so merely as, and on the same terms as, a member of the general public. The language of the forfeiture of right by the workman is comprehensive.

> "Neither I, nor my executors or administrators or relatives, shall have any claim against you by reason of any accident, injury or loss which may happen to me or my property, while joining, travelling by or alighting from such trains, or while upon your railway or property, notwithstanding any such accident, injury or loss is occasioned by the negligence of you or any of your officers or servants."

The whole of these arrangements were part of the contract of employment; the workman signed the stamped contract of railway indemnity, and was debited with 6d. for the stamp by the employers off the wages. Finally, the payment for the weekly pass was deducted on the pay sheet from the wages paid, the deduction being made under the head of "off-take." These arrangements continued for the whole twelve years of service. The company and the man were thus brought into intimate and continual daily relations. The workman secured his access to his work; the company provided the means of transport.

Upon the discussion of this case at your Lordships' Bar counsel for the appellants very properly conceded that the case stood in law precisely on the same footing as if, so far as the workman was concerned, the colliery company owned

the line and worked it themselves. So far, accordingly, as employment goes, the contract of employment itself embraces the carriage of these workmen from Maryport to the Siddick station. The case was much stronger on fact than *Cremins' Case* (1). I entirely agree with the county court judge upon that topic; this was not merely a case of the free offer of travelling facilities to any who cared to avail himself of such an offer, but it was an actual paction, the employers granting the passport and coming under the obligation of the carriage and the workmen paying their passage to the employers. In my opinion, this is quite a clear case of the employment beginning when the men entered the train. In the terms of their contract of employment, from that moment they had closed the bargain with the employers as per their contract of employment, they secured by deduction from their wages this mode of access to the work of the colliery which they had to do, and this mode of access the employers were bound by contract to provide. The case of the respondent is illustrative. His contract of employment had lasted for twelve years; he had used the railway for that period and regularly paid to his employers, by way of deduction from his wages, his fare for the passport given. Not only so, but in the knowledge of both employer and workman the position of the latter was completely dissociated from that of a passenger with the ordinary rights of passengers as against the railway, and was embraced within the contract which he made with his employers as such. In the course of doing that thing which was the subject of onerous contract with his employers, he met his injuries by the derailing of the train. The answer, however, made in argument was to the effect that although his passage to the works per the railway was paid for to his employers, and was part of his contract of employment with them, still what was paid for was a right, a privilege, and he was not obliged to use it. He might have provided himself with some other means of transport. To apply accordingly that to the position of the respondent himself, it would mean in the concrete this: although you have your contract of employment, in gremio of which is this right of carriage to your work, which your employers are obliged to furnish and have furnished, yet nevertheless on this October morning it was within your power to abandon your rights, as against your employers, to go the six miles by the 5.15 special train provided and paid for by you in the terms of your bargain, to relieve your employers from their duty to carry you by the transport provided, and to start earlier in the dark and reach the colliery by bicycle or on your own feet. If this doctrine of excluding from the scope of the terms of employment those things and dangers which merely spring from the exercise of rights within a contract of employment be sound, I know not where it is to stop. A man goes for his wages from the yard to the office by a bridge provided by the employers, and the bridge is broken, or blown down, and he is injured. The answer, I presume, would be: no claim against the employers because to go for his wages he might have chosen to walk round half a mile—to use the bridge was only his right—or, indeed, he might have chosen to go without his wages at all, he was not obliged to lift his money, to do so was only his right. I can give no countenance to such an argument which seems to me not only to fly in the face of the decisions quoted, but to be an unreasonable limitation of the word "employment." I think the more reasonable view is that this man's employment was just exactly as wide as his contract, and that he was within the scope of his employment and in the course of it, not only in performing duties, but in exercising rights under his contract. Furthermore, it stands to reason, as I view it, that, upon the facts stated, this conveyance of the workman was part and parcel of the employment in the sense of being, to say the least, one of its incidents. I think, further, that to all intents and purposes it was a necessary incident of the contract. The learned county court judge appears to me to have been right when he found as follows: "I think also that it was obligatory on this man who lived six miles away and had to be, when on the day shift, at his work at 5.45 a.m., to use the train if he wished to continue in the employer's service."

I have referred to the principle that the word "employment" under the statute

A should be held to include the incidents of the employment, and two other principles, which also may be mentioned, occur in many of the cases. The one is that the course of the employment may be interrupted by the workman's own conduct, and so a new casual factor be introduced, and a new peril added which was beyond the scope of the contract of service. It is sufficient to say that nothing in the workman's own conduct occurs to bar the claim in the present case. A further
B principle, however, more nearly illustrates negatively the main idea of employment under the statute, because it shows what it does not include. I refer to the case where liability does not arise, because the workman was not engaged upon or in the course of his employment, but upon purposes of his own apart from the employment. If he had been, in sport or out of private curiosity, or for some other purpose of his own not incidental to his service, doing something or proceeding
C somewhere out of the course of the incidents of his employment, then a claim for compensation fails. But this, in my view, illustrates very much in favour of the respondent his right to compensation, for the respondent was not in the derailed train for any purpose of his own, apart from his employment. Apart from his employment, he would not have been in the train; his only object was to get to his work by the means provided in terms of his contract with his masters. In
D the view which I take, the denial of compensation for his injuries is a defeat not only of the intention, but of the terms, of the Workmen's Compensation Act, 1906.

I feel it to be my duty to add the following observations. I desire, respectfully and pointedly, to call the attention of the legislature to the position of peril in which large classes of His Majesty's subjects may be placed by the decision about to be announced from the Woolsack. The case of the respondent is typical of that
E of 500 men employed in this single colliery. How many other collieries and works have similar contracts throughout the kingdom is unknown; their number may be large, and looking to the difficulties of housing and building, may quickly grow larger. In all of these cases the position of the men requiring to be transported will be very seriously affected. They will have no railway passengers' rights; they will have bargained that away by their contracts with their employers, who will
F have obtained a material decrease of fares by the obliteration of the men's right of free carriage; and they will have no rights under the Workmen's Compensation Act, 1906, because the accident occurred, not in the course of employment, but in the course of the transport to it provided by the contract of employment. Unhappily, in such businesses accident on a large scale is not unknown. In this single colliery hundreds of men might have been killed without any fault on their
G part, and while travelling for no purpose of their own, but for the purpose of their employment, and in the fair and proper exercise of their rights under their contracts of employment. Under this decision they, if injured, and their dependants, if they are killed, are without compensation and without remedy. It is because I feel strongly that Parliament did not mean this that I have ventured to suggest that the case demands the attention of the legislature.

H At the discussion of this case I raised the question whether the sums charged for fares were permissible deductions from wages under the Truck Acts, and I was answered that they were. I am not deciding the point, but assuming it. If they were not, then upon a large scale offences against the Truck Acts have been committed by the employers. But if they were, as I assume, and as I suppose for the purposes of this case I am bound to assume, then how did they come to be
I legitimate exceptions to the law that the entirety of the wages must be paid in coin of the realm? The answer possibly is that this deduction for wages became permissible under the Truck Act, 1896. Section 3 of that statute provides that an employer shall not make any contract with any workman for any deduction from the sum contracted to be paid by the employer to the workman, or for any payment to the employer by the workman "for, or in respect of, the use of supply of materials, tools or machines, standing room, light, heat, or for or in respect of any other thing to be done or provided by the employer in relation to the work or labour of the workman," unless—as I understand was done here—the terms are

in writing, and duly notified and other conditions are complied with. This, at least, shows that the legislature intended to deal comprehensively with deductions for everything done or provided—including transport of men by a provided train—in relation to—a very wide phrase—the work or labour. As I say, I do not venture to decide the point; but I must add that these statutory truck provisions, not referred to in the discussions below, appear to me to confirm the view taken both by the arbitrator and the Court of Appeal. This workman accordingly, by the deductions from his wages, has properly paid for what was in relation to his work or labour, namely, his transport to his work—this under one Act of Parliament, whereas, under the judgment proposed in respect of deductions from his wages, he, being carried as per contract, is not in the course of his employment—this under another Act of Parliament. I cannot agree that this is, or can be, the law.

LORD WRENBURY. –Before coming to the facts of this case, I must once again say something as to the meaning of those troublesome words upon which so much question has arisen, "personal injury by accident arising out of and in the course of the employment." The words "out of" connote origin. In matters physical a plant arises "out of" a seed—a vessel may be wrecked "out of" the violence of the waves. In matters metaphysical a motor-car accident may arise "out of" the carelessness, or "out of" the inefficiency, of the driver. The words indicate an origin, a source or a cause. It has been said that the expression "arising out of the employment" applies to the employment as such—to its nature, its conditions, its obligations, and its incidents. I am disposed to agree with this, if the wideness of the language does not lead to uncertainty in the meaning. A first step is to ascertain whether the accident had its origin in the employment, and, therefore, arose out of it. The words "and in the course of" are not equivalent to "during." The accident must occur during the employment, but more than that, it must occur "in the course of the employment." The employment may be by the year. The accident must, of course, be one which happens during the year, but more than that, it must be in the course of the employment during the year. The employment may be to do some defined manual work, say, hewing coal, but the accident need not arise when the man is actually using his pick. He may be going down in the cage. He may be resting between shifts. He may be taking a meal. He may be merely standing by, waiting for the next job. All these, and such as these, are not "the employment," but are incidental to the employment. The man is in the course of his employment—is engaged in his employment in all such cases. "They also serve who only stand and wait." In every case, the facts have to be ascertained, and discrimination made between the time during which, or the place at which, the employment is and those during, or at which, it is not being carried on.

A first step is to ascertain what is the employment. If the workman is doing anything which his employer could, and did expressly or by implication, employ him to do, or order him to do, and the accident occurs when he is doing it, the case is within the Act. If, for instance, the employer says, "Go by the 9.45 train to Manchester, and there do such and such a job," the employer is on the risk directly the man goes as he is ordered. This was the case in *Lancashire and Yorkshire Rail. Co.* v. *Highley* (17). If the man is paid by time, his time begins from the moment of his going. If, again, the employer—being entitled so to do—says, "Come to your work by a particular route," the employer is on the risk when the man is coming by that route. This is so, because in each of these cases there is an obligation. The man enters the assigned train or goes by the assigned route, because he has received, and is obeying, an order to do so. There are also cases which would, I suppose, be within what are called above the "incidents" of the employment, in which the journey to and from work may fall within the employment, because by implication, but not by express words, the employer has indicated the route, and the man owes the duty to obey. But the mere fact that the man is going to or coming from his work, although it is a necessary incident

A of his employment, is not enough. A useful test in many cases is whether, at the moment of the accident, the employer would have been entitled to give the workman an order, and the man would have owed the duty to obey it. If the employment be to do some definite manual work at some definite spot, for example, to hew coal in a mine, and the workman is, at the moment of the accident, not at or near to that spot, but is on the surface on a public road, or in a public train, B or other vehicle six miles from the mine, the mere fact that he is going to or from his work does not raise any right in the employer, then and there, to give him an order, or any duty in the man to obey it. The man is not at that moment in the course of his employment.

The respondents have relied upon a sentence in the judgment of Farwell, L.J., in *Gane* v. *Norton Hill Colliery Co.* (16). It runs thus ([1909] 2 K.B. at p. 545):

C "All those things that he is entitled to do by virtue of his contract he is for the purposes of the Act employed to do, and they are therefore within his contract of employment."

This is one of those incautious expressions which we are all liable to use, and, when taken from their context, they may be applied in a sense which their author D would have immediately repudiated. Suppose the man is, by virtue of his contract of service, entitled to take a fortnight's holiday. Is he employed to take a holiday? If, by virtue of his contract, he is entitled to take vegetables from his employer's garden, is he employed so to do? During his holiday, or when he is digging potatoes, is the employer liable in respect of an accident? Of course not. The lord justice would have been the first to repudiate any such meaning attached to E his words. He had, in the sentence immediately preceding, mentioned several acts, such as coming on to his employer's premises, and so on. It is with reference to such acts as he had specified that he used the words. To understand properly the sentence which I have quoted, there must be added some such words as "in the matter or course of his employment," so that the sentence will run: "All those things that in the course of his employment he is entitled to do by virtue of F his contract he is for the purposes of the Act employed to do." It is, in fact, only another way of bringing in what other judges have called acts incidental to the contract of service. It advances the matter little, if at all.

It still remains to inquire whether the occasion was one in which the man was "in the course of his employment." The fact is that there is a radical difference between an obligation and a right—between that which it is a man's duty to do, G and that which he is entitled to do without breach of his duty. In the latter case, it is beside the matter to say that it is by virtue of his contract of service that he is entitled to do it. The man who is taking the fortnight's holiday, to which he is entitled under his contract of service, is not in the course of his employment by absenting himself from it. In the decisions there is found again and again the test of duty. I refer, in particular, to the decision of this House in *Parker* v. H *Black Rock* (*Owners*) (7). Each in turn of the noble Lords who gave judgment in that case takes duty as the test. I may quote from Lord Parker ([1915] A.C. at p. 729):

"In order to make it an accident arising out of the employment the absence from the vessel must be in pursuance of a duty owed to the employer."

I Lord Parmoor said ([1915] A.C. at p. 732):

"in the absence of such duty [namely, duty owed to the employer], no liability would arise under the provisions of the Workmen's Compensation Act."

The same principle lies at the root of *Armstrong, Whitworth & Co.* v. *Redford* (12). In *Holmes* v. *Great Northern Rail. Co.* (4), "it was his duty," said A. L. Smith, L.J., ([1900] 2 Q.B. at p. 411), "to obey the order." *Bell* v. *Armstrong, Whitworth & Co., Ltd.* (13) is another illustration of this proposition. The word "duty," however, is not to be taken in a narrow sense. It is not necessary that it should be the man's duty to do the act; it suffices that he is engaged at the

moment in doing his duty. If, as in *John Stewart & Son (1912), Ltd.* v. *Longhurst* (3), the accident occurs to the man in a place in which he would not be entitled to be, except in order to perform his contract of service, the test is satisfied, because he is there solely in pursuance of his duty. The same is a fortiori true if he was in a place where he was not only entitled to be, but was bound to be in order to perform his contract of service, as in the lightning case, *Andrew* v. *Failsworth Industrial Society* (18), and the case of the woman working in her employer's shed, *Thom (or Simpson)* v. *Sinclair* (11). Secus, if he was in the dangerous place not in performance of any duty in his employment, but for purposes of his own, *Charles R. Davidson* v. *M'Robb or Officer* (10). *Philbin* v. *Hayes* (19), where the man was sleeping in a hut which he had rented from his employer, is another illustration. *Cremins* v. *Guest, Keen, and Nettlefold, Ltd.* (1) and *Walton* v. *Tredegar Iron and Coal Co.* (2), which followed it, are not consistent with that which I have said. They proceed upon the footing that if the workman was in a dangerous place in which it was no breach of his duty to be, a place in which his contract of service expressly or impliedly allowed him to be, if he voluntarily chose so to be, he is within the Act. I think that those cases were wrongly decided. The man is not in the course of his employment unless the facts are such that it is in the course of his employment, and in performance of a duty under his contract of service, he is found in the place where the accident occurs. If there is only a right, and there is no obligation binding on the man in the matter of his employment, there is no liability.

Turning to the facts of this case, I will seek to apply the above principles. What was the origin, source or cause of this accident? The answer primâ facie looks easy. The accident arose from the defective condition of the permanent way or of the points of the railway of the London and North-Western Rail. Co. But this does not end the matter. The whole question—the real question—the relevant question—is: What was the origin, source or cause of this accident to this man? The answer is not single, but composite. It arose from two facts, namely (i) that the permanent way or the points were defective, and (ii) that the man was in the train; and in order to see whether the accident arose out of his employment it is necessary to see whether he was in his employment when he was in the train. The fact is that in the words "out of his employment" is contained implicitly that which is next expressed directly by the words which follow, namely, "and in the course of his employment." The two conditions of liability are not really two things of which the one is independent of the other. The latter is a repetition by way of emphasis of one thing, namely, that the man must be in his employment when the accident occurs, and adds something, namely, that the man must not only be in the employment, but that the accident must occur in the course of the employment. The injury must result from accident arising to him out of and in the course of the employment in which he is engaged at the time so that the accident can arise out of it. It follows that I have to see (i) whether the man was in his employment when the train went off the line, and (ii) if I find that he was, then whether the accident arose out of and in the course of that employment. For myself I am content to deal with the case as if the train were a special train for which the employers paid, and in which the workman was, by virtue of a term in his contract of service, at liberty to travel if he wished to do so. These facts do not, to my mind, indicate in any way that the workman was in the employment at the time. Suppose it is a term of the service, whether expressed or implied, that a man shall enjoy, if he likes to accept it, a convenience of this kind, that is no obligation of the employment. If he avails himself of it, he is not at the same time accepting the obligation of employment, while he is availing himself of it. The facts amount to no more than this: "You may go this way to and from your work at a reduced rate if you wish to do so and accept the terms on which the facility is granted." There was in this no obligation, and there arose in the workman no duty. If I apply the other test which I have suggested, the workman, when in the train, owed no duty to obey an order which the employers might there

give him. He was not at the place where the assigned work of his employment was to be done. There was no question of mining at this place, six miles from the pit's mouth, and it was only in respect of mining and acts incidental to mining that he owed obedience to his employer. I may add, however, in case it be thought material, that, in my judgment, the train was not in any relevent sense the employers' train. The travellers paid for their conveyance, and they paid the railway company for it, and this none the less because the sum they paid was reduced by the interposed machinery which resulted in their conveyance at a reduced rate and the payment was made, not by the traveller direct to the railway company, but was collected by the employer and applied by him in or towards the payment which the employer made in the aggregate to the railway company. Further, when the man desiring to avail himself of the train agreed to a deduction of 1s. 8d. from his wages, there arose, in my judgment, another contract which formed no part of his contract of service, although it was one which his contract of service entitled him to claim if he was minded so to do. For instance, suppose the case of a man who had worked in the colliery for a year, and had lived close by —and suppose that he changed his residence to Maryport, and then signed the necessary documents, and received the necessary identification ticket to enable him to use the train, that man's contract of service would remain unaffected. He would have made voluntarily a new contract, and it was under the latter contract that he would have been travelling, if he were in the train when the accident occurred.

It may be convenient to collect and say a few words upon some of the decisions which are reported upon the particular case of travelling to and from work by train. In *Davies* v. *Rhymney Iron Co., Ltd.* (5) the workman failed on the ground that he was availing himself of a facility, that he was not bound to travel by that route, that he owed no duty in the matter. I think that case is right. In *Nolan* v. *Porter & Sons* (20) the man was going to work as a labourer for a ship scaler—a ticket was given him to go by train to the dock railway station. He went by train, and fell into the dock on his way from the station. He failed on the ground that it was not obligatory upon him to go by train, and that his employment had not begun when he did so. That, I think, was right. In *Cremins* v. *Guest, Keen, and Nettlefold, Ltd.* (1) and *Walton* v. *Tredegar Iron and Coal Co.* (2) the claimants succeeded. I have given my reasons for thinking that those two decisions are wrong. In *Holmes* v. *Great Northern Rail. Co.* (4) the claim succeeded on the ground that the workman had been told to go, and that it was his duty to obey the order. In that case an implied contract was found to exist to carry the man to Hornsey, to find him work there, and to bring him back. On those findings the decision, no doubt, was right. The employment began when the man started to go. In *Lancashire and Yorkshire Rail. Co.* v. *Highley* (17) the man was sent by the railway company, and was obeying the order of the company, given by their foreman, to do so. His employment began when he started to go. The decision against him was on another ground. I sympathise with the Court of Appeal in regard to the difficulty in which they stood, looking at *Davies* v. *Rhymney Iron Co., Ltd.* (5) and *Cremins* v. *Guest, Keen, and Nettlefold, Ltd.* (1). Your Lordships enjoy a freedom which the Court of Appeal had not. For the reasons which I have given, I think that the workman in this case is not within the Act, and that this appeal succeeds.

LORD CARSON.—The state of the authorities by which the county court judge and the Court of Appeal felt themselves bound, has been fully discussed by your Lordships. I do not propose to pursue the subject further, but I should like to add this, that, ambiguous as the words of the statute are, I doubt if the authorities give any great assistance in elucidating them. Nor do I feel certain that any definition can be framed, apart from the particular facts of each case, which will be found to solve the meaning of the statute. In the present case, it certainly satisfies my mind, when I look into the facts, that I come to the conclusion that I

can find no evidence that the respondent was employed to travel by the train to which the accident occurred. When I look at the findings of the county court judge, I think that one realises the embarrassment which he felt in trying to work out a case upon the facts, and to bring the matter within *Cremins* v. *Guest, Keen, and Nettlefold, Ltd.* (1). The only finding of fact, however, which he makes is that the miners should have the right to travel to and fro, and then your Lordships will notice that, when he comes to his findings of law, he makes the statement that "it was obligatory upon this man, who lived six miles away, and had, when on the day shift, to be at his work at 5.45 a.m., to use the train if he wished to continue in the employer's service." I do not think that this is a finding of law at all. I think that it is a finding of fact, and I find no evidence whatever by which that finding can be supported. I should like to add one word as to a portion of the speech just delivered by LORD SHAW. I do not share the anxiety felt by him as to the result of the decision proposed by LORD BUCKMASTER in this case, nor do I feel myself in a position to join in his recommendations to the legislature. I have no information before me to justify a conclusion as to what would be the effect of putting an end to, or interfering with, voluntary arrangements for providing greater conveniences for workmen going to their employment. However, that does not appear to be a matter on which I am competent or bound to express my opinion. I agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *Blyth, Dutton, Hartley & Blyth*, for *Chapman & Baxter*, Whitehaven; *W. C. Crocker*, for *Wood, Lord & Sumner*, Whitehaven.

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

ROWLAND *v.* DIVALL

[COURT OF APPEAL (Bankes, Scrutton and Atkin, L.JJ.), June 11, 1923]

[Reported [1923] 2 K.B. 500; 92 L.J.K.B. 1041; 129 L.T. 757; 67 Sol. Jo. 703]

Sale of Goods—Condition—Implied condition of seller's right to sell—Breach—Buyer's right to recover purchase price—Possession by buyer of article sold for two months—Inability to return article owing to seller's lack of title—Article seized by police—Sale of Goods Act, 1893 (56 & 57 *Vict.*, *c.* 71), *s.* 12 (1).

In May, 1922, the defendant sold to the plaintiff, a motor-car dealer, a car for £334. The plantiff had the possession and use of the car until July when he sold it to R. In September the police took possession of the car upon the ground that it had been stolen before it came into the defendant's possession. In an action brought by the plaintiff against the defendant to recover the price which he had paid for the car as money paid for a consideration which had wholly failed,

Held: the defendant was in breach of the condition to be implied, under s. 12 (1) of the Sale of Goods Act, 1893, in a contract for the sale of goods, namely, that the seller had a right to sell the goods, and, therefore, the plaintiff was entitled to succeed, the fact that he had the use and possession of the car for some two months being immaterial, and his inability to return the car to the defendant being due to the fact that the defendant had not, and never had had, any right to the possession of the car.

Notes. Considered: *Chao* v. *British Traders and Shippers, Ltd.*, [1954] 1 All E.R. 779. Applied: *Butterworth* v. *Kingsway Motors, Ltd.*, [1954] 2 All E.R. 694. Referred to: *Comptoir d'Achat et de Vente du Boerenbond Belge S.A.* v. *Luis de Ridder, Limitada*, [1949] 1 All E.R. 269.

As to the implied condition of title in a contract of sale, see 29 HALSBURY'S LAWS (2nd Edn.) 57, 58; and for cases see 39 DIGEST 430–432, 681–683. For Sale of Goods Act, 1893, see 22 HALSBURY'S STATUTES (2nd Edn.) 985.

Cases referred to:

(1) *Taylor* v. *Hare* (1805), 1 Bos. & P.N.R. 260; 127 E.R. 461; 12 Digest (Repl.) 255, *1975*.

(2) *Hunt* v. *Silk* (1804), 5 East, 449; 2 Smith, K.B. 15; 102 E.R. 1142; 12 Digest (Repl.) 622, *4804*.

(3) *Lawes* v. *Purser* (1856), 6 E. & B. 930; 26 L.J.Q.B. 25; 28 L.T.O.S. 84; 3 Jur.N.S. 182; 5 W.R. 43; 119 E.R. 110; 12 Digest (Repl.) 255, *1976*.

Also referred to in argument:

Morley v. *Attenborough* (1849), 3 Exch. 500; 18 L.J.Ex. 148; 12 L.T.O.S. 532; 13 J.P. 427; 13 Jur. 282; 154 E.R. 943; 39 Digest 431, *602*.

Chapman v. *Speller* (1850), 14 Q.B. 621; 19 L.J.Q.B. 239; 15 L.T.O.S. 158; 14 Jur. 652; 117 E.R. 240; 39 Digest 430, *598*.

Eichholz v. *Bannister* (1864), 17 C.B.N.S. 708; 5 New Rep. 87; 34 L.J.C.P. 105; 11 Jur.N.S. 15; 13 W.R. 96; 144 E.R. 284; sub nom. *Eicoltz* v. *Bannister*, 12 L.T. 76; 39 Digest 431, *605*.

Bagueley v. *Hawley* (1867), L.R. 2 C.P. 625; 36 L.J.C.P. 328; 17 L.T. 116; 39 Digest 430, *600*.

Edwards v. *Pearson* (1890), 6 T.L.R. 220, C.A.; 39 Digest 431, *607*.

Davis v. *Bryan* (1827), 6 B. & C. 651; 9 Dow. & Ry.K.B. 726; 5 L.J.O.S.K.B. 237; 108 E.R. 591; 12 Digest (Repl.) 252, *1957*.

Young v. *Cole* (1837), 3 Bing.N.C. 724; 3 Hodg. 126; 4 Scott, 489; 6 L.J.C.P. 201; 1 Jur. 22; 132 E.R. 589; 12 Digest (Repl.) 258, *2001*.

Bannerman v. *White* (1861), 10 C.B.N.S. 844; 31 L.J.C.P. 28; 4 L.T. 740; 8 Jur.N.S. 282; 9 W.R. 784; 142 E.R. 685; 39 Digest 450, *776*.

Carter v. *Scargill* (1875), L.R. 10 Q.B. 564; 32 L.T. 694; 12 Digest (Repl.) 495, *3715*.

Appeal from an order of BRAY, J., made in an action tried by him without a jury. In April, 1922, the defendant bought a motor car from one, Garbett, and in May sold it to the plaintiff for £334 The plaintiff, who was a motor-car dealer, exhibited the car for sale in his showroom, and at the end of July he sold it to a Colonel Railsdon for £400. In September the police took possession of the car on the ground that it was a stolen car, and that Garbett, not being the owner, had no title to sell it, and the plaintiff thereupon refunded to Colonel Railsdon the £400 which he had paid for the car. The owner of the car had insured it against, inter alia, theft. A claim having been put forward, the insurance company paid the owner the value of the car, took over the car themselves, and then sold it to the plaintiff for £260. The plaintiff then brought the present action against the defendant to recover the price he had paid for the car, viz., £334, as being money paid for a consideration which had wholly failed. The defendant obtained leave to defend and paid £260 into court. BRAY, J., held that as the plaintiff and his purchaser had the use of the car for four months there had not been a total failure of consideration and gave judgment for the defendant. The plaintiff appealed.

Rayner Goddard, K.C., and *Tucker* for the plaintiff.

Doughty and *R. Jennings* for the defendant.

BANKES, L.J.—Whatever doubt there may have been as to the legal position of a person in the position of the plaintiff in this case was settled by the passing of the Sale of Goods Act, 1893, s. 12 of which provides that:

"In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is (1) an implied condition on the part of the seller that, in the case of a sale, he has a right to sell the goods."

Here the facts are shortly these. The plaintiff bought a motor car from the defendant and had it delivered to him in June, 1922. He remained in possession of it, exhibited it in his shop, and ultimately sold it, and it was not discovered that the car was a stolen car until September. He took possession of it at once, and in fact drove it from the place where he bought it to the place where he carried on his business at Blandford, and he actually had it in his possession for about three months. The car having been removed from his possession by the police, upon the ground that it was a stolen car, he buys it back from the insurance company with whom the real owner had insured it, but that seems to me to be quite an immaterial matter. After he had bought the car back he brought the present action to recover the price which he had originally paid for the car upon the ground of the total failure of consideration.

As I have said, it cannot any longer be disputed, since the passing of the Sale of Goods Act, that there was an implied condition on the part of the seller, the defendant, that he had a right to sell the car. Unless or until something happened to change that condition into a warranty, it seems to me that the plaintiff must have the right to set up that he is entitled to the recovery of the purchase money on the ground of failure of consideration. The Sale of Goods Act itself indicates how the condition may be changed into a warranty, for s. 53 provides that:

"Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may . . . (b) maintain an action against the seller for damages for the breach of warranty."

Counsel for the defendant, as I understand his argument, contends that this is a case in which the buyer is forced to treat the condition as a warranty because he had the use of the car during the period I have mentioned, and he referred to several authorities in support of that contention.

When these authorities are looked into, I think it appears that in every one of them the buyer got some part of what he had contracted either to purchase or procure. In *Taylor* v. *Hare* (1) it was a question as to the right of the plaintiff to recover back money, which he had paid for the use of a patent, upon the ground of total failure of consideration, and it was quite true that the patent was a void patent, and, therefore, the plaintiff obtained no benefit under it, but the court pointed out that for the sale of a patent the principle of caveat emptor applied, because the vendor did not warrant the patent, and the purchaser and the vendor were, as it were, joint adventurers in relation to the patent. In those circumstances it was said by HEATH, J., in language which was applicable to that case, but which I think is too broad to be employed in the sense in which counsel for the defendant contends, that "There never has been a case, and there never will be, in which a plaintiff, having received benefit from a thing which has afterwards been recovered from him, has been allowed to maintain an action for the consideration originally paid." I understand that in that case the plaintiff had received some part of what he paid. A similar question is raised in *Hunt* v. *Silk* (2), where I think the language of LORD ELLENBOROUGH, C.J., is more correct than that of HEATH, J. He said (5 East at p. 452):

"Now where a contract is to be rescinded at all, it must be rescinded in toto, and the parties put in status quo. But here was an intermediate occupation, a part execution of the agreement, which was incapable of being rescinded."

That points to the fact that in the learned judge's view there was not a total failure of consideration; the party complaining had received part of what he bargained for. The same is true, I think, in *Lawes* v. *Purser* (3), where again it

A was quite plain that the court treated the case as one in which the party complaining had received part of what he agreed to acquire.

In my opinion, that cannot possibly be said here. The plaintiff received nothing, no portion of what he had agreed to buy. It is quite true that a car was handed over to him, but the person who handed it over to him had no right to hand it over to him and no title to it. In these circumstances the use by the plaintiff to the B extent to which he had used it seems to me to be quite immaterial in considering whether anything was done which entitles the defendant to say that the condition has been waived or converted into a warranty. In these circumstances I think that the right of the plaintiff to recover the whole of the purchase money remains, and that the view taken by the learned judge that he should sue in damages was not justified. The appeal must, therefore, be allowed and judgment entered for the C plaintiff with costs here and below.

SCRUTTON, L.J.—The discussion which this case has received in the course of the argument has made it reasonably clear to me that the learned judge below came to an erroneous conclusion. The facts were these. The plaintiff purchased from the defendant a motor car for £334. He drove it from Brighton, where he D had bought it, to the place where he had a garage, painted it, and put it under shelter, and it was there for about two months. He then sold it to a local resident who kept it another month or so. Then came the police who said "This is the stolen car for which we have been looking." It appears that it had been stolen before the sale by the defendant to the plaintiff, and that, consequently, the defendant had no title which he could confer on the plaintiff. In these circum- E stances the plaintiff sued the defendant for the price he paid for the car as on a total failure of consideration.

Before the passing of the Sale of Goods Act there was a good deal of confusion in the authorities as to the exact nature, if any, of the contract of the vendor with regard to his title to sell. It has ranged from the maximum caveat emptor to what was supposed to be the real rule that the vendor did warrant in title. Gradu- F ally a large number of exceptions crept in, and at last, the exception became the rule, the rule being that the vendor did warrant to have a title to what he purported to sell, except in special cases, such as that of the sheriff who does not warrant the title. Then came the Sale of Goods Act, which re-enacted the rule as a condition and not as a warranty. Section 12 of the Sale of Goods Act in express terms says that there shall be "an implied condition on the part of the seller that in the G case of a sale he has a right to sell the goods."

When once one gets a condition, and that condition is broken, the contract can be rescinded, and with the rescission of the contract, one can demand the return of the purchase money. Treating it as a condition, unless the purchaser with knowledge of the facts has held on to the bargain so as to waive the condition and will himself be relying on his claim for breach of warranty in damages, there H appears to be no difficulty whatever in recovering the purchase money. But counsel for the defendant puts the argument which, when properly carried out, seems to be perfectly reasonable. He says: "You cannot rescind because you cannot return the car." The purchaser says: "That is exactly what I am complaining of, that I cannot return the car, because you were not the owner, and had no right to sell it to me. You make a virtue of your breach of contract and I say: 'You, the purchaser, cannot return the car because I was not the true owner and the true owner has taken it, and, therefore, you cannot get the price back from me.' " That seems a most admirable doctrine, but it is quite inconsistent with the implied condition provided by the Sale of Goods Act. That Act provides that the vendor shall promise as a condition that he has a title to the car. The complaint in the present case is that the defendant had no title to the car, but sold it with a title to the legal ownership entitling to legal possession. He has not given that; the plaintiff cannot restore what was to be sold to him because he was never given the legal title and legal right to possession, and it would be

perfectly absurd to apply the rule about restitutio to it. A breach like this is a breach of a condition that the seller has a right to sell the goods. I do not wish to say anything about the rule that in many cases you cannot obtain return of the money unless you can restore the subject-matter. There are a large number of cases on the subject, and some of them have been cited. I have had to look into them, and some of them are not very easy to reconcile with others. Some of them make it highly probable that a certain amount of deterioration of the subject-matter is not sufficient to remove the right to receive the purchase money.

However, I do not think it necessary to refer to those cases. It certainly seems to me that in a case of rescission for the breach of a condition that the seller has a right to sell the goods, it cannot be that the purchaser is deprived of his right to get back the purchase money because he cannot restore the goods which, from the nature of the transaction, are not the goods of the seller at all, and which the seller has, therefore, no right to in any circumstances. For these reasons it seems to me, with deference to the learned judge below, that he came to a wrong conclusion and that the plaintiff is entitled to recover the whole of the purchase money, as and for the total failure of the consideration, inasmuch as the seller did not give that which he contracted to give, namely, the legal ownership of the car and the legal right to possession of it.

ATKIN, L.J.—I agree. It seems to me that in this case there has been a total failure of consideration, that is to say, that the buyer has not got that which he paid his price for. He paid the money in order that he might have the property, and he has not got it. It is true that the seller handed over to him the de facto possession, but the seller had not the right to possession, and could not give to the buyer the right to possession, so that the buyer, during the time he had this car in his possession, had no right to possession and was at all times liable to the true owner of the car in damages for the conversion of the car. There is no doubt that what he had the right to get was the property in the car because that is provided for by s. 12 (1) of the Sale of Goods Act, which expressly provides that in every contract of sale there is an implied condition on the part of the seller that he has the right to sell the goods, and the only difficulty that I have in the case is that arising from the wording of s. 11 (1) (c), which provides that:

> "Where a contract of sale is not severable, and the buyer has accepted the goods . . . the breach of any conditions to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect."

It is said here, where there was a contract of sale which was not severable and the buyer had accepted the goods, that, owing to the contract being for specific goods, the claim to the property had passed to the buyer. If that be so, the Act seems to say that the breach of any condition by the seller can only be treated as a breach of warranty. But I think the true answer to that is that a seller cannot sell the goods which are not his property. I think that the right view is to say that there was a term of the contract implied, namely, that the condition could be treated as a ground for rejecting the goods, and for repudiation under the contract. I think that would be the true implied term. One difficulty in actually reading the Sale of Goods Act seems to be that in this case there must be a right to reject, and not merely a right to reject, but a right to sue for the price upon failure of consideration for the sale, and also that there is no obligation on the part of the buyer to return the goods, for, ex hypothesi, the seller has no good title to receive the goods back. On the facts of this case—and on the facts of most cases—the trouble arises because the goods have been taken from the buyer because some third person has the right to take them from him. In these circumstances can it make any difference that the buyer has received and has used the goods before he has found out that there was a breach of the condition? To my mind, it makes no difference at all. The buyer accepted them upon the representation by the seller

A that he had the right to deal with the goods, but, inasmuch as the seller had no right and could convey to the buyer no right to use the goods at all, the seller cannot say: "You have got a benefit under the contract which you have not become entitled to, and that must be taken into account." It seems to me that in these circumstances the buyer has not received any part of that which he is entitled to receive. He has not received the goods, he has not received the right to possession B of the goods, and in those circumstances there has been a complete failure of consideration. I think, therefore, the plaintiff should succeed in this action.

Appeal allowed.

Solicitors: *Peacock & Goddard* for *Luff, Raymond & Blanchard*, Blandford; *J. C. Buckwell*, Brighton.

C [*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

D

HARDY & CO. *v.* HILLERNS AND FOWLER

[COURT OF APPEAL (Bankes, Atkin and Younger, L.JJ.) May 15, 1923]

[Reported [1923] 2 K.B. 490; 92 L.J.K.B. 930; 129 L.T. 674; 39 T.L.R. 547; 67 Sol. Jo. 618; 29 Com. Cas. 30]

E *Sale of Goods—Rejection—Act inconsistent with ownership of sellers—Goods dispatched to sub-buyers—Stoppage in transitu—Sale of Goods Act*, 1893 (56 *& 57 Vict., c.* 71), *ss.* 34, 35.

By a c.i.f. contract dated Mar. 1, 1922, the sellers agreed to sell and the buyers to buy a quantity of wheat to be shipped from a foreign port to Hull. F On arrival of the ship on Mar. 20 the buyers took up the shipping documents, and on Mar. 21 the ship began to discharge the wheat and the buyers to take delivery. On that day the buyers re-sold and dispatched part of the wheat to sub-purchasers, and then and on the following day took samples which showed that the wheat was not of the kind contracted for, being of an inferior quality. They stopped in transitu the wheat dispatched to sub-purchasers and caused it G to be returned to Hull, and on Mar. 23, before a reasonable time for examining the wheat had elapsed, they notified the sellers that they rejected the whole cargo.

Held: the provisions of s. 35 of the Sale of Goods Act, 1893, imported a qualification on those of s. 34, and an intimation of acceptance within s. 35 might be made before the buyers had had the reasonable opportunity of H examining the goods given by s. 34; the transfer of possession to sub-purchasers was an act inconsistent with the ownership of the sellers within s. 35, and the fact that the buyers had been able to regain possession was immaterial; and, therefore, the buyers had lost the right to reject the goods and must be satisfied with the remedy of damages.

Decision of GREER, J., [1923] 1 K.B. 658, affirmed.

I **Notes.** Considered: *Chao* v. *British Traders and Shippers, Ltd.*, [1954] 1 All E.R. 779. Referred to: *Barker (Junior)* v. *Agius* (1927), 43 T.L.R. 751; *E. & S. Ruben, Ltd.* v. *Faire Bros. & Co., Ltd.*, [1949] 1 All E.R. 215.

As to right of buyer to reject goods under a c.i.f. contract, see 29 HALSBURY'S LAWS (2nd Edn.) 224; and for cases see 39 DIGEST 586 et seq. For the Sale of Goods Act, 1893, see 22 HALSBURY'S STATUTES (2nd Edn.) 985.

Cases referred to:

(1) *Heilbutt* v. *Hickson* (1872), L.R. 7 C.P. 438; 41 L.J.C.P. 228; 27 L.T. 336; 20 W.R. 1005; 39 Digest 591, *1913.*

(2) *Molling & Co.* v. *Dean & Sons, Ltd.* (1901), 18 T.L.R. 217, D.C.; 39 Digest 585, *1870.* A

Also referred to in argument:

Perkins v. *Bell*, [1893] 1 Q.B. 193; 62 L.J.Q.B. 91; 67 L.T. 792; 41 W.R. 195; 9 T.L.R. 147; 37 Sol. Jo. 130; 4 R. 212, C.A.; 39 Digest 592, *1916.*

Appeal by the buyers from an order of GREER, J., on a Special Case stated by an arbitrator. B

By a contract dated Mar. 1, 1922, made between Hardy & Co. (London) (the sellers) and Messrs. Hillerns and Fowler (the buyers) the sellers agreed to sell to the buyers 2,365 tons of Rosario and/or Santa Fé wheat, shipped per the steamship *Heathmore* from a port or ports in the Argentine Republic and/or Uruguay. The buyers took up the shipping documents in respect of the wheat on Mar. 20, 1922. The bills of lading described the goods as a C

"quantity of wheat . . . shipped in good order and condition on board the steamship *Heathmore* now lying in the port of Concepcion del Uruguay."

The *Heathmore* arrived at Hull on Mar. 18, 1922, and reported at the Customs on Mar. 20. On Mar. 21, 1922, the buyers re-sold 200 quarters and 100 quarters of the wheat to purchasers at Barnsley and Nottingham. The wheat was discharged in bulk into and carried in lighters to the North-Eastern Rail. Co.'s wharf and there bagged and dispatched by rail to the sub-purchasers. On the same day the buyers forwarded 500 quarters of the wheat to purchasers at Southwell by a vessel provided by the Trent Navigation Co. On Mar. 21 and Mar. 22 the buyers took samples of the wheat discharged ex the steamship, and on Mar. 23 they notified the sellers that they rejected the whole cargo of wheat on the ground that it was not Rosario or Santa Fé wheat but Entre Rios wheat, which is of an inferior quality. They also stopped all parcels of wheat which were still in transit to sub-purchasers and caused them to be returned to Hull and stored there. The sellers disputed the claim of the buyers to reject the wheat, and the dispute was referred to arbitration. D E

The arbitrators found that the samples of the wheat taken by the buyers on Mar. 21 were representative only of a small proportion of the contract quantity, and that the buyers acted reasonably in delaying a decision until further samples were obtained on the following day. They further found that the buyers acted reasonably in not giving notice of rejection before Mar. 23, and that such notice was given with reasonable promptitude. By their award they awarded that the buyers were entitled to reject the wheat on Mar. 23, 1922, and that they were entitled to recover from the sellers £30,479 19s. 5d. paid by them to the sellers in respect thereof with interest. They further awarded that, if the court should be of opinion that the buyers were not entitled to reject the wheat, the sellers should pay to the buyers the sum of £543 2s. 10d., the difference between the market value of the wheat at the date of delivery, and the market value of Rosario or Santa Fé wheat at the same date. The Sale of Goods Act, 1893: F G H

"Section 34. When goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

Section 35. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him; and he does any act in relation to them inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them." I

GREER, J., held that the buyers were not entitled to reject the wheat since by re-selling a portion of it to sub-purchasers they had committed an act which was inconsistent with the ownership of the sellers within s. 35 of the Sale of Goods Act,

1893, and had thereby lost the right to reject, and he upheld the award in the last paragraph of the Case of the arbitrators. The buyers appealed.

Le Quesne for the buyers.

Leck, K.C., and *Van Breda*, for the sellers, were not called on to argue.

BANKES, L.J.—This is an appeal from an order of GREER, J. Counsel for the buyers, who has argued this case with great clearness, has put several points before the court, and the first one is that the arbitration tribunal, or the appeal tribunal, have really stated the sellers out of court on the facts. With respect to them I may say that they have done their best in that direction, but I do not think that the statement that counsel relied on is a statement of fact. What the Case states is this:

> "Having taken upon ourselves the burden of the said reference and having heard the parties and duly extended our time for making our award, we find, so far as they consist of matters of fact, and we hold so far as they consist of matters of law, as follows"

then included in what follows is the statement which counsel relies on. The statement is this:

> "By so dispatching the said parcels to Barnsley and Southwell, the buyers did not waive their right of rejection in the event of the goods being found not to be goods of the contract description, nor was the said despatch of the parcels inconsistent with the subsequent exercise by the buyers of their right to reject."

In my opinion the last statement is not a statement of fact at all. It may be a statement of mixed fact and law, but it certainly, to a large extent, is a question of law whether what the buyers did here was inconsistent with the subsequent exercise by them of their right to reject.

I pass, therefore, to consider what the question of law as between these parties is, and whether GREER, J., has arrived at a right conclusion on that point. That depends on the construction to be placed on ss. 34 and 35 of the Sale of Goods Act, 1893. [His Lordship stated the facts and continued:] On these facts, the sellers contended that under the terms of s. 35 of the Sale of Goods Act the buyers must be deemed to have accepted the goods and therefore had lost their right to reject them in the event of the wheat proving not to be in accordance with the contract. The arbitrators found that the wheat was not in accordance with the contract, and therefore, if nothing else had happened, the buyers would have had the right to reject. The question now arises, on the construction of the contract, whether on these facts they have lost their right to reject and must be satisfied with their remedy in damages. The construction which GREER, J., has placed on ss. 34 and 35 of the Sale of Goods Act is one with which I entirely agree (see [1923] 1 K.B. at p. 663). My view is this. Section 34 gives a buyer, to whom goods were delivered and who has not previously examined them, a reasonable opportunity of examination before he shall be deemed to have accepted them. This is a case, according to the findings of the arbitrators, in which, undoubtedly, a certain number of days after the arrival of the vessel and the commencement of the discharge would be allowed as a reasonable opportunity to enable the buyers to examine the cargo. It may be from the difficulty of experts deciding upon small samples, or of getting what is a satisfactory or complete sample of a quantity of wheat such as was within this vessel, until some substantial quantities had been discharged from each hold—it is not necessary to go into the reasons. I accept the findings to the fullest extent that certainly the buyers ought to be allowed until, say, Mar. 22, as a reasonable opportunity of examining this wheat to see whether or not they should reject it.

Section 35 seems to me to import a qualification on s. 34, and provides for possibilities which may happen in the interval, which the buyer has to give him the reasonable opportunity for examination. It may be, according to s. 35, that

during that reasonable time the buyer may take some steps which are to be deemed to be an acceptance of the goods, although the reasonable opportunity of examination may not have expired; and s. 35 deals with three separate states of fact. I think it may be expressed in this way: One is an express acceptance of the goods during a reasonable time; another is a dealing with the goods which the statute treats as an implied acceptance; and the third is the doing nothing within the reasonable time, which is to be deemed to be an intimation that he accepts them. The words of s. 35 are these:

> "The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, [the express acceptance] or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller [that seems to me to be the implied acceptance] or when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them."

That seems to me to be the failure to take action within a reasonable time, which is to be deemed to be the acceptance. GREER, J., has taken that view of the proper construction of these sections, and he has gone further and said that, in his opinion, taking delivery of a portion of the wheat and delivering it to the sub-purchaser is an act which is inconsistent with the ownership of the seller; and it is quite immaterial that the buyer managed to persuade or procure the sub-purchasers to return the wheat.

Then counsel for the buyers argues that the language of s. 35 has no application to this particular case, because this is a c.i.f. contract, and, therefore, when the buyers took up the documents, the property in the goods passed to them, and these sub-sales and deliveries to the sub-purchasers were acts which were done before the attempted rejection, and so at a time when it was impossible to speak of these particular acts being inconsistent with the ownership of the sellers, because at that particular time there was no question that the goods were the property of the buyers. With submission to that very ingenious argument, it seems to me that that is putting, or attempting to put, a meaning on the language of the section which it does not reasonably bear, because I read the language of the section where it speaks of doing any act in relation to the goods which is inconsistent with the ownership of the seller, as meaning an act which is inconsistent with the seller being the owner at the material date; and the material date for that purpose is the date of the attempted rejection and not the date of the sub-sale or delivery to the sub-buyer.

For those reasons I come to the conclusion that the view taken by GREER, J., was right. With regard to the authorities, *Heilbutt* v. *Hickson* (1) does not seem to touch this point, for the material question there was the proper place of inspection. In *Molling & Co.* v. *Dean & Sons, Ltd.* (2) the grounds on which the court proceeded are not clear. It may be that there were facts in that case which do not appear in the report, and which would have explained the decision. For these reasons I think the appeal must fail and must be dismissed with costs.

ATKIN, L.J.—This case raises an important question as to the relation of s. 34 (1) of the Act to s. 35; a matter which, I think, has been raised before, but has not been a matter of definite decision. A possible view of those two sections is that s. 34 limits the provisions of s. 35. Whereas s. 35 says the buyer is deemed to have accepted the goods in certain circumstances, that must be read with s. 34, but that he is not to be deemed to have accepted them unless he has had reasonable time and opportunity for examining them. That seems to have been the view taken by the learned editors of BENJAMIN ON SALE in the last two editions (5th and 6th Edns.). At p. 857 of the sixth edition it is said:

> "Section 35 contemplates a later stage of the transaction than s. 34 (1). Under s. 34 (1) where the buyer has not previously examined the goods, he is not deemed to have accepted them until he has been able to examine them.

A By s. 35 it is necessary to prove some further fact in order to show that the buyer has accepted them."

The "some further fact" would seem to presume that it was necessary to prove he had the reasonable opportunity for examining them, and also that he has performed the act mentioned in s. 35. That is a possible view, but I think it is B incorrect. In fact it was not so argued before us, and I think the reason is obvious, and is that given by GREER, J. Looking at s. 35, one of the acts upon the happening of which the buyer is deemed to have accepted the goods is that the buyer intimates to the seller that he has accepted them; and I think it plain that such an intimation of acceptance may be made before the buyer has had a reasonable opportunity of examining them; and if such an intimation is made, C then it appears to me that s. 35 operates, and he is deemed to have accepted them. I think in the same way, when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, it is a clause which may come into operation before the reasonable opportunity for examining them has expired; as, for instance, when a man, having had goods delivered to him, turns them at once into his mill and uses them. In those cir- D cumstances it appears to me plain that he has done an act inconsistent with the ownership of the seller; therefore it appears to me to be by no means conclusive, as suggested in the argument for the buyers in this case, that the opportunity for examination had not expired before the acts done in this particular case. I entertain no doubt at all that the tribunal of appeal have found on the facts that in this case the buyer had not had a reasonable opportunity to examine the goods until a E date which is after the act relied on by the seller as being inconsistent with his ownership. Therefore we have to face the problem, as it seems to me, whether or not the acts which have been done by the buyer, though they were done before the buyer had a reasonable opportunity of examining the goods, are inconsistent with the ownership of the seller. If they are, it appears to me that the buyer must be deemed to have accepted them.

F I should like to point out, in reference to that provision, that all the words of the section must be given effect to, and those words are: "When the goods have been delivered to him"—that is, the buyer—"and he does"—that means, after such delivery—"any act in relation to them which is inconsistent with the ownership of the seller"; in this particular case it is claimed that the goods had been delivered to the buyer; the buyer had intended to take delivery of them and G in fact he did take delivery of the bulk, as is plain from the finding of the arbitrators. He took delivery of them at separate days; he took delivery of about 1,800 quarters on Mar. 21—the first day on which delivery of wheat was made. On that day the buyer forwarded to sub-purchasers, to whom on that day he had sold these particular goods, 100 quarters to one sub-buyer, 200 quarters to another, and 500 quarters to another and he took the goods on craft or on rail; some of them H were bagged, and they were so dispatched to the sub-purchaser. I have no doubt at all that by doing that, as the judge has found, he parted with the property in those goods, and transferred, and meant to transfer, the property to his sub-buyers. That act of his appears to me to be inconsistent with the ownership of the seller. What is the precise position of the property in a case of this kind, where the finding is that the goods are not in accordance with the contract, it is perhaps I not necessary finally to determine. I think that the proper view is that, if the goods are not in accordance with the contract, the property does not in fact pass to the purchaser upon taking up the documents, if he has not at that time an opportunity of knowing whether the goods are or are not in accordance with his contract. Or it may be that the property passes conditionally, subject to being re-vested in the seller when the person who has taken up the documents exercises his undoubted right to reject. It does not seem to me to matter very much for the purpose of this case. But there can be no doubt that after delivery is taken under the documents, there is a period during which the buyer may hold the

possession in a position which is neutral as to the rights of property, and as long as he retains the possession under that footing, he quite plainly has the right to reject. But if he transfers the possession after it has in fact been handed to him, in circumstances inconsistent either with the goods remaining at that time the property of the seller, or inconsistent with the goods being eventually restored to the seller, then it appears to me that he has done that which is inconsistent with the ownership of the seller; and it seems to me quite irrelevant to the fact that he has done such an act that the sub-purchaser from him may, either by agreement or otherwise, or under the rights of the contracts with him, thereafter return the goods to him; the act that he has done seems to me inconsistent with the ownership of the seller.

Those are the facts as found, and though the arbitration tribunal, by their finding, have purported to find what is, I think, a matter of law, because they purport to deal with the matter of law as well as fact—that the buyers were not precluded from rejecting—it appears to me, when the facts are ascertained from their own finding, that thereafter the Act lays down what the mutual rights of the parties are and confers no further right to reject. It is not an uncommon matter in business for buyers to take risks and to act in such a way as to preclude themselves from rejecting goods which they clearly would have rejected if they had availed themselves of all the opportunities of inspection before they chose to do business and re-sell the goods which they had bought. I think that is the position in this case. Having lost the right to reject, I think the buyers must be content with their claim in damages. I think this appeal must be dismissed with costs.

YOUNGER, L.J.—I agree. I do not doubt that the learned judge and my Lords have correctly defined and expounded the legal rights of the parties in this case as those rights are fixed by the Sale of Goods Act; but I cannot myself refrain from expressing some regret that the measure of right set by that Act falls below the standard set, not only by the two trade arbitration tribunals who have dealt with this case, but also below the standard which would, I think, undoubtedly be set in a court of equity if this had been an application by the buyers to rescind this contract, and that court had been free to determine on the facts found by the arbitrators the rights of the parties in accordance with its own principles.

Appeal dismissed.

Solicitors: *Pritchards*, for *Andrew M. Jackson & Co.*, Hull; *Richards & Butler.*

[*Reported by* W. C. Sandford, Esq., *Barrister-at-Law.*]

EUSTACE *v.* EUSTACE

[Court of Appeal (Sir Henry Duke, P., Warrington and Atkin, L.JJ.), June 25, 26, July 23, 1923]

[Reported [1924] P. 45; 93 L.J.P. 28; 130 L.T. 79; 39 T.L.R. 687; 67 Sol. Jo. 807]

Divorce—Judicial separation—Jurisdiction—Respondent resident abroad.

The Divorce Court has jurisdiction to pronounce a decree of judicial separation where the parties are domiciled within the jurisdiction at the commencement of the suit even though the respondent is not resident within the jurisdiction.

Graham v. *Graham* (1), [1923] P. 31, distinguished.

Notes. Referred to: *Wall* v. *Wall*, [1949] 2 All E.R. 927.

As to the jurisdiction of the Divorce Court based on residence, see 7 Halsbury's Laws (3rd Edn.) 105, 106; and for cases see 11 Digest (Repl.) 475, 476.

Cases referred to:

(1) *Graham* v. *Graham*, [1923] P. 31; 92 L.J.P. 26; 128 L.T. 639; 39 T.L.R. 139; 67 Sol. Jo. 316; 11 Digest (Repl.) 475, *1054*.

(2) *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517; 64 L.J.P.C. 97; 72 L.T. 873; 11 T.L.R. 481; 11 R. 527, P.C.; 11 Digest (Repl.) 468, *1011*.

(3) *Bater* v. *Bater*, [1906] P. 209; 75 L.J.P. 60; 94 L.T. 835; 22 T.L.R. 408; 50 Sol. Jo. 389, C.A.; 11 Digest (Repl.) 482, *1087*.

(4) *Udny* v. *Udny* (1869), L.R. 1 Sc. & Div. 441, H.L.; 11 Digest (Repl.) 326, *22*.

(5) *Bell* v. *Kennedy* (1868), L.R. 1 Sc. & Div. 307, H.L.; 11 Digest (Repl.) 329, *39*.

(6) *Yelverton* v. *Yelverton* (1859), 1 Sw. & Tr. 574; Sea. & Sm. 49; 29 L.J.P. & M. 34; 1 L.T. 194; 6 Jur.N.S. 24; 8 W.R. 134; 164 E.R. 866; 11 Digest (Repl.) 471, *1025*.

(7) *Christian* v. *Christian* (1897), 67 L.J.P. 18; 78 L.T. 86; 11 Digest (Repl.) 548, *1556*.

(8) *Firebrace* v. *Firebrace* (1878), 4 P.D. 63; 47 L.J.P.C. 41; 39 L.T. 94; 26 W.R. 617; 11 Digest (Repl.) 342, *127*.

(9) *Dicks* v. *Dicks*, [1899] P. 275; 68 L.J.P. 118; 81 L.T. 462; 48 W.R. 302; 15 T.L.R. 482; 27 Digest (Repl.) 469, *4038*.

(10) *Bateman* v. *Bateman* (*otherwise Harrison*) (1898), 78 L.T. 472; 27 Digest (Repl.) 689, *6606*.

(11) *Perrin* v. *Perrin*, *Powell* v. *Powell*, [1914] P. 135; 83 L.J.P. 69; 111 L.T. 335; 30 T.L.R. 497; 58 Sol. Jo. 513; 27 Digest (Repl.) 469, *4037*.

(12) *Penny* v. *Penny* (1922), November, unreported.

(13) *Anghinelli* v. *Anghinelli*, [1918] P. 247; 87 L.J.P. 175; 119 L.T. 227; 34 T.L.R. 438; 62 Sol. Jo. 548, C.A.; 11 Digest (Repl.) 475, *1053*.

Also referred to in argument:

Rush v. *Rush*, *Bailey and Pimenta*, [1920] P. 242; 89 L.J.P. 129; 122 L.T. 792; 36 T.L.R. 302; 64 Sol. Jo. 323, C.A.; 11 Digest (Repl.) 474, *1050*.

Armytage v. *Armytage*, [1898] P. 178; 67 L.J.P. 90; 78 L.T. 689; 14 T.L.R. 480; 11 Digest (Repl.) 475, *1052*.

Wilson v. *Wilson* (1872), L.R. 2 P. & D. 435; 41 L.J.P. & M. 74; 27 L.T. 351; 20 W.R. 891; 11 Digest (Repl.) 468, *1010*.

Appeal from the order of Horridge, J., refusing to grant to the petitioner, Gertrude Annie Frances Eustace, a decree of judicial separation.

The petition stated that the respondent, Francis Rowland Eustace, was domiciled in England and in her evidence before Horridge, J., the petitioner said she was

married to the respondent in Edinburgh on June 18, 1915. The respondent was then a lieutenant in the Lothian and Border Horse and he had been learning the business of a land agent in Scotland. He was now managing the estates in Ireland of his father, Major-General Sir Francis Eustace. In 1917 she joined her husband at Bedford, where he was stationed, and she stayed with him there for about two months. In 1920 the respondent told her that he was negotiating with a Mr. Coldwell for a partnership in a farm known as Leighton, Ironbridge, in Shropshire. He went to stay with Mr. and Mrs. Coldwell, and, becoming infatuated with Mrs. Coldwell, went to Ireland with her and had not since returned. On May 22, 1922, the petitioner obtained a decree for restitution of conjugal rights, and that decree was served on the respondent in Ireland on June 3, 1922. The respondent had not complied with the decree, and a petition was presented for a judicial separation on the ground of his desertion in failing to comply with the decree. HORRIDGE, J., held that he had no jurisdiction to pronounce a decree of judicial separation because at the institution of the suit the respondent was not resident in England, and that he felt himself bound by his own decision in *Graham* v. *Graham* (1) to dismiss the petition. The petitioner appealed.

Cotes-Preedy for the petitioner.

The respondent was not represented.

SIR HENRY DUKE, P. [after stating the facts, and that the petitioner had alleged domicil in England, continued:] The suit was dismissed by HORRIDGE, J., on the ground of want of jurisdiction. The learned judge summed up the view of the law upon which he acted in the statement:

> "Divorce depends upon domicil and not residence; judicial separation depends upon residence only."

The learned judge held himself bound by his earlier decision in *Graham* v. *Graham* (1). The facts in the present case differ from the facts in *Graham* v. *Graham* (1) because in that case there was neither domicil nor residence of the parties on which to found jurisdiction; but the reasons of the judgment as reported are in effect those upon which the judge declined jurisdiction here. Counsel for the petitioner pointed out upon the hearing of this appeal some anomalous consequences which would seem to follow from the rejection of the petitioner's suit for want of jurisdiction. Upon proof of the respondent's adultery as well as desertion she would have been entitled, at her choice, as was said, to a decree of dissolution of marriage or of judicial separation. She would certainly have been entitled to a decree of dissolution. The Matrimonial Causes Act, 1884, when construed with the Matrimonial Causes Act, 1857, empowers a wife deserted by her husband to claim judicial separation [see now Matrimonial Causes Act, 1950, s. 14], and it does not appear that there is any other but an English forum in which she can obtain that relief, so that so long as the respondent remains abroad she cannot proceed.

These are, no doubt, practical considerations, though they do not materially help in the decision of the plaintiff's appeal. This depends in substance upon the construction of the clauses of the Matrimonial Causes Act, 1857, which created the court for divorce and matrimonial causes, and granted to it the jurisdiction which, under the Judicature Act, was transferred to the Probate, Divorce, and Admiralty Division. The argument in favour of the limitation of jurisdiction in respect of judicial separation to cases in which the respondent is resident in England is founded in the main upon two facts—first, that the ecclesiastical courts could only grant decrees of divorce a mensa et thoro in such cases, and, secondly, that this jurisdiction was transferred to the newly established court by the Act of 1857, with a direction that in suits and proceedings other than proceedings for divorce the principles and rules upon which the ecclesiastical courts had acted, subject to certain statutory qualifications, should continue to be observed. To examine in detail the numerous cases which establish the limited nature of the

jurisdiction of the ecclesiastical courts is unnecessary. Every ecclesiastical court in England was restricted by the common law to its prescribed area of operation. Moreover, by the Statute of Citations (23 Hen. 8, c. 9), it was enacted for the prevention of abuses, which it was said had grown up in usurpation of power in the provincial courts that

> "no person shall be from henceforth cited or summoned . . . to appear before any . . . judge spiritual out of the diocese or peculiar jurisdiction where the person . . . shall be inhabiting and dwelling at the time of the awarding or going forth of the same citation or summons."

No ecclesiastical court in England, therefore, could have entertained a suit of the present petitioner for a decree of divorce a mensa et thoro, while her husband was resident in Ireland, and this is demonstrated in various decisions of dates before and since the year 1857 which were cited in argument in *Graham* v. *Graham* (1). Apart from *Graham* v. *Graham* (1) there was stated to us to be no direct authority for the proposition there enunciated, though the principles involved have been often discussed.

It is advisable, however, before examining the cases cited in *Graham* v. *Graham* (1) or the other authorities bearing upon the matter to see what are the express provisions of the Matrimonial Causes Act, 1857. That Act established in this country a new court of record to which it transferred the jurisdiction in matrimonial causes which had theretofore been exercised by the ecclesiastical tribunals, and to which it also gave certain other and new jurisdiction. The matters subject to the power of the court being thus determined, the statute states with absolute generality who are the persons over whom, in respect of the ascertained subjects, the court shall have authority. A decree of dissolution of marriage under s. 27 may be obtained "by any husband" or "by any wife" having in fact the grounds of complaint upon which dissolution of marriage may be decreed. A sentence of judicial separation may, under ss. 16 and 17 be obtained by "the husband" or "the wife" having the statutory grounds of complaint, and by "either husband or wife."

Legal principles now well ascertained are applied to determine generally the limitations which are imposed by law upon the jurisdiction given by a State to its domestic tribunals. The judgments in *Le Mesurier* v. *Le Mesurier* (2) and *Bater* v. *Bater* (3) show, for example, with regard to divorce that the jurisdiction of the Probate, Divorce, and Admiralty Division, is, as the jurisdiction of the court for matrimonial causes was, limited in respect of persons to those domiciled in England. The governing principle which determines what persons are subject to the jurisdiction of His Majesty's courts in other matrimonial causes is, I think, that stated in the House of Lords in *Udny* v. *Udny* (4) and in *Bell* v. *Kennedy* (5). Broadly, it is this, that questions which arise with regard to the personal rights and relations are properly determinable by the courts of the domicil of the party. LORD HATHERLY in *Udny* v. *Udny* (4) (L.R. 1 Sc. & Div. at p. 449) says that by domicil the party acquires a certain status civilis which subjects him and his property to the municipal jurisdiction of his place of domicil. LORD CHELMSFORD speaks of domicil as identifying the municipal jurisdiction to which recourse is had for the purpose of determining any question which may arise as to a party's personal rights and relations, and LORD WESTBURY expressed his opinion to the like effect in *Bell* v. *Kennedy* (5), in which he said:

> "The law of the country of the domicil of a person is attached to his person, and remains attached wherever he goes until he ceases to be so domiciled."

The legislature having, by the Matrimonial Causes Act, 1857, invested the court in question with what is primâ facie a general jurisdiction in certain matters of personal status and personal relationship, what is there in the statute which confines the exercise of the jurisdiction within narrower bounds than those set by application of the test of domicil? Section 22 prescribes that in certain causes other than proceedings for divorce the court is to proceed and act and give relief on

principles and rules which, in the opinion of the court, shall be as nearly as may be conformable to the principles and rules upon which the ecclesiastical courts have heretofore acted and given relief, but subject to the provisions of the Act and of rules and orders thereunder. That this section restricts the jurisdiction of the court over persons to the jurisdiction over persons which the ecclesiastical courts possessed is an impossible contention. Section 42 of the Act, indeed, excludes this idea by enacting that in matrimonial causes other than divorce the petition which commences a suit "shall be served on the party affected thereby either within or without Her Majesty's Dominions." It is worth while, too, to recall that relief for desertion by a decree of judicial separation was a form of relief not known to the ecclesiastical courts, and that the change in the status of a woman for which ss. 25 and 26 of the Act provide was not only unknown to the ecclesiastical courts but was such as none of the courts of the realm could previously have decreed. Section 22 of the Act of 1857 is not in truth restrictive of the jurisdiction granted by the Act. It directs the mode in which the jurisdiction shall be exercised. To treat it as limiting the class of causes with which the court is to deal is to disregard the effect of the Act as a whole. To treat it as imposing a condition of residence analogous to that of the Statute of Citations is to disregard the terms of s. 42.

There having been created by the Act of 1857, in its primâ facie meaning, a general jurisdiction in matrimonial causes over persons domiciled within the realm, it is necessary to see whether there is, upon petition for judicial separation, authority binding upon this court which narrows the jurisdiction, so as to include only persons resident. I know of none. There is, on the other hand, a series of judgments which seem to me to support the view that there is jurisdiction in such cases where there is domicil, and that there may be jurisdiction without domicil if there is residence. Sir Cresswell Cresswell in a well-known case of *Yelverton* v. *Yelverton* (6), where a decree of nullity was claimed against a respondent resident in the jurisdiction, said that unless some ground could be discovered for saying that the respondent was domiciled in England, he was not subject to the jurisdiction. Sir Francis Jeune, P., in *Christian* v. *Christian* (7), stated in plain terms that a suit for judicial separation may be founded upon matrimonial residence, as distinguished by our law from domicil, but that "domicil gives jurisdiction, not only in suits for dissolution but likewise in suits for judicial separation." In *Firebrace* v. *Firebrace* (8) Sir James Hannen, P., considered the questions which underlie the present case; the general rule as to the jurisdiction of the court, the legal limitations which in 1857 governed the powers of the judges in the ecclesiastical courts, and the effect of s. 42 of the Act of 1857, as regards the exercise of the jurisdiction over persons neither domiciled nor resident. The learned President also discussed the effect of this section with some particularity in its operation in suits for restitution of conjugal rights, and expressed certain views which have since been reconsidered in the light of the effect on such suits of the provisions of the Matrimonial Causes Act, 1884, s. 5. This is on the present occasion immaterial. The broad principle which Sir James Hannen deemed to govern the jurisdiction is expressed in this statement, which he applied to both divorce and judicial separation, contained in his judgment in *Firebrace* v. *Firebrace* (8) (4 P.D. at p. 67):

> "The domicil of the wife is that of the husband, and her remedy for matrimonial wrongs must be usually sought in the place of that domicil."

In *Dicks* v. *Dicks* (9), Barnes, J., found it necessary to consider whether a decree of restitution of conjugal rights could properly be served on a husband of English domicil who was resident in Ireland, and held, that the fact of English domicil was decisive of the case, and that the service was good. *Bateman* v. *Bateman* (10), again, was a suit for restitution against a husband resident in the United States of America, and, at successive stages of the case, Jeune, P., and Barnes, J., acted upon the view that upon proof of an English domicil the suit was well constituted

A and within the jurisdiction of the court. In *Perrin* v. *Perrin* (11), EVANS, P., stated in a considered judgment that, given domicil, there is jurisdiction in such cases, although there be no residence. An unreported case of *Penny* v. *Penny* (12) decided after argument in November, 1922, was mentioned at the hearing, and upon examination of the record and notes proves to be an act on petition in a suit for judicial separation, where, upon proof of English domicil, the suit was allowed B to proceed, although the respondent, who was temporarily in England, alleged, no doubt truly, that his place of residence was in the Straits Settlements.

It is unquestionable that successive judges in the Probate, Divorce, and Admiralty Division have from time to time in various cases other than suits for dissolution of marriage acted upon the view that domicil of the parties confers jurisdiction. But that this court should, upon an undefended petition for judicial C separation, determine any wider questions than those which are necessarily raised would be manifestly inconvenient. I, therefore, refrain from expressing upon this occasion any concluded view as to the character and limits of the jurisdiction of the Divorce Division in causes other than those of divorce and judicial separation. What is in question here is a wife's claim for judicial separation, and the true view of the Matrimonial Causes Act, 1857, with regard to proceedings for judicial D separation is, in my opinion, that which was acted upon by various judges to whose decisions I have referred—that domicil gives jurisdiction to decree judicial separation, and the jurisdiction also arises where there is residence of the respondent. There was in this case primâ facie proof of domicil; there was therefore jurisdiction to entertain the suit, and to grant to the petitioner the relief she sought.

E **WARRINGTON, L.J.**—I agree with the learned President's judgment. I only wish to say that in this case the provisions of s. 22 of the Act of 1857 do not help the respondent, or justify the order of HORRIDGE, J. It is true that the ecclesiastical courts had no jurisdiction over persons not resident within their ambit, and accordingly did not pronounce decrees of divorce a mensa et thoro in such cases, but this arose not from any rule or principle acted upon by those courts, but F from the provisions of the general law of the land restricting their jurisdiction. In *Anghinelli* v. *Anghinelli* (13) s. 22 was properly relied upon, because there the question was whether, the condition of residence being satisfied, the ecclesiastical courts could have exercised the jurisdiction without proof of domicil. This depended upon the rules and principles acted upon by those courts.

G **ATKIN, L.J.**—I agree with the judgment which has been delivered by the President. I only desire to add that the reason which leads me to hold that domicil gives jurisdiction in suits for judicial separation is that, in my view, the provisions of s. 26 of the Matrimonial Causes Act, 1857, affect the status of the spouses after decree. So to hold is not inconsistent with the view taken by the courts hitherto that residence is also sufficient to found jurisdiction in such cases. H What the effect of s. 26 may be in the country of domicil whose jurisdiction has been founded upon residence only it is unnecessary in the present case to determine. I further wish to emphasise that this decision reserves the case of a claim for restitution of conjugal rights. Whether there is any jurisdiction to order a domiciled Englishman, bona fide resident abroad at the date of commencement of suit, to render conjugal rights abroad, or, as the ordinary form of decree runs, to I return home and render conjugal rights, seems to me to be a question of difficulty that does not arise in the present case.

Appeal allowed.

Solicitors: *Blyth, Dutton, Hartley & Blyth.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

A

UPTON *v.* GREAT CENTRAL RAIL. CO.

[House of Lords (Viscount Haldane, Lord Dunedin, Lord Atkinson, Lord Sumner and Lord Buckmaster) November 22, 23, December 18, 1923]

[Reported [1924] A.C. 302; 93 L.J.K.B. 224; 130 L.T. 557; 40 T.L.R. 204; 68 Sol. Jo. 251; 16 B.W.C.C. 269]

B

Workmen's Compensation—Accident "arising out of employment"—Arising out of conditions under which workman employed—Workman instructed to go to place of work and return by train—Injury caused by fall when crossing platform to returning train—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1 (1).

C

The expression "arising out of" in s. 1 (1) of the Workmen's Compensation Act, 1906, imports some kind of causal relation between the accident and the employment, but it does not logically necessitate direct or physical causation. Looking at the object which the statute discloses by its language, its language directs us to interpret the kind of causal relation required as satisfied by cases in which there has been injury by accident arising out of what the workman has to do, merely because of the conditions of his employment, as distinguished from being directly physically caused by it. It is not easy to lay down with precision how far such conditions may extend. The mere fact that they have arisen in the course of the employment is not in itself sufficient. They must be such that the accident has some sort of causal relation with them, although not necessarily an active physical connection. If, in the course of his employment, the workman meets with injury by an accident which has arisen directly out of circumstances encountered because to encounter them fell within the scope of the employment, compensation may be claimed. The question is whether such circumstances are to be found among the causal conditions of the accident. These may have amounted to no more than passive and inert surroundings, requisite only to provide circumstances which admitted of the accident being occasioned by his own movement. Active physical causation by the surroundings is not required in order to satisfy what is implied by the expression "arising out of the employment": per Viscount Haldane.

D

E

F

A workman employed by a railway company was sent to do certain work near Y. station, it being part of the terms of his employment that he should be conveyed from X. station to Y. station and back in trains provided by the company. After finishing his work he went to Y. on his way back to X. When the train came in he went hurriedly across the platform to get into the carriage, slipped, fell, injured his knee, and, blood-poisoning supervening, died. The employers admitted that the accident happened to the workman in the course of his employment, but denied that it arose out of the employment within s. 1 (1) of the Workmen's Compensation Act, 1906. On a claim by his widow for compensation under the Act,

G

H

Held: the accident, having arisen out of the conditions under which the workman was employed, had arisen out of his employment, and the widow was entitled to compensation.

Notes. The Workmen's Compensation Act, 1906, was repealed by the Workmen's Compensation Act, 1925, itself repealed by the National Insurance (Industrial Injuries) Act, 1946, which prescribes a system of insurance against injuries caused by industrial accidents, but s. 1 (1) of the Act of 1946 provides that the insurance shall be "against personal injury caused . . . by accident arising out of and in the course of" employment, thus adopting the language of the Act of 1906. See also s. 7 (1).

I

Distinguished: *Lawrence* v. *George Matthews (1924) Ltd.*, [1929] 1 K.B. 1. Considered: *Lee* v. *Breckman* (1928), 138 L.T. 610; *Brooker v. Thomas Borthwick & Sons (Australasia), Ltd., and Connected Appeals*, [1933] A.C. 669; *Dover Navi-*

gation Co., Ltd. v. *Craig* [1939] 4 All E.R. 558. Referred to: *Holden* v. *Premier Waterproof and Rubber Co.* (1930), 144 L.T. 519; *Lander* v. *British United Shoe Machinery Co., Ltd.*, [1933] All E.R.Rep. 261; *Powell* v. *Great Western Rail Co.*, [1940] 1 All E.R. 87; *Netherton* v. *Coles*, [1945] 1 All E.R. 227.

As to accidents arising out of and in the course of employment, see 34 HALSBURY'S LAWS (2nd Edn.) 822 et seq.; and for cases see 34 DIGEST 276 et seq. For National Insurance (Industrial Injuries) Act, 1946, see 16 HALSBURY'S STATUTES (2nd Edn.) 797.

Cases referred to:

(1) *Charles R. Davidson & Co.* v. *M'Robb or Officer*, [1918] A.C. 304; 87 L.J.P.C. 58; 118 L.T. 451; 34 T.L.R. 213; 62 Sol. Jo. 347; 10 B.W.C.C. 673, H.L.; 34 Digest 276, *2339*.

(2) *Armstrong, Whitworth & Co.* v. *Redford*, [1920] A.C. 757; 89 L.J.K.B. 495; 123 L.T. 114; 36 T.L.R. 451; 64 Sol. Jo. 388; 13 B.W.C.C. 68, H.L.; 34 Digest 314, *2579*.

(3) *Thom (or Simpson)* v. *Sinclair*, [1917] A.C. 127; 86 L.J.P.C. 102; 116 L.T. 609; 33 T.L.R. 247; 61 Sol. Jo. 350; 10 B.W.C.C. 220, H.L.; 34 Digest 320, *2619*.

(4) *John Stewart & Son (1912), Ltd.* v. *Longhurst*, [1917] A.C. 249; 86 L.J.K.B. 729; 116 L.T. 763; 33 T.L.R. 285; 61 Sol. Jo. 414; 10 B.W.C.C. 266, H.L.; 34 Digest 279, *2357*.

(5) *Dennis* v. *A. J. White & Co.*, [1917] A.C. 479; 86 L.J.K.B. 1074; 116 L.T. 774; 33 T.L.R. 434; 61 Sol. Jo. 558; 10 B.W.C.C. 280, H.L.; 34 Digest 321, *2627*.

(6) *Millar* v. *Refuge Assurance Co., Ltd.*, 1912 S.C. 37; 34 Digest 319, *r*.

(7) *Arkell* v. *Gudgeon* (1917), 87 L.J.K.B. 1104; 118 L.T. 258; 62 Sol. Jo. 174; 10 B.W.C.C. 660, H.L.; 34 Digest 321, *2628*.

(8) *McNicholas* v. *Dawson & Son*, [1899] 1 Q.B. 773; 68 L.J.Q.B. 470; 80 L.T. 317; 47 W.R. 500; 15 T.L.R. 242; 43 Sol. Jo. 312; 1 W.C.C. 80, C.A.; 34 Digest 324, *2652*.

(9) *Frazer v. John Riddell & Co.* (1913), 7 B.W.C.C. 841; 1914 S.C. 584; 34 Digest 332, *t*.

(10) *Williams* v. *Llandudno Coaching and Carriage Co., Ltd.*, [1915] 2 K.B. 101; 84 L.J.K.B. 655; 112 L.T. 848; 31 T.L.R. 186; 59 Sol. Jo. 286; 8 B.W.C.C. 143, C.A.; 34 Digest 317, *2599*.

(11) *Mawdsley* v. *West Leigh Colliery Co., Ltd.* (1911), 5 B.W.C.C. 80, C.A.; 34 Digest 307, *2534*.

(12) *Blair & Co., Ltd.* v. *Chilton* (1915), 84 L.J.K.B. 1147; 113 L.T. 514; 31 T.L.R. 437; 59 Sol. Jo. 474; 8 B.W.C.C. 324, H.L.; 34 Digest 308, *2541*.

(13) *Jibb* v. *Chadwick*, [1915] 2 K.B. 94; 84 L.J.K.B. 1241; 112 L.T. 878; 31 T.L.R. 185; 8 B.W.C.C. 152, C.A.; 34 Digest 290, *2426*.

(14) *Wright and Greig, Ltd.* v. *M'Kendry* (1918), 11 B.W.C.C. 402; 12 B.W.C.C. 410; sub nom. *M'Kendry* v. *Wright and Greig, Ltd.*, 1919 S.C. 98; 56 Sc.L.R. 39; [1918] 2 S.L.T. 282; 34 Digest 325, *t*.

(15) *Hunter* v. *Simner* (1922), 14 B.W.C.C. 327, C.A.; 34 Digest 337, *2733*.

(16) *Holmes* v. *Great Northern Rail. Co.*, [1900] 2 Q.B. 409; 69 L.J.Q.B. 854; 83 L.T. 44; 64 J.P. 532; 48 W.R. 681; 16 T.L.R. 412; 2 W.C.C. 19, C.A.; 34 Digest 279, *2359*.

Also referred to in argument:

Allcock v. *Rogers* (1918), 87 L.J.K.B. 693; 118 L.T. 386; 34 T.L.R. 324; 62 Sol. Jo. 421; 11 B.W.C.C. 149, H.L.; 34 Digest 315, *2582*.

Blake v. *Ramsay* (1916), 10 B.W.C.C. 500; 34 Digest 320, *e*.

Fearnley v. *Bates and Northcliffe, Ltd.* (1917), 86 L.J.K.B. 1000; 117 L.T. 193; 61 Sol. Jo. 506; 10 B.W.C.C. 308, C.A.; 34 Digest 320, *2623*.

Kelly v. *Kerry County Council* (1908), 42 1 L.T. 23; 1 B.W.C.C. 194; 34 Digest 318, *2605 i*.

Mitchinson v. *Day Bros*, [1913] 1 K.B. 603; 82 L.J.K.B. 421; 108 L.T. 193; 29 T.L.R. 267; 57 Sol. Jo. 300; 6 B.W.C.C. 190, C.A.; 34 Digest 270, *2299*.

Sheldon v. *Needham* (1914), 111 L.T. 729; 30 T.L.R. 590; 58 Sol. Jo. 652; 7 B.W.C.C. 471, C.A.; 34 Digest 323, *2638*.

Trim Joint District School Board of Management v. *Kelly*, [1914] A.C. 667; 83 L.J.P.C. 220; 111 L.T. 305; 30 T.L.R. 452; 58 Sol. Jo. 493; 7 B.W.C.C. 274, H.L.; 34 Digest 270, *2300*.

Warner v. *Couchman*, [1912] A.C. 35; 81 L.J.K.B. 45; 105 L.T. 676; 28 T.L.R. 58; 56 Sol. Jo. 70; 5 B.W.C.C. 177, H.L.; 34 Digest 318, *2604*.

Weekes v. *William Stead, Ltd.* (1914), 83 L.J.K.B. 1542; 111 L.T. 693; 30 T.L.R. 586; 58 Sol. Jo. 633; 7 B.W.C.C. 398, C.A.; 34 Digest 271, *2301*.

White v. *W. & T. Avery, Ltd.*, 1916 S.C. 209; 53 Sc.L.R. 122; [1915] 2 S.L.T. 374; 9 B.W.C.C. 663; 34 Digest 322, *p*.

Plumb v. *Cobden Flour Mills Co., Ltd.*, [1914] A.C. 62; 83 L.J.K.B. 197; 109 L.T. 759; 30 T.L.R. 174; 58 Sol. Jo. 184; 7 B.W.C.C. 1, H.L.; 34 Digest 288, *2415*.

Barnes v. *Nunnery Colliery Co., Ltd.*, [1912] A.C. 44; 81 L.J.K.B. 213; 105 L.T. 961; 28 T.L.R. 135; 56 Sol. Jo. 159; 5 B.W.C.C. 195, H.L.; 34 Digest 299, *2489*.

Shaw (*Glasgow*), *Ltd.* v. *Macfarlane*, 1915 S.C. 273; 52 Sc.L.R. 236; [1915] 1 S.L.T. 30; 8 B.W.C.C. 302; 34 Digest 315, *l*.

Marsh v. *Pope and Pearson, Ltd.* (1917), 86 L.J.K.B. 1349; 117 L.T. 456; 33 T.L.R. 523; 62 Sol. Jo. 9; 10 B.W.C.C. 566, C.A.; 34 Digest 321, *2624*.

W. Baird & Co., Ltd. v. *M'Graw* (1920), 89 L.J.P.C. 188; 124 L.T. 38; 64 Sol. Jo. 650; 13 B.W.C.C. 233; 1920 S.C. (H.L.) 155, H.L.; 34 Digest 313, *2569*.

Guthrie v. *Kinghorn*, 1913 S.C. 1155; 50 Sc.L.R. 863; [1913] 2 S.L.T. 153; 34 Digest 337, *t*.

Rodger v. *Paisley School Board*, 1912 S.C. 584; 49 Sc.L.R. 413; [1912] 1 S.L.T. 271; 5 B.W.C.C. 547; 34 Digest 336, *r*.

Wales v. *Lambton and Hetton Collieries* (1917), 86 L.J.K.B. 1346; 117 L.T. 454; 33 T.L.R. 504; 61 Sol. Jo. 611; 10 B.W.C.C. 527, C.A.; 34 Digest 321, *2625*.

Clark v. *Lord Advocate*, 1922 S.C. 561; 34 Digest 321, *k*.

Chapman v. *John W. Pearn* (*Owner*) (1916), 32 T.L.R. 368; 9 B.W.C.C. 224, C.A.; 34 Digest 323, *2639*.

Appeal by the applicant (the dependant of a workman) from an order of the Court of Appeal (Lord Sterndale, M.R., Warrington, L.J. (dissenting), and Scrutton, L.J.) dismissing an appeal by the applicant from a decision of the learned judge of the county court of Ashton-under-Lyne, sitting as an arbitrator under the Workmen's Compensation Acts. The facts and the arguments sufficiently appear from their Lordships' opinions.

Shakespeare and *Berryman* for the appellant.

Barrington-Ward, K.C., and *Beazley* for the respondents, the employers.

The House took time for consideration.

Dec. 18. The following opinions were read.

VISCOUNT HALDANE.—In this case it is not in dispute that Alfred Upton, the husband of the appellant, died of blood poisoning following on an injury to his knee, due to his having accidentally slipped on the platform at Dunford Bridge Station on Sept. 17, 1922. Nor is it in dispute that the accident happened to him in the course of his employment. The respondent railway company have further very readily agreed that, if they are liable, the amount payable to the appellant may be taken as being the full amount of £300. The real question which the appeal raises is whether they are free from liability on the ground that the accident did not arise out of the deceased workman's employment. The county court judge who disposed of the case held that the accident did not so arise, and the Court of Appeal, Warrington, L.J., dissenting, affirmed the decision.

A The question is one of delicacy and difficulty because of some obscurity as to principle due to the state of the authorities. The facts lie in small compass. Alfred Upton, who was a foreman labourer in the employment of the respondents, was sent from Guide Bridge, on the date mentioned, to work for them on a water-main near Dunford Bridge Station. After finishing his work he proceeded to the latter station in order to return by train to Guide Bridge. He was waiting with B other workmen for the train. It was a wet, windy day. The train came in. He went hurriedly across the platform to reach the proper carriage. He slipped and fell, injuring his left knee. As the result, the injury caused his death. It will be convenient in the first place to ask what the natural answer to the question raised would be. If one looks only to the words of the Workmen's Compensation Act, 1906, and then to see how far the decided cases hinder such an answer, there C is little room for doubt, either on principle or on authority, that the accident arose in the course of the employment. That the deceased man should have been waiting for the train at the station, and should have had to cross the platform in order to get into it, fell within the conditions on which he was employed. The accident happened while he was doing something which was incidental to his employment. It did not occur merely during a period in which he was in the employment of the D respondents. I agree with the interpretation placed on the words "in the course of" by LORD DUNEDIN in *Charles R. Davidson & Co.* v. *M'Robb or Officer* (1) and subsequently in *Armstrong, Whitworth & Co.* v. *Redford* (2), and think that, interpreted in the limited sense, that the workman must be doing something which, in contemplation of law, is part of his service, the workman was, in the circumstances before us, doing something which made the accident which happened E to him happen in the course of his employment. This, indeed, is not in dispute. That Upton might have avoided slipping if he had exercised more care may possibly be true. But unless the injury was attributable to serious and wilful misconduct on his part, which is not alleged, compensation can be claimed. Moreover, his carelessness cannot bar the claim, because death has ensued. Section 1 (2) (c) of the Workmen's Compensation Act, 1906, puts this beyond F question. The only issue which is open is whether an accident like this, whether avoidable or not, was one arising out of the employment in the course of which it was caused.

The expression "arising out of," no doubt, imports some kind of causal relation with the employment, but it does not logically necessitate direct or physical causation. If there had been a hole or an unusually slippery place on the platform G which gave rise to the fall, that would have been a plain illustration of direct and also physical causation. But the statute does not prescribe such causation as this as being required before a claim can arise. The right given is no remedy for negligence on the part of the employer, but is rather in the nature of an insurance of the workman against certain sorts of accident. The legislature appears to have provided that he is to be insured against certain injuries by accident which may H happen to him, provided that they arise out of the conditions under which he is employed. That the accident should have arisen out of his fulfilment of these conditions seems to be all that is required to establish the only kind of causation which is demanded. The expression "cause" may always be regarded as including an infinity of conditions, but in ordinary life we have to look for those which are relevant to the standpoint of inquiry. A direct physical cause will, of course, fall I among those which are included in s. 1 of the Workmen's Compensation Act, 1906, but the scope of the Act and the inquiry which it enjoins appear to extend also to the general conditions under which the workman has been directed to act. If he simply dies of heart disease, the effect of which has not been aggravated by anything which his employment led to his doing, or if he is struck by lightning in a place where the conditions of his employment rendered him no more exposed to danger than any member of the public not so employed, the injury will not have resulted from the conditions under which he was being employed. But if, for example, he is sent on a message on a bicycle, and an ordinary collision which

might have happened to anybody takes place, then what has happened would not have done so had he not been engaged in fulfilling his duty, and there is liability. Looking at the object which the statute discloses by its language, I think that its language directs us to interpret the kind of causal relation required as satisfied by cases in which there has been injury by accident arising out of what the workman has to do, merely because of the conditions of his employment, as distinguished from being directly physically caused by it. It is not easy to lay down with precision how far such conditions may extend. The mere fact that they have arisen in the course of the employment is not in itself sufficient. They must be such that the accident has some sort of causal relation with them, although not necessarily an active physical connection. If, in the course of his employment, the workman meets with injury by an accident which has arisen directly out of circumstances encountered because to encounter them fell within the scope of the employment, compensation may be claimed. His own negligence may have been an immediately contributing factor. If, as in the present case, his death has resulted, such negligence is immaterial. The question is whether circumstances such as I have referred to are to be found among the causal conditions of the accident. These may have amounted to no more than passive and inert surroundings, requisite only to provide circumstances which admitted of the accident being occasioned by his own movement. Active physical causation by the surroundings is not required in order to satisfy what is implied by the expression "arising out of the employment."

In the case before us the man was crossing the platform in fulfilment of the implied direction of his employers. He might have escaped accident had he been more careful, but no such negligence as may have occurred was in law sufficient to take his case outside the statute. So far, therefore, as it is open to us to decide the question as one of principle merely, I think that the accident plainly arose out of the conditions of the employment. These conditions seem to me to have been its origin sufficiently to bring it within the kind of risk defined for which compensation by way of insurance is to be provided. So far as the authorities are concerned, these were up to about the year 1917 in a state which disclosed considerable differences in judicial opinion as to the kind of causation required. But in that and subsequent years decisions have been given by your Lordships' House in which the state of the authorities was reviewed, and certain principles were authoritatively laid down. Among these decisions are *Thom (or Simpson)* v. *Sinclair* (3), *Longhurst* v. *John Stewart & Son, Ltd.* (4), *Dennis* v. *A. J. White & Co.* (5), and *Charles R. Davidson & Co.* v. *M'Robb or Officer* (1). I think that the interpretation which I have placed on the language of the statute in reference to the kind of causal relation required, whether or not it is wholly consistent with some earlier interpretations here and in Scotland, is at least in harmony with the views authoritatively expressed in this House in the decisions which I have quoted, and in others which followed them later. I am, therefore, of opinion that the decision of the majority in the Court of Appeal should be reversed, and that the case must go back to the county court for entry of an award for £300, the amount agreed by the respondents in case they should be held liable, and to be disposed of in accordance with our judgment. The appellant should have her costs here and in the courts below.

LORD DUNEDIN.—The arbitrator begins his award by saying: "I received an admission from the respondents' solicitor that the employment of the deceased continued until he arrived back at Guide Bridge Station." He further explains this statement by saying: "There is no dispute on the facts that the accident arose in the course of the deceased's employment." When an admission is made it must be construed in accordance with the legal meaning of the words used, as these words have been authoritatively defined. What exactly is meant by "in the course of employment" was most fully discussed, and, I think, authoritatively

decided, in *Charles R. Davidson & Co.* v. *M'Robb or Officer* (1). I will quote a single sentence from my own judgment in that case:

> "It [the course of employment] connotes, to my mind, the idea that the workman or servant is doing something which is part of his service to his employer or master."

I take it, therefore, that the injured man here was doing the work of his master when he was crossing the platform to reach the train. That being so, I find it quite impossible to distinguish this case from *Millar* v. *Refuge Assurance Co., Ltd.* (6). In that case the man was doing the work of his employers in ascending and descending the common stair in the course of his employment to collect premiums. He slipped and fell. There was no suggestion that the stair was faulty in any way. That case, being only decided in the Court of Sessions, is not binding on your Lordships, although it expresses my own opinion. But I find that in *Arkell* v. *Gudgeon* (7) it was distinctly approved in this House. It does not seem to have received the attention of the learned judges who formed the majority in this case. I said, in *Millar* v. *Refuge Assurance Co., Ltd.* (6) that the distinction between accidents which happen to a man, and are, so to speak, brought on him by his business, and accidents which, although a man may in one sense be on his business, are just accidents which may happen to everybody, is a very fine one. So it is. LORD KINNEAR, in the same case, put it thus (1912 S.C. at p. 43):

> "I think that a risk is specially connected with a man's employment if it is due to the particular place where his employment requires him to be at the time."

This man's employment compelled him to cross the platform, and it was there that a slip occurred. The slip was connected with his presence on the platform. I, therefore, concur in the motion made.

LORD ATKINSON.—In construing the language of the Workmen's Compensation Act, 1906, one must, I think, have regard to the habits of members of the general public in doing such an act as the workman may be employed by his employer to do. For instance, if an employer should order his workman to travel from Station A. to Station B., on a particular line of railway, to do certain indicated work at or near B., and then travel back from B. to A. by train, he must, I think, be held by implication to have authorised his workman to do everything which, according to the ordinary usages and practices of the travelling public, is involved in the adventure of this travelling by train. Should his workman arrive at Station B. before the arrival there of the returning train which is to carry him back to A., and should it happen to be raining at the time, as it was in this case, he, the workman, would, I think, unquestionably be acting in the course of his employment in taking shelter in a waiting room and, when the returning train arrived at Station B., in traversing the platform to get into a carriage of the train in which he would be authorised or entitled to travel. Things of this kind are done in ordinary railway traffic by the travelling public, and the employer must, it would appear to me, be held to have impliedly authorised the workman to do them. If so, in doing them, the workman would be discharging a duty to his master imposed upon him by his contract of service, and the accident which befell him would undoubtedly have happened in the course of his employment. Joseph Potter states shortly and clearly how the accident occurred. He says: "It was a nasty day, rainy and windy. We arrived at the station and walked into a waiting-room—six of us. On the approach of the train four went out, Upton and I myself remained behind. The train pulled up—the first-class coach in front of us; we all went to the left to the third-class. Upton and I were the last two. As Upton was running to the third-class he fell, his left foot slipped and he fell on his left knee, and he then rolled over on his side. The platform was wet and so were we." On cross-examination he says that there was nothing unusual on the platform. It was intact. It cannot be suggested that

Upton's running across the platform to reach the third-class carriage of the train amounted to "serious and wilful misconduct," and it is well established that a workman is not deprived of his right to compensation by doing negligently something which his employer has expressly or impliedly authorised him to do. The law is so laid down quite clearly in *McNicholas* v. *Dawson & Son* (8). COLLINS, L.J., is reported to have stated the rule of law upon this point thus:

> "Under the Workmen's Compensation Act, 1897 [there is no difference between this statute and the Act of 1906 on this point], it is not necessary to prove negligence on the part of the employer, and it is no defect in the workman's case that he has been guilty of contributory negligence. If he brings himself within the Act by showing that the accident arose out of and in the course of his employment, his case can only be met by the employer by showing that the injury to the workman is attributable to his serious and wilful misconduct; so that the element of negligence may be eliminated from this case. The deceased was doing something which it was his duty to do, though he may have been negligent in doing it. Probably there may be acts of negligence on the part of a workman entirely outside his employment as to prevent an accident following on the negligent act from being described as arising out of his employment."

In *Frazer* v. *John Riddell & Co.* (9) an engine-driver in the course of his employment fell off the traction engine when he was driving and was killed. His fall was due to his being intoxicated. It was held that this did not preclude his widow from recovering, intoxication not being of itself a defence in fatal accidents. In *Williams* v. *Llandudno Coaching and Carriage Co., Ltd.* (10), a workman was engaged by the respondents as a stableman, and his duty was to chop and mix food for horses and to convey it by carts to various stables. The loft in which he performed part of his duties was reached by a vertical ladder fixed a little distance from the wall, and the workman, to carry out his work, had to ascend and descend it. In attempting to ascend the ladder to do his work, the workman, who was intoxicated, fell, receiving injuries from which he died. SWINFEN EADY, L.J., said:

> "It was urged by the appellants [the employers] that the real cause of the accident was the drunkenness of the deceased, and, therefore, that his widow could not recover, although if he had been sober and the accident had happened, it might be said to have arisen out of and in the course of his employment. . . . The cases establish the proposition that if an accident occurs while the workman is acting within the scope of his authority, and is doing an act which it was part of his duty to do, and the accident arises from his being engaged in doing that act and being thereby exposed to a special risk beyond that of other persons not so engaged, the employer is liable to pay compensation, although the workman is doing the act negligently or contrary to rules laid down for his guidance."

He refers to *Mawdsley* v. *West Leigh Colliery Co., Ltd.* (11), where a workman was engaged to oil machinery, but was forbidden to do so while the machinery was in motion, and *Blair & Co., Ltd.* v. *Chilton* (12), where a workman was employed to turn a wheel in a rolling machine, but forbidden to do so sitting down; and he winds up by saying:

> "If a state of facts is proved which brings the workman within the proposition I have stated, the fact that he, the workman, was drunk when the accident happened, or indeed the fact that the proximate cause of the accident was his drunkenness, will not disentitle him or in case of death his dependants from recovering compensation from his employer where death or serious and permanent disablement results."

The case which most nearly approaches the present, but is, on the facts, quite distinguished from it, is that of *Jibb* v. *Chadwick* (13). There the workman, a

A foreman joiner, who lived at Rotherham, near Sheffield, and was in the employment of the appellants who carried on business at Rotherham, but had contracts for works to be executed at Sheffield, was sent by his employers to Sheffield, travelling by train. He had a season ticket on the railway from Rotherham to Sheffield for which his employers paid. He was, on the day of the accident, instructed by his employers to return to Rotherham before 6 o'clock in the evening B and report what work had been done at Sheffield in the course of the day. The last train which would have brought him to Rotherham before 6 p.m. left Sheffield at 5.26 p.m. On the evening in question he arrived rather late at the station. This train was actually in motion as he entered the station. He ran and attempted to get into the moving train, but he fell between it and the platform, was carried forward by the train 150 yards before it could be stopped, and received injuries C from which he died. No evidence was given to show that the deceased could not have arrived earlier at the station. It was held that it was an illegal act on his part to attempt to get into a train while in motion, and that he, the workman, in endeavouring to do this unauthorised and illegal act, exposed himself to an additional risk not expressly or by implication incidental to his employment, and was, therefore, not entitled to compensation. So that according to this case, if D Mrs. Upton would have been entitled to compensation if her husband had, while walking carefully across the platform to enter the third-class carriage, fallen and injured himself, as he did in fact fall and injure himself, she could not legally be deprived of compensation by reason of the fact that he was running, not walking, when he fell. It was urged in argument on behalf of the respondents that Upton's running across the platform and his fall had nothing to do with his employment, just E as it was urged in *Williams* v. *Llandudno Coaching and Carriage Co., Ltd.* (10), that the real cause of the accident was the drunkenness of the deceased workman. I cannot concur in this view. In running as Upton did, he was in the course of doing, though incautiously it may be, what he was employed to do, namely, to return by train to the station from which he had departed in the morning. That employment obliged him, in order to do his duty to his employer, to get into the F train and return by it, and the effort, incautious though it may have been, to discharge that duty was the cause of the accident. I think, therefore, that the accident by which Upton lost his life arose out of and in the course of his employment, and that his widow is entitled to recover compensation.

I do not find that in *Wright and Greig, Ltd.* v. *M'Kendry* (14) the concrete G flooring upon which the workman slipped and fell, fracturing his skull, was found to be dangerous to walk on. The same observation applies to the floor in *Hunter* v. *Simner* (15). Nor were the stairs on which the collector fell in *Millar* v. *Refuge Assurance Co., Ltd.* (6), found to be more difficult to walk on or more dangerous than ordinary stairs of their kind. In *Armstrong, Whitworth & Co.* v. *Redford* (2) a decision of this House by which, so far as it is a decision on a point of law H properly raised in this case, we are bound, the main question in controversy was whether the accident which the respondent met with in descending the stairs from the canteen in order to clock on, that is, to return to her work, was an accident sustained by her "in the course of her employment." Here the accident was caused by the performance of an act which the deceased was employed to perform, namely, to traverse the platform, if need arose, for the purpose of getting into the I proper class in the returning train. That was an act obviously done in the course of the employment of the deceased. It may have been done incautiously, but having been done in the course of the employment of the deceased, and the accident having been caused by the doing of it even incautiously, it must, I think, be held that the accident arose out of the employment of the deceased. I, accordingly, think that the appeal succeeds, and that the order appealed from must be reversed.

LORD SUMNER.—In view of the decided cases, I do not think that it can now be held that a man may not meet with an accident arising out of his employ-

ment if he falls and breaks his knee, while running at a time and place when and where he is employed to run. The reason why he fell may be unknown, for to say that he fell because he slipped is rather a description of the manner than of the cause of his fall, but the fall arises out of his running, since he would not have fallen if he had been sitting down or standing still, and being attended with damage, it is, in ordinary language, an accident. The difficulty of this case arises out of the finding in the award that the accident arose in the course of the deceased's employment, a finding apparently based on an admission "that his employment continued till he arrived back at the Guide Bridge Station." I agree that the finding must be taken as it stands, although I strongly surmise that the admission was misunderstood. It is not impossible that a man should be employed to go from Guide Bridge Station to Dunford Bridge Station, thence to the water-main, and, after repairing it, back to the station and so by the next train to Guide Bridge Station again, but I question if that was so here, and still more I do feel reluctant to say that the deceased was employed to hurry across the platform, or even to go home by the next train, or by train at all. It is more probable that he had a railway pass, if he liked to use it, and could not count for pay the time necessary for returning in the next train, whether he took the train or not. If so, questions as to the ambit of the employment as to the special risks run by the workman at the place of the accident and the general risks run by the public there, and other difficult questions of the same kind would arise. As it is, I think that they do not, and the case falls to be decided on an assumption of fact not likely to recur in many other cases. I think, however, that the appeal succeeds.

LORD BUCKMASTER (read by LORD DUNEDIN).—In this case the county court judge has found that the accident which resulted in the death of Alfred Upton was an accident in the course of his employment. Unless it can be shown that he had no evidence before him to support this conclusion, or that he misconstrued the phrase "in the course of his employment," his decision is final. In my opinion, neither of these conditions is established, and it results that all that is left for consideration is whether the accident arose out of the employment. I think that it did. While in the course of his employment the man slipped on a railway platform. I can see no difference between this and a similar misadventure arising while a man was being told in a factory to go from one machine to another. It is true that a railway station is no part of factory buildings, but this, to my mind, makes no difference. The idea of some general catastrophe, such as a thunder-storm, to which all people alike, independent of employment may be subject, does not arise. It was, indeed, suggested that as anybody might have slipped down on the railway platform, the fact that this man so slipped disentitles his widow to recover. The answer is that he was on the railway platform and using it in the course of his employment, and I think it impossible to measure the exact standard of danger which the platform must present in order to establish what counsel for the respondents call a special risk. Had the man slipped on a banana skin the case would have been parallel to that of the boy injured by collision on a bicycle: *Dennis* v. *A. J. White & Co.* (5), but as between the slipperiness due to the presence of foreign matter and the actual slipperiness which must have existed I see no means of drawing a line. That he slipped is certain, and the particular condition of the actual spot where he fell is incapable of determination. I think, therefore, that his accident arose out of his employment. I find it difficult to distinguish this case from the case in the Court of Appeal of *Holmes* v. *Great Northern Rail. Co.* (16) which, I think, was rightly decided. There, as here, the man was directed to go from one railway station (King's Cross) to another, in that case to clean engines. He crossed the railway lines when he might have used a bridge, and was injured by a train before he arrived at the actual work which he had to do. A. L. SMITH, L.J., decided that he was entitled to recover, as his employment began from the moment when he left King's Cross station. It would,

in my opinion, have made no difference if he had slipped on the rails, as indeed was suggested by A. L. Smith, L.J., in the course of the argument, and, further, I see no difference between slipping on the rails and slipping on the platform. I, therefore, think that this appeal should be allowed.

Appeal allowed.

Solicitors: *Pattinson & Brewer*; *Thomas Chew.*

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

JENKINS *v.* FEIT

[King's Bench Division (Lord Hewart, C.J., Roche and Branson, JJ.), May 3, 4, 1923]

[Reported 129 L.T. 95; 87 J.P. 129; 39 T.L.R. 467; 67 Sol. Jo. 706; 27 Cox, C.C. 427]

Criminal Law—Evidence—Character of accused—Question in cross-examination tending to show commission of other offence—Not ground for acquittal—Duty of court—Criminal Evidence Act, 1898 (61 & 62 *Vict.*, *c.* 36), *s.* 1 (*f*).

The respondent, who was the occupier of premises, was charged with knowingly permitting them to be used for habitual prostitution. Evidence was given that the police found two women in the house, each with a man, and the respondent said that she did not know that one of the women was a prostitute. The respondent was then asked whether she had been convicted of allowing this woman to use the house for prostitution, and she denied it. The magistrate dismissed the case on the ground that this question was inadmissible under s. 1 (f) of the Criminal Evidence Act, 1898.

Held: the asking of such a question was improper, but it was not conclusive as matter of law that the case should be dismissed on that ground; the court should consider whether the impression made on its mind by such a question or the answer to it could or could not be effaced when the task of forming the judgment arose, and whether, on other evidence which was not open to criticism, the materials before the court were such as to lead to a conviction.

Notes. As to cross-examination as to character, see 10 Halsbury's Laws (3rd Edn.) 451; and for cases see 14 Digest (Repl.) 511 et seq. For the Criminal Evidence Act, 1898, see 9 Halsbury's Statutes (2nd Edn.) 613.

Cases referred to:

(1) *Makin* v. *A.-G. for New South Wales*, [1894] A.C. 57; 63 L.J.P.C. 41; 69 L.T. 778; 58 J.P. 148; 10 T.L.R. 155; 17 Cox, C.C. 704; 6 R. 373, P.C.; 14 Digest (Repl.) 420, *4094*.

(2) *R.* v. *Ellis*, [1910] 2 K.B. 746; 79 L.J.K.B. 841; 102 L.T. 922; 74 J.P. 388; 26 T.L.R. 535; 22 Cox, C.C. 330; 5 Cr. App. Rep. 41, C.C.A.; 14 Digest (Repl.) 408, *3975*.

(3) *Barker* v. *Arnold*, [1911] 2 K.B. 120; 80 L.J.K.B. 820; 105 L.T. 112; 75 J.P. 364; 27 T.L.R. 374; 22 Cox, C.C. 533, D.C.; 14 Digest (Repl.) 511, *4946*.

(4) *Charnock* v. *Merchant*, [1900] 1 Q.B. 474; 69 L.J.Q.B. 221; 82 L.T. 89; 64 J.P. 183; 48 W.R. 334; 16 T.L.R. 139; 44 Sol. Jo. 196; 19 Cox, C.C. 443, D.C.; 14 Digest (Repl.) 509, *4929*.

Case Stated by the stipendiary magistrate for the city of Birmingham.

The Case stated as follows: (1) On Jan. 10, 1923, an information was laid by the

appellant, Plato Jenkins, an inspector of police for the city, for that on Dec. 30, 1922, and Jan. 1, 2, 3, and 4, 1923, at the city aforesaid, one Gertie Feit, the respondent, then being the occupier of certain premises known as No. 131, Alexandra Road, Edgbaston, in the city, unlawfully and knowingly did permit such premises to be used for the purposes of habitual prostitution. (2) At the hearing of the information it was proved or admitted that on the days set out in the information the police kept observation upon the premises of the respondent and saw a prostitute named Olive Mason and other prostitutes take men to the house of the respondent at various times on the said days. On Jan. 4, 1923, the police raided the house and found Olive Mason and another prostitute in their bedrooms each with a man. The police remained in the house until the respondent came home and they informed her that they had raided the house for being used for the purpose of habitual prostitution, and told her that they had found Olive Mason and another prostitute with men upstairs. It was further proved that the respondent was rated jointly with her husband as the occupier of the house. (3) The respondent gave evidence that she lived at the house with her six children, and that her husband did not live there; she stated that she let apartments and that Olive Mason occupied the front bedroom and paid 30s. per week, including gas and fuel. She also stated that she had other lodgers, and that she did not allow her house to be used for the purpose of prostitution. She stated that she had known Olive Mason for a long time, and that she did not know that she was a prostitute. (4) At this stage the solicitor for the prosecution put the following question: "I put it to you that you have been prosecuted for allowing Olive Mason to use your house for the purpose of prostitution." The respondent replied, "Not to my knowledge." The solicitor for the appellant then asked the respondent if she had been convicted of such an offence. The respondent said: "Not to my knowledge." The question was again repeated, and the respondent said that she was quite certain that she had not been convicted, and on the matter being pressed still further she denied having paid any fine in respect of such a conviction. The solicitor for the respondent objected to these questions being put, but the solicitor for the appellant persisted, urging that he was entitled to put them. (5) The respondent was in fact prosecuted at the Birmingham Police Court on Sept. 24, 1917, for keeping a brothel at the same house, but the case was dismissed on the ground that Olive Mason alone used the premises for the purpose of prostitution. (6) The solicitor for the respondent submitted that under the Criminal Evidence Act, 1898, s. 1 (f), these questions were inadmissible and he asked that the case be dismissed on that ground. (7) The solicitor for the appellant argued that the questions were admissible under s. 1 (f) of the Act on the ground that knowledge that Olive Mason was a prostitute was material to the issue, and under the authority of *Makin* v. *A.-G. for New South Wales* (1) and other cases evidence of another offence or charge was admissible as being material to the issue which the magistrate had to try. (8) The magistrate was of opinion that the questions were not admissible and dismissed the information on that ground. The prosecutor appealed.

Maurice Healy for the appellant.
Norman Birkett for the respondent.

LORD HEWART, C.J.—This is a Case stated by the learned stipendiary magistrate of the city of Birmingham, and it arises in this way. In January of this year an information was laid by an inspector of police for that city, who is the appellant, for that on Dec. 30, 1922, and other days, the respondent, then being the occupier of certain premises, unlawfully and knowingly did permit such premises to be used for the purpose of habitual prostitution. That information was heard and was dismissed by the learned stipendiary subject to this Case stated. It is not necessary that I should recapitulate the details of the case, but it is quite clear from para. (4) that certain questions were put which ought not to have been put. When one looks at the material elicited and sought to be elicited by those questions, it is also quite obvious that, with the exception of a single element, all the material

might have been properly elicited, but it was said that these questions went to show that the accused on a former occasion had been charged with the like offence, and, in those circumstances, the solicitor for the respondent submitted that under the Criminal Evidence Act, 1898, s. 1 (f), certain questions were inadmissible and asked that the case be dismissed "on that ground." The learned stipendiary says that he was of opinion that the questions were not admissible, and he dismissed the information on that ground. The question for the opinion of the court is whether or not that decision is correct in law, and, if not, what is to be done in the premises.

The first question that it is necessary to ask is what precisely is the meaning of the statement in para. (8). I am satisfied, especially when I read para. (8) in connection with para. (6), which it so closely follows, that the magistrate was invited to say, and did say, that as a matter of law, because certain inadmissible questions had been asked, he had no course open to him except to dismiss the information, and in the first part, and the major part, of counsel for the respondent's argument, that was the contention put forward in this court on behalf of the respondent. What is it that the words of the statute provide? It is this:

> "A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged or is of bad character,"

unless certain conditions are fulfilled. It is, of course, impossible to exaggerate the practical importance of that provision. The matter was explained in carefully chosen words in the Court of Criminal Appeal in a considered judgment of a court consisting of LORD ALVERSTONE, C.J., JELF, BRAY, A. T. LAWRENCE and LORD COLERIDGE, JJ., in *R.* v. *Ellis* (2). BRAY, J., delivering the judgment of the court, said ([1910] 2 K.B. at p. 763):

> "The statute provides that the prisoner shall not be asked, and if asked shall not be required to answer, these questions. In our opinion these words were intended to afford a double protection to the prisoner. The statute provides that the question shall not be asked. The reason of this is plain, because in most cases the mischief is done by the asking of the question. The jury naturally assume that no such question would be put unless there was foundation for it, and the more objection is made to it by the prisoner's counsel, the stronger to their minds becomes that assumption. It is most damaging to the prisoner's case for his counsel to get up and argue that a question is inadmissible, because it tends to show that the prisoner has committed another crime. In this case, in order to make his objection clear, Mr. Elliott [that is to say, the counsel for the defence, the counsel for the appellant in the Court of Criminal Appeal] was obliged to tell the recorder in the hearing of the jury that there was another charge pending against the appellant which was contained in another indictment. This of itself, unless removed by some clear statement from the recorder that they must dismiss the question from their minds, must prejudice the jury. That is the reason, in our opinion, why the statute forbade the question even being asked. In our opinion it is the duty of the judge not to wait for any objection from the prisoner's counsel, but to stop such questions himself, and if by mischance the question be put, it is equally the clear duty of the judge to direct the jury to disregard it and not let it influence their minds."

But, if the proposition which is contended for on behalf of this respondent were correct, all such words as "unless removed by some clear statement from the recorder that they must dismiss the question from their minds," or, again, "it is equally the clear duty of the judge to direct the jury to disregard it and not let it influence their minds," would not merely be surplusage but misleading surplusage; it would have been enough to say that the mere asking of such questions concluded the matter. That is not the doctrine laid down in *R.* v. *Ellis* (2), nor is it the

doctrine laid down in *Barker* v. *Arnold* (3), which was a Case stated by justices. In that case LORD ALVERSTONE, C.J., said ([1911] 2 K.B. at p. 122): A

> "The question, therefore, is an improper one forbidden by the Act, and undoubtedly if such a question is put a primâ facie case arises for quashing the conviction, because this court cannot say whether the minds of the justices may not have been affected thereby"

B

—a primâ facie case, it is to be observed. BRAY, J., says (ibid. at p. 123):

> "We cannot quash this conviction unless we come to the conclusion that if such a question is merely asked the conviction must in every case be quashed. I decline to go that length."

That is a refusal in terms to accept the major proposition which is contended for here. It is further said that the decision in *Charnock* v. *Merchant* (4) supports a similar view. In my opinion it does not. When that judgment is read in connection with the facts of the case, there is no discrepancy between it and the judgment in *Barker* v. *Arnold* (3), which, indeed, was a judgment delivered after the judgment in *Charnock* v. *Merchant* (4) had been cited and considered. C

It follows, therefore, that if the learned stipendiary in the present case means, as I think he means and says, that the mere asking of the improper questions was, in his mind, conclusive as a matter of law that the information must be dismissed, he came to a conclusion which was erroneous in law; but it is argued that it may be that the learned magistrate does not mean quite that; it may be, it is said, that his meaning is rather of this kind, that the improper questions having been asked he could not in that particular case, and contemplating the state of his own individual mind in that case, get rid of the impression unfortunately created by the improper questions and so arrive at a fair conclusion upon the evidence which was not open to criticism. In my opinion that is not what the learned magistrate says: I do not think that it is what he means, but of course in this case, as in others, if the court were satisfied that the impression created by the mere asking of the improper questions could not be removed, that would be a good reason for dismissing the information. In this case the magistrate seems to have acted upon the universal proposition that the mere asking of a question prohibited by the Act of 1898 involves the consequence that the information must be dismissed. I think, therefore, that this case must go back to the learned magistrate in order that the information may be heard and determined according to law, with the direction that the mere asking of questions such as those referred to in para. (4) of the Case is not conclusive, but the court should consider whether the impression made upon its mind by these questions or the answers given to them can or cannot be effaced when the task of forming the judgment arises, and whether upon the rest of the evidence, that is to say, the evidence which is not open to any observation, the materials are such as to lead to a conviction. I think, therefore, that the appeal succeeds. D E F G H

ROCHE, J.—I agree.

BRANSON, J.—I agree.

Appeal allowed.

Solicitors: *Wilfrid J. Day*, Birmingham; *Philip Baker & Co.*, Birmingham.

[*Reported by* J. F. WALKER, ESQ., *Barrister-at-Law.*]

A

GEORGE WILLS & SONS, LTD. *v.* R. S. CUNNINGHAM, SON & CO., LTD.

[KING'S BENCH DIVISION (Greer, J.), November 22, 1923]

B [Reported [1924] 2 K.B. 220; 93 L.J.K.B. 1008; 131 L.T. 400; 40 T.L.R. 108]

Contract—Non-performance—Defence—Exceptions clause—"Unforeseen circumstances excepted"—Sale of goods—Need to prove absolute inability to obtain goods.

The defendant company who carried on business as iron and steel merchants C agreed to supply the plaintiff company with a quantity of steel goods to be delivered f.o.b. Antwerp. No particular source from which the goods were to come was indicated. The defendant company had in fact ordered the steel goods from German manufacturers, but it was not proved that Germany was the only possible source of supply. The contract contained a u.c.e. (unforeseen circumstances excepted) clause. Owing to the French occupation of the Ruhr D Valley, trade and business in Germany became disorganised and the manufacture of steel goods impossible, and the defendant company were able to deliver only part of the goods. In an action brought by the plaintiff company for damages for breach of contract the defendant company relied on the French occupation of the Ruhr as a circumstance bringing them within the u.c.e. proviso and relieving them from liability under the contract.

E **Held:** for the proviso to apply the defendant company must prove that the unforeseen circumstance relied on absolutely prevented them from obtaining goods of the contract description anywhere; this they had failed to do; and, therefore, the plaintiff company were entitled to judgment.

Notes. Referred to: *Leavey & Co.* v. *George H. Hirst & Co.*, [1943] 2 All E.R. 581.

F As to clauses envisaging the possibility of non-performance, see 8 HALSBURY'S LAWS (3rd Edn.) 181–182; and for cases see 12 DIGEST (Repl.) 417 et seq, 429 et seq.

Action tried by GREER, J., without a jury.

The facts are set out fully in the headnote.

G *Holman Gregory, K.C.*, and *Robert Fortune* for the plaintiff company.
W. Norman Raeburn, K.C., and *G. L. Hardy* for the defendant company.

GREER, J. [stated the facts, dealt with various points raised by the defence, and then proceeded to deal with the defendant company's principal defence]. The defendant company also rely on the proviso expressed as u.c.e., which means H "unforeseen circumstances or contingencies excepted." It is to be observed that the contract does not specify any source from which the steel goods in question are to come and it is difficult to see how exactly such a proviso as the one in question is to be applied and construed in the absence of a provision in the contract specifying the source from which the steel goods in question are to be obtained. But merchants will keep on making use of shorthand phrases such as the one used I in the present case, with the consequence that the court is left with the very difficult task of construing and applying them. In my view, the proviso must be construed to apply the exception only to the happening of such unforeseen circumstances as would render the performance of the contract impossible. The defendant company are not relieved of liability by the proviso merely because, by reason of the occupation of the Ruhr by the French, they are prevented from obtaining the goods from the particular source from which they intended to obtain them, if they could still, notwithstanding the unforeseen circumstances, obtain steel goods of the contract description elsewhere. To come within the u.c.e. proviso, the

unforeseen circumstances relied on must amount to an absolute prevention of the defendant company from obtaining goods of contract description anywhere. In this case the defendant company has failed to show any such absolute prevention. The defence therefore fails, and there must be judgment for the plaintiff company.

Judgment for the plaintiff company.

Solicitors: *Kimber, Bull & Co.*; *Morris & Shepherd.*

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

LONDON COUNTY COUNCIL *v.* GAINSBOROUGH

[King's Bench Division (Lord Hewart, C.J., Avory and Roche, JJ.), April 12, 13, 1923]

[Reported [1923] 2 K.B. 301; 92 L.J.K.B. 597; 129 L.T. 633; 87 J.P. 102; 39 T.L.R. 422; 67 Sol. Jo. 595; 21 L.G.R. 312; 27 Cox, C.C. 503]

Shop—Hours of closing—Sunday—"Every day other than Saturday"—"Weekdays other than Saturdays"—Shops (Early Closing) Act, 1920 (10 & 11 *Geo.* 5, *c.* 58), *Schedule, Part I, art.* 1 (*a*)—*Shops* (*Early Closing*) *Act* (1920) *Amendment Act*, 1921 (11 & 12 *Geo.* 5, *c.* 60), *s.* 1.

By the Shops (Early Closing) Act, 1920, Schedule, Part I, art. 1 (a): "Every shop shall be closed for the serving of customers not later than 8 o'clock in the evening on every day other than Saturday and not later than 9 o'clock in the evening on Saturday. . . ." By the Shops (Early Closing) Act (1920) Amendment Act, 1921, s. 1, Part I of the schedule to the 1920 Act was to have effect as though at the end of art. 2 (by which in certain cases sales to customers after closing hours were not prevented) the following words were inserted: "(4) The sale of fruit, table waters, sweets, chocolates, or other sugar confectionery, or ice cream, until 9.30 p.m. on weekdays other than Saturdays, and 10 p.m. on Saturdays." The respondent, who occupied a shop where confectionery, sweets and light refreshments were sold, was charged with keeping his shop open between 8 and 9.30 p.m. on a Sunday.

Held: the words "every day other than Saturday" in art. 1 (a) of Part I of the schedule to the 1920 Act included Sundays, and the words "weekdays other than Saturdays" in s. 1 of the amending Act of 1921 did not include Sundays; and, therefore, the respondent had committed an offence under the Act of 1920.

Notes. The Shops (Early Closing) Act, 1920, and the Shops (Early Closing) Act (1920) Amendment Act, 1921, were repealed by the Shops (Hours of Closing) Act, 1928, s. 10 (4) and Sched. IV, which in turn was repealed by the Shops Act, 1950, s. 76 (1) and Sched. VIII. See now s. 2 (1) and s. 6 of the Act of 1950, as amended by the Shops (Revocation of Winter Closing Provisions) Order, 1952 (S.I. 1952 No. 1862), art. 1.

As to shop hours and Sunday trading, see 17 Halsbury's Laws (3rd Edn.) 194 et seq.; and for cases see 24 Digest (Repl.) 1107 et seq. For the Shops Act, 1950, s. 2 and s. 6, see 29 Halsbury's Statutes (2nd Edn.) 191, 194.

Case Stated by a metropolitan police magistrate.

On Aug. 19 and 25, 1922, an information was preferred by J. H. Pawlin, on behalf of the appellants, the London County Council, against the respondent, that on Sunday, April 30, 1922, a shop known as No. 10a, Marble Arch, was not closed

for the serving of customers at and after the hour of 8 p.m., contrary to art. 1 (a) of the order in Part I of the schedule to the Shops (Early Closing) Act, 1920, as amended by the Shops (Early Closing) Act (1920) Amendment Act, 1921, whereby the respondent, being the occupier of the shop, became guilty of an offence against the Shops Act, 1912, and liable to a fine. It was proved or admitted that the respondent was the occupier of the shop No. 10a, Marble Arch, and that he there carried on a retail trade in confectionery, sweets and light refreshments, and that the shop was open for the serving of customers with sweets after 8 p.m., but not after 9.30 p.m., on Sunday, April 30, 1922.

It was contended for the appellants that, in the expression "every day other than Saturday" in art. 1 (a) of Part I of the schedule to the Shops (Early Closing) Act, 1920, "every day" included Sunday, and that, in the expression "weekdays other than Saturdays" in s. 1 of the Shops (Early Closing) Act (1920) Amendment Act, 1921, "weekdays" meant weekdays in the ordinary acceptation of the term, namely, the days of the week other than Sunday, that Sundays accordingly were not affected by the Act of 1921, and that the hours at which a shop should be closed on Sundays were governed by the provisions of the Act of 1920. It was contended for the respondent that the Acts of 1920 and 1921 did not apply to Sundays, and that the closing of shops on Sundays was still left wholly to the operation of the Sunday Observance Act, 1677.

The magistrate dismissed the information and the appellants now appealed.

H. D. Roome for the appellants.

Matthews, K.C., and *Phineas Quass* for the respondent.

LORD HEWART, C.J.—This is a Case Stated, and the question arises under the comparatively recent legislation on the early closing of shops. There are really two questions to consider, and they are shortly stated in the judgment delivered by the learned magistrate. He says:

> "There are two points. The contention in this case is that in Sched. I to the Shops (Early Closing) Act, 1920, the expression 'every day other than Saturday' also includes Sunday; and further, that, in the amending Act, s. 1, which is read into art. 2 of Parts I and II of the schedule to the Act of 1920, the expression 'weekdays other than Saturdays' intentionally excludes Sunday."

Looking at that legislation and looking at the context of those words, I have no doubt, speaking for myself, that each of those contentions was correct. It is, of course, obvious—too obvious to need explanation or development—that it is one thing to say that Sunday is a day of the week, and another thing to say that Sunday is a weekday, especially when one is dealing with legislation which in more than one place points a clear contrast between Sundays on the one hand and weekdays on the other hand. I refer only to three matters: in the Shops Act, 1912, s. 19, "week" is defined; it is the period between midnight on Saturday night and midnight on the succeeding Saturday night. In the Shops Act, 1913, s. 1 (1) (b), it is provided as follows:

> "Provision shall be made for securing to every such assistant—(i) thirty-two whole holidays on a weekday in every year, of which at least two shall be given within the currency of each month and which shall comprise a holiday on full pay of not less than six consecutive days; (ii) twenty-six whole holidays on Sunday in every year, so distributed that at least one out of every three consecutive Sundays shall be a whole holiday."

And, again, if one turns to the amending Act of 1921, one there finds the expression,

> "The sale of fruit, table waters, sweets, chocolates, or other sugar confectionery, or ice-cream, until 9.30 p.m. on weekdays other than Saturdays."

I cannot doubt that "every day other than Saturday" includes Sunday, and that "weekdays other than Saturday" excludes Sunday, and no dissertation, however edifying, on the statutory piety of the later seventeenth century, and no analysis,

however exhaustive, of the enactments of the last thirty years, seems to me to affect, or even to obscure, that simple point.

It was said by the learned magistrate, and it has been repeated in argument to-day, that to hold what I am now holding involves this: that the Sunday Observance Act, 1677, must be taken to have been pro tanto impliedly repealed by this later legislation. I do not think that that conclusion in the least degree follows. On the contrary, the later legislation is cumulative on the Sunday Observance Act, 1677. But even supposing that that earlier Act is in abeyance, whatever the fact may be—and it may well be that the practice in different parts of the country is different—that Act remains, and superadded to it, as something cognate to and not repugnant to its provisions, there comes the later legislation as to hours of closing. In these circumstances, I think that the learned magistrate was wrong, and that this case ought to be remitted to him with directions to convict.

AVORY, J.—I am of the same opinion. The short point in this case is whether the words in the schedule to the Shops (Early Closing) Act, 1920, "every day other than Saturday," include Sunday; and para. (b) of art. 1 of the schedule makes it even more plain when it goes on to provide that any person who carries on in any place, not being a shop, any retail trade or business after eight o'clock in the evening on any day other than Saturday shall be liable to a penalty. I cannot doubt that Sunday is a day other than Saturday in the week. The only further difficulty which is presented in this case is whether the word "weekdays" in the Act of 1921 include Sunday. It is clear, looking at these several Acts, that the expression "weekdays" is distinguished throughout them from the expression "days of the week," and that the expression "weekdays" means "the days of the week other than Sunday," whereas Sunday is undoubtedly "a day in the week."

With regard to the point that the effect of so construing this statute is to repeal the Sunday Observance Act, 1677, it clearly will not help the respondent here to say that the Sunday Observance Act, 1677, has been repealed while the Shops Act remains in force. In my view, this does not operate as a repeal of the Sunday Observance Act, 1677, especially in view of the fact that the legislature has recognised by the Sunday Observation Prosecution Act, 1871, that prosecutions under the original Act are seldom undertaken, and now they can only be undertaken on the express consent of the chief officer of police or of a magistrate. It having been recognised that such prosecutions are seldom undertaken, there is no inconsistency in saying that, although a man may be liable if he opens his shop at all on Sunday, he shall be liable to a particular penalty if he keeps it open after a certain hour in the evening of Sunday.

I only wish to add that I cannot concur in the reason given by the learned magistrate for construing the Shops Act in the way that he did, when he says that, as a magistrate, he knows that there is a great public feeling that these restrictions should not be unduly maintained and enforced. In my opinion, restrictive legislation of this kind which is intended to restrain that portion of the public who have a vicious appetite for eating sweetmeats up to the last moment before they go to bed should be enforced for the benefit of the community at large, and legislation of this character ought not to be so construed that it panders to those vicious proclivities.

ROCHE, J.—I concur in the decision of Lord Hewart, C.J., and Avory, J., and with their reasons, except that I do not propose to enter on either the reasons given by the learned magistrate or on the traverse of these reasons by my brother. Those matters seem to me to be matters rather for the legislature than for the court.

Case remitted.

Solicitors: *D. P. Andrews*; *S. Landman.*

[*Reported by* J. F. Walker, Esq., *Barrister-at-Law.*]

A

THE AMBATIELOS. THE CEPHALONIA

[Probate, Divorce and Admiralty Division (Hill, J.), December 6, 1922, January 15, 1923]

B [Reported [1923] P. 68; 92 L.J.P. 45; 128 L.T. 699; 39 T.L.R. 183; 16 Asp.M.L.C. 120]

Harbour—Pilot—Pilotage dues—Right to sue in rem in Admiralty Court—Pilotage Act, 1913 (2 *& 3 Geo. 5, c.* 31), *s.* 49.

A pilot's right to recover pilotage dues is not restricted to his right to recover in summary proceedings under the Pilotage Act, 1913, s. 49, since the C High Court of Admiralty and its successor, the Admiralty Division of the High Court of Justice, have always had jurisdiction to entertain an action in rem by a pilot for the dues.

Quære: whether there is a maritime lien in respect of pilotage dues.

Notes. As to pilotage dues, see 30 Halsbury's Laws (2nd Edn.) 931; and for D cases see 41 Digest 899 et seq. For the Pilotage Act, 1913, s. 49, see 23 Halsbury's Statutes (2nd Edn.) 863.

Cases referred to:

(1) *Ross* v. *Walker* (1765), 2 Wils. 264; 95 E.R. 801; 1 Digest 135, *429.*
(2) *The Nelson* (1805), 6 Ch. Rob. 227; 165 E.R. 911; 41 Digest 256, *975.*
(3) *The Bee* (1822), 2 Dods. 498; 165 E.R. 1559; 41 Digest 901; *7934.*
E (4) *The Benjamin Franklin* (1806), 6 Ch. Rob. 350; 1 Digest 135, *430.*
(5) *The Adah* (1830), 2 Hag. Adm. 326; 166 E.R. 262; 41 Digest 901; *7935.*
(6) *The Dowthorpe* (1843), 2 Wm. Rob. 73; 2 Notes of Cases, 264; 3 L.T. 341; 7 Jur. 609; 166 E.R. 682; 41 Digest 945, *8369.*
(7) *La Constancia* (1846), 2 Wm. Rob. 487; 4 Notes of Cases, 677; 3 L.T. 381; 10 Jur. 845; 166 E.R. 839; 41 Digest 598, *4237.*
F (8) *Westrup* v. *Great Yarmouth Steam Carrying Co.* (1889), 43 Ch.D. 241; 59 L.J.Ch. 111; 61 L.T. 714; 38 W.R. 505; 6 T.L.R. 84; 6 Asp.M.L.C. 443; 41 Digest 939, *8310.*
(9) *The Clan Grant* (1887), 12 P.D. 139; 56 L.J.P. 62; 57 L.T. 124; 35 W.R. 670; 6 Asp.M.L.C 144; 41 Digest 901, *7937.*
(10) *The Limerick* (1875), November 23, unreported.
G (11) *R.* v. *City of London Court Judge and Michigan (Owners)* (1890), 25 Q.B.D. 339; 59 L.J.Q.B. 427; 63 L.T. 492; 38 W.R. 638; 6 T.L.R. 364; 1 Digest 247, *1751.*
(12) *The Ruby (No. 2)*, [1898] P. 59; 67 L.J.P. 28; 78 L.T. 235; 46 W.R. 687; 14 T.L.R. 184; 8 Asp.M.L.C. 421; 41 Digest 936, *8258.*
(13) *Morteo* v. *Julian* (1879), 4 C.P.D. 216; 48 L.J.M.C. 126; 41 L.T. 71.
H (14) *Northcote* v. *Henrich Björn (Owners) The Henrich Björn* (1886), 11 App. Cas. 270; 55 L.J.P. 80; 55 L.T. 66; 2 T.L.R. 498; 6 Asp.M.L.C. 1, H.L.; 41 Digest 942, *8333.*

Also referred to in argument:

The Prince George (1837), 3 Hag. Adm. 376; 166 E.R. 445; 41 Digest 240, *807.*
I *The Servia, The Carinthia*, [1898] P. 36; 67 L.J.P. 36; 78 L.T. 54; 46 W.R. 492; 14 T.L.R. 188; 8 Asp.M.L.C. 353; 41 Digest 901, *7938.*
Crosfield & Sons, Ltd. v. *Manchester Ship Canal Co.*, [1905] A.C. 421; 74 L.J.Ch. 637; 93 L.T. 141; 69 J.P. 441; 54 W.R. 172; 21 T.L.R. 689, H.L.; 16 Digest 114, *145.*

Actions.

The plaintiffs were duly licensed Cardiff pilots, and were employed, in October, 1921, to perform certain pilotage services to the Greek vessels *Ambatielos* and *Cephalonia*, in respect of which there was due to them £21 17s. 6d. in respect of

the former, and £42 17s. 6d. in respect of the latter vessel, being their dues at the statutory pilotage rates. The vessels were under arrest in actions by a mortgagee. In each case the facts were admitted.

Dumas for the plaintiffs.
Carpmael for the defendants.

Cur. adv. vult.

Jan. 15. **HILL, J.,** read the following judgment.—In each of these cases a pilot, duly licensed by the Cardiff Pilotage Board, brings an action in rem, claiming the amount of the authorised dues for piloting the ship from Barry Roads to dock at Cardiff. At the date of the writ, each ship was under arrest in a mortgagee's action. The ships are Greek. The Greek owner entered an appearance not under protest. The only defence raised at the hearing was that no action by a pilot is sustainable in this court, whether in rem or in personam, the contention being that the remedy by summary proceedings under s. 49 of the Pilotage Act, 1913, is the only remedy.

I have examined the authorities and the Pilotage Act, and the Acts which preceded it. I have come to the conclusion that the High Court of Admiralty, and its successor, the Admiralty Division of the High Court of Justice, have always entertained actions in rem for pilotage remuneration, and that there is nothing in the statutes which has taken away that jurisdiction. A judgment in rem can, therefore, be pronounced. A fortiori there is nothing to take away jurisdiction in personam, and, the defendants having appeared, a judgment in personam can be pronounced. It is clear that High Court of Admiralty entertained suits for pilotage remuneration, and treated the pilot as a seaman and his remuneration as wages. It is also clear that the courts of common law, at a time when they were most jealous of Admiralty jurisdiction, recognised this jurisdiction of the High Court of Admiralty except in cases where the contract was made and the work done within the body of a county.

It is unnecessary to go further back than *Ross* v. *Walker* (1). That was a motion of prohibition in a suit described as "a pilot's suit for wages in Admiralty." The court of common law granted prohibition because the contract was made on land and was to do work on board within "the body of a county" (the pilotage was Sea Reach to Deptford); but in the judgment it was said,

> "It is established that every officer and common man who assists in navigating the ship (except the master) . . . is a mariner and may sue for wages in the Court of Admiralty."

Suits by pilots for remuneration were heard without objection by Sir William Scott in *The Nelson* (2) and *The Bee* (3). A similar suit for conducting an American ship from the Downs to Flushing was dismissed on the ground that the service was illegal as involving trading with the enemy; but there was no suggestion that the High Court of Admiralty had not jurisdiction: *The Benjamin Franklin* (4). In 1830, in *The Adah* (5), Sir Christopher Robinson heard a similar suit without objection. Dr. Lushington admitted similar claims in *The Dowthorpe* (6) and *La Constancia* (7) and treated pilotage as on the same footing as wages, and in *La Constancia* (7) as towage also, as giving maritime liens. He was wrong in thinking that towage carried a maritime lien: see *Westrup* v. *Great Yarmouth Steam Carrying Co.* (8). He was right in thinking that there was a right in rem for towage whether there was or was not such a right before the Act of 1840, for towage is mentioned in that Act. Wages and pilotage were not mentioned in that Act, and Dr. Lushington was, therefore, exercising a jurisdiction which did not depend on statute. Coming to more modern times, a suit for pilotage remuneration was heard without objection in *The Clan Grant* (9), and in a note on p. 201 of the third edition of Williams and Bruce's Admiralty Practice there is a reference to *The Limerick* (10).

These cases are subsequent to the Admiralty Court Act, 1861, which, by s. 10, provided that

A "the High Court of Admiralty shall have jurisdiction over any claim by a seaman of any ship for wages earned by him on board a ship, whether the same be under a special contract, or otherwise . . ."

I incline to think that "seaman" and "wages," as used in that section, include pilot and a pilot's remuneration. The original jurisdiction was based on so treating a pilot and his remuneration. It is nothing to the point that the Merchant B Shipping Act, 1854, and its successors define "seaman" so as to exclude pilot. The question is in what sense was "seaman" used in the Admiralty Court Act, 1861. The courts have treated it as used in the wide sense in which it was used in the eighteenth and nineteenth century, when dealing with the words "any claim for wages" in the County Courts Admiralty Jurisdiction Act, 1868. In *R.* v. *City of London Court Judge and Michigan* (*Owners*) (11) WILLS, J., after consulting C BUTT, J., said (25 Q.B.D. at p. 342):

> "The right to proceed in rem for services rendered on board a ship, apparently extends to every class of person who is connected with the ship, as a ship, as a sea-going instrument of navigation,"

and in *The Ruby* (*No. 2*) (12) SIR FRANCIS JEUNE, with reference to s. 10 of the D Act of 1861, said ([1898] P. at p. 62):

> "I agree that the word seaman may be extended to any person who is employed in the practical employment or management of a ship; but the gist of the matter is that the employment must be to do the work of the ship."

But whether s. 10 includes a pilot or not, the jurisdiction in respect of a pilot's E claim was not questioned in *The Clan Grant* (9). That implies that, if a pilot's claim was not within s. 10, then it was within the original jurisdiction of the court. Further in the third edition of WILLIAMS AND BRUCE'S ADMIRALTY PRACTICE, I find this at p. 201:

> "By the ancient practice of the Court of Admiralty the privilege of suing in the court extended to every person other than the master employed on F board a ship—to the mate, to a surgeon, to a pilot, unless the contract was made and the work done infra corpus comitatus, to a purser, to a ship's carpenter, to a boatswain, to a female acting as cook and steward, and to an apprentice. The word 'seaman,' when used in the Admiralty Court Act, 1861, thus appears to include every person other than the master who may have a claim for wages."

G And at p. 669 are given forms of writ and warrant of arrest in a pilotage action and a form of statement of claim taken from *The Clan Grant* (9), and there is a note, "Suits for pilotage are of rare occurrence," and a further note to the statement of claim:

> "This form was drawn whilst the Merchant Shipping Act, 1854, was in force. H It can easily be altered to suit a case under the Act of 1894."

But it is said that s. 49 of the Pilotage Act, 1913, gives the pilot his remedy and his only remedy. Let us examine the statutes. At the date of *The Bee* (3) (1822), the Pilotage Act in question was 52 Geo. 3, c. 39. By s. 57 and s. 58, together with s. 71 and s. 72, pilotage rates were made recoverable, according to the amount involved, either before justices or before any of the Courts of Record I at Westminster; s. 73 provided that nothing in the Act should impair the jurisdiction of the High Court of Admiralty. At the date of *The Adah* (5) (1830), the Pilotage Act in question was 6 Geo. 4, c. 125. Section 44 and s. 45, together with s. 76 and s. 77, gave remedies summary or otherwise, according to the amounts involved, similar to 52 Geo. 3, c. 39. Section 87 provided that nothing in the Act should impair the jurisdiction of the High Court of Admiralty. It will be observed that both these statutes recognised that the High Court of Admiralty had a jurisdiction in matters of pilots. But the saving clauses leave it open to contend that, without them, the remedies provided would have ousted the

jurisdiction of the High Court of Admiralty. The Merchant Shipping Act, 1854, by s. 363 and s. 364, gave a qualified pilot a summary remedy for pilotage dues. It was held in *Morteo* v. *Julian* (13) that this did not extend to the allowances under s. 357 of the Act of 1894, to a pilot taken out of his district. The Merchant Shipping Act, 1894, by s. 591 re-enacted s. 363 and s. 364. The Pilotage Act, 1913, s. 49, re-enacts s. 591, substituting "licensed pilot" for "qualified pilot," and by s. 34 extends the summary remedy to allowances to a pilot taken out of his district. If s. 49 of the Act of 1913 provides the only remedy, then the corresponding sections of the Merchant Shipping Acts, 1894 and 1854, provided the only remedy. *The Clan Grant* (9) and *The Limerick* (10) ought never to have been heard, and the passages cited from WILLIAMS AND BRUCE'S ADMIRALTY PRACTICE (3rd Edn.) are wrong. I see no sufficient reason why they should be held to provide the only remedy. It is to be observed that the Acts of 1854 and 1894, which define a seaman so as to exclude a pilot, and provide a summary remedy for seaman's wages, in terms provide that a proceeding for recovery of wages not exceeding £50 shall not be instituted in any superior court of record nor in any court having Admiralty jurisdiction, except in certain cases: see s. 188 and s. 189 of the Act of 1854, corresponding with s. 164 and s. 165 of the Act of 1894. The same Acts give a summary remedy to a qualified pilot, but contain no section corresponding to s. 189 of the Act of 1854 and s. 165 of the Act of 1894, prohibiting proceedings in superior courts of record. Further, if s. 49 of the Pilotage Act does provide the only remedy, it would produce anomalous results. It applies only to licensed pilots suing for pilotage dues (including allowances when taken out of the district). Pilotage in districts where no licence is necessary would still be within the jurisdiction of the court; claims for pilotage abroad or cases of pilotage to which no dues were applicable, would still remain within the jurisdiction, while the very men whom the statute sets out to protect would be left to their summary procedure. Moreover, while the Merchant Shipping Act would have permitted claims of small amount by seamen (exclusive of pilots) to be brought in this court when the ship was under arrest, a pilot would have no such right.

I hold that a pilot, claiming pilotage remuneration, has a right in rem, and can sue in this court. In general, he will be ill-advised to sue when he has a summary remedy, for he is not likely to be given costs if he neglect the cheaper and pursues the more expensive remedy. But in cases where the ship is already under arrest, and especially when the ship is foreign owned, it may be a proper thing to sue in this court. In the present case, I hold that it was, and I give judgment for the plaintiff with costs. I am not deciding that there is a maritime lien for pilotage dues. It does not necessarily follow that because there was original jurisdiction in the High Court of Admiralty in respect of pilotage that there was a maritime lien for pilotage: see the judgments of LORD BRAMWELL and LORD FITZGERALD in *The Henrich Björn* (14). It is not proper that I should decide in favour of a maritime lien in the absence of the mortgagees. But the amounts are so small that probably the mortgagees and the owners will both recognise that the judgments ought to be satisfied out of the proceeds of the ships if they are realised.

Solicitors: *Richards & Butler*; *William A. Crump & Son.*

[*Reported by* GEOFFREY HUTCHINSON, ESQ., *Barrister-at-Law.*]

KEELING *v.* PEARL ASSURANCE CO., LTD.

[KING'S BENCH DIVISION (Bailhache, J.), June 25, 26, 1923]

[Reported 129 L.T. 573]

Insurance—Agent—Proposal—Mis-statements in proposal form—Form signed in blank—Statements filled in by agent—True information given to agent—Effect on policy.

Where the agent of an insurance company fills up a proposal form for the assured and the facts set down by the agent are contrary to the facts given him by the assured, the knowledge of the agent that the facts set down in the proposal form are untrue must be imputed to the insurance company, and the policy is not vitiated.

Bawden v. *London, Edinburgh and Glasgow Assurance Co.* (1), [1892] 2 Q.B. 534, applied.

Notes. Distinguished: *Newsholme* v. *Road Transport and General Insurance* (1928), 45 T.L.R. 123.

As to insurance agents, see 22 HALSBURY'S LAWS (3rd Edn.) 201 et seq.; and for cases see 29 DIGEST 54 et seq.

Cases referred to:

(1) *Bawden* v. *London, Edinburgh and Glasgow Assurance Co.*, [1892] 2 Q.B. 534; 61 L.J.Q.B. 792; 57 J.P. 116; 8 T.L.R. 566; 36 Sol. Jo. 502, C.A.; 29 Digest 60, *200.*

(2) *Biggar* v. *Rock Life Assurance Co.*, [1902] 1 K.B. 516; 71 L.J.K.B. 79; 18 T.L.R. 119; 46 Sol. Jo. 105; sub nom. *Re Biggar and Rock Life Assurance Co.*, 85 L.T. 636; 29 Digest 54, *170.*

Also referred to in argument:

Parsons v. *Bignold* (1846), 15 L.J.Ch. 379, L.C.; 29 Digest 59, *194.*

Wells v. *Smith*, [1914] 3 K.B. 722; 83 L.J.K.B. 1614; 111 L.T. 809; 30 T.L.R. 623; 1 Digest 613, *2415.*

Levy v. *Scottish Employers' Insurance Co.* (1901), 17 T.L.R. 229, D.C.; 29 Digest 57, *184.*

Special Case stated by an arbitrator under s. 7 of the Arbitration Act, 1889, s. 7.

The facts are set out in the judgment.

Rawlinson, K.C., and *C. H. Spafford* for the insurance company.

Merriman, K.C., and *Ridgeway Bennett* for the assured.

BAILHACHE, J.—This case comes before me from a learned arbitrator, and the question is whether a certain policy of insurance, effected by a married woman named Keeling on the life of her husband, Harry Keeling, is enforceable, or is void against the insurance company. The ground on which the insurance company contest the claim under the policy, Harry Keeling having died, is that certain answers in the proposal form which covered the policy are untrue. The policy contains the usual clause, that the proposal form is the basis on which the policy is issued.

The facts of the case, as is clear from the award, are these: Mrs. Keeling had had a previous policy on her husband's life, but beyond the arbitrator finding that that insurance policy is void, I know nothing at all about it. So far as this policy is concerned, the facts stated are that, in October, 1920, an inspector of the insurance company, and I believe also an ordinary collector—the inspector's name being Allen and the collector's name being Pearce—they together, or one of them at any rate, went and saw Mrs. Keeling and suggested that she should insure the life of her husband, which she was quite willing to do, for the sum of £500. The proposal form was produced to Mrs. Keeling, and she signed it. It was signed by her in blank; the inspector took it away, and because there was some mistake made in filling up the form, he got another form filled up which was afterwards signed, and signed again, I think, before it was completed, by Mrs. Keeling, and

by her husband. This form contains (as all proposal forms do) a certain number of questions. The following questions are objected to by the insurance company, on the ground that the answers to them are untrue. If that is made out, and they are untrue to the knowledge of the person making them, no doubt the policy is void. The first answer to which they object is this: The question is, the date of birth; and the date of birth is given as Nov. 28, 1863. The place of birth is given as New Mills, which I understand is correct. Then the age next birthday is given as 48. It is obvious to anybody who does the simplest subtraction sum, that a person born in 1863 would not be 48, but would be 57, in 1920. There was no reason to suppose that time had stood still for the husband, and it was obvious, therefore, that there was some mistake about his age, and it turns out that, in fact, 1863 is the wrong date of the birth, and that the age next birthday, instead of being 48, ought to be 49. The insurance company had that form before them, and they saw, on the face of it, that there was a mistake somewhere about the age. Obviously, it must have hit them in the eye the moment they had the proposal form. Yet, notwithstanding that, they chose to issue a policy; and if they chose to issue a policy on a proposal form which contained a mistake, obviously, on the face of it, without further inquiry, there is no ground, in my opinion, for vitiating the policy. It is not suggested that there was any fraud in stating that the age next birthday was 48. So much for that which, I think, gives no trouble at all.

Then there is an objection to the answer to question number 6—"What is the name and residence of your usual medical attendant? State when and for what illnesses he has been consulted?" The answer given to that is: "None required." The learned arbitrator finds that that answer was, in fact, untrue. How that came to be answered in that way was that, apparently, the inspector asked the intending assured about her husband's life, and to that question he got no answer, or, if he did get an answer, it is not recorded in the case. However, he knew the husband, and he said that he would see him himself, and when he, I think a month or two afterwards, saw him himself, he asked him these questions: "(Q.) Are you in good health?—(A.) Yes. (Q.) Have you had a serious illness?—(A.) No. (Q.) Have you been under any medical examination?—(A.) Nothing serious. (Q.) Is there any consumption?—(A.) No." On the strength of these answers, the agent, in answer to the question: "What is the name of your usual medical attendant?" said "None required." As a matter of fact, the husband had been ill from May to July, 1919, and again from May to July, 1920. On both occasions he had suffered from bronchial catarrh, and on the first occasion from some pleurisy. There is a question whether he had had any serious illness, and as to that the answer is "No"; but the learned arbitrator finds, apparently, that there is no objection to be taken to that answer. When it is said that there was no doctor required, that answer is certainly untrue, and if that was the natural result, although not stated, of the answer given by the husband to the insurance inspector when answering these questions, I should have said, beyond all doubt, that the wife, who knew that the inspector was going to get the information as to her husband's health from the husband himself, would be bound by that answer, and, the answer being untrue, the policy could not stand. But the learned arbitrator finds that the answers were true; and, obviously, there is nothing in the answers to suggest that there has not been a doctor at all. The answer is: "I have not been examined for anything serious." That rather implies that there has been a doctor, although the illness was not serious.

The last objection that was taken, as I understand it, before the arbitrator, is whether the husband had been insured before. That is question number 10. On the same occasion, when the inspector asked the husband about his health, he asked about other insurances on his life, and the husband said: "I think my wife had me in for a trifle"; and it appears that the wife had insured his life for some small sums. Notwithstanding that information, the inspector puts in the proposal form as the answer to the question "Have you any other insurances?"—"No." That is directly contrary to the information which he had from the husband.

It appears, therefore, that, in the answers on the proposal form, two are untrue. One is that there was no doctor, and the other is that there were no other insurances. Undoubtedly, if that information had been given either by the wife or by her husband on her behalf, there is no doubt at all that the policy based on those answers would be void, and could not be enforced. Although it is hardly necessary to mention it, as the matter has been referred to, I will just deal with it. It does not matter whether the question is material or not, if a question is asked as the basis of a proposal for insurance. The question must be truly answered, however immaterial the question may appear to be to the person who gives the answer. I am not saying that either of these questions is immaterial; but even if they were, they would have to be truly answered.

The remaining question is one which in these cases always seems to me to be one of very considerable difficulty. It is: "Is the assured barred because the person who negotiated on behalf of the insurance company with Mrs. Keeling, for this insurance on her husband's life, had inserted in the proposal form answers which are untrue?" No doubt, if the answers had been given by the assured, or by her husband, the policy would be void, but the agent in this case has inserted answers which are not consistent with, and in one case are certainly directly contrary to, the information which he had from the husband. If the knowledge of the agent is to be imputed to the insurance company, or if in filling up the proposal form he was acting as the agent for the insurance company, then, inasmuch as the answers are his own answers and not the answers of the assured, the policy is undoubtedly good.

There have been a large number of cases cited to me on one side and the other. Perhaps the most illuminating, on the one hand, is that of the one-eyed man, *Bawden* v. *London, Edinburgh and Glasgow Assurance Co.* (1), and on the other hand, the case before WRIGHT, J., of *Biggar* v. *Rock Life Assurance Co.* (2), each of them coming to a different conclusion. In *Bawden's Case* (1), it was held that the knowledge of the insurance agent that the assured had only one eye was to be imputed to the company, although in the filling up of the proposal form it was stated that he was not suffering from any physical defect—a statement which, obviously, having regard to the fact that the man had only one eye, was untrue. In *Biggar's Case* (2), the answers were manufactured by the insurance agent, and were manufactured in fraud of the insurance company. In that case, it was held that the policy was void, and that the insurance agent, in manufacturing those answers, was not acting as the agent for the insurance company. A good many cases have been decided, some falling on one side of the line, and some on the other. The learned arbitrator has found that, in this particular case, the agent, Mr. Allen, who filled up this form, was acting as the agent of the insurance company. However that may be, in my opinion, where an agent does, in fact, fill up these forms, and particularly when he is more than a mere collector—when he is an inspector whose business it is, as Mr. Allen says, to negotiate these contracts, and, as I gather, to fill up these forms for people who cannot fill them up for themselves—then, when one finds that the answers which the agent puts down are contrary to the facts which are stated to him by the assured—in such cases as that and in view of the finding of the learned arbitrator that Mr. Allen was in fact the agent of the insurance company, I have come to the conclusion that in this case the line of cases to be followed is the *Bawden* line of cases rather than the *Biggar* line of cases. Having arrived at that conclusion, I see no reason to differ from the finding of the learned arbitrator in his award. The result is that Mr. Allen was the agent of the insurance company in the matters to which I have alluded, and I answer the question submitted to me—whether the insurance company are liable to pay Mrs. Keeling the £500 under the policy—in the affirmative.

Award affirmed.

Solicitors: *Cree & Sons*, for *J. Sumner Pollitt*, New Mills; *J. M. Storer.*

[*Reported by* J. S. SCRIMGEOUR, ESQ., *Barrister-at-Law.*]

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CALDWELL *v.* JONES

[King's Bench Division (Lord Hewart, C.J., Roche and Branson, JJ.), May 9, 1923]

[Reported [1923] 2 K.B. 309; 92 L.J.K.B. 760; 129 L.T. 631; 87 J.P. 130; 39 T.L.R. 471; 67 Sol. Jo. 596; 21 L.G.R. 520; 27 Cox, C.C. 498] B

Licensing—Offence—Consumption of liquor outside permitted hours—Liquor brought to licensed premises and there consumed—Licensing Act, 1921 (11 & 12 *Geo.* 5, *c.* 42), *s.* 4 (*b*).

By the Licensing Act, 1921, s. 4, ". . . no person shall, except during the permitted hours . . . (b) consume in . . . any such premises . . . any intoxicating liquor." The respondents were found on licensed premises during non-permitted hours drinking whisky which one of them had brought on to the premises. C

Held: the word "consume" in s. 4 (b) must be given its natural and obvious meaning, and, therefore, the respondents had committed an offence under s. 4 (b). D

Notes. The Licensing Act, 1921, has been repealed by the Licensing Act, 1953, s. 168 (1) and Sched. X. Section 4 of the 1921 Act has been replaced by s. 100 (1) of the 1950 Act.

As to the infringement of licensing hours, see 22 Halsbury's Laws (3rd Edn.) 674; and for cases see 30 Digest (Repl.) 106 et seq. For the Licensing Act, 1953, s. 100, see 33 Halsbury's Laws (2nd Edn.) 231. E

Cases referred to:

(1) *Blakey* v. *Harrison*, [1915] 3 K.B. 258; 84 L.J.K.B. 1886; 113 L.T. 733; 79 J.P. 454; 31 T.L.R. 503, D.C.; 30 Digest (Repl.) 106, *780*.

(2) *Thompson* v. *Davison*, [1916] 1 K.B. 917; 85 L.J.K.B. 969; 114 L.T. 1040; 80 J.P. 274; 32 T.L.R. 430; 14 L.G.R. 678; 25 Cox, C.C. 390, D.C.; 30 Digest (Repl.) 106, *781*. F

(3) *M'Elfrish* v. *Barlow*, *M'Elfrish* v. *Maclean*, 1917 S.C.(J.) 32; 30 Digest (Repl.) 139, **1375*.

Case Stated by the stipendiary magistrate for Liverpool.

Informations were laid by the appellant, the chief constable of Liverpool, against the respondents, David John Jones, Cecil Dawson, and Charles Hannah, for that they, on Dec. 9, 1922, at 5.3 p.m. (not being during permitted hours within the meaning of the Licensing Act, 1921), on certain licensed premises consumed certain intoxicating liquor, to wit, whisky. G

On the hearing of the informations, the following facts were proved or admitted: At 5.3 p.m. on Saturday, Dec. 9, 1922, a sergeant and police constable visited the licensed premises, 6, Moor Street, Liverpool, and found the three respondents in a small parlour at the rear of the bar with three glasses of whisky and soda. The whisky which the respondents were consuming had not been at any time sold or supplied to them by the licensee or the barmaid of the licensed premises but had been carried there in a bottle by the respondent Jones when he entered the licensed premises. The respondent Jones had the whisky in his possession because it had been his intention to attend a football match in the neighbourhood during the afternoon, an intention, however, which he did not carry into effect. The respondents, before the entry of the police, ordered soda water from the barmaid, and the respondent Jones added thereto in the absence and without the knowledge of the barmaid (the licensee not being on the premises at all) the whisky which he had brought on to the premises, and it was this whisky and soda which the three respondents were consuming when the police officers entered. The time at which the consumption was taking place, viz., 5.3 p.m., was not a "permitted" hour within the meaning of the Licensing Act, 1921. H I

It was contended for the appellant that: (i) The facts disclosed an offence by each of the respondents against s. 4 (b) of the Licensing Act, 1921. (ii) The effect of s. 4 was to prohibit absolutely the consumption on licensed premises of any intoxicating liquor during prohibited hours except in conformity with the exceptions provided for in s. 5 of the Act. (iii) The fact that the intoxicating liquor was brought on to the premises by the person consuming it and was not sold or supplied to him on those premises by the licensee thereof, did not affect his liability under s. 4.

It was contended for the respondents that: (i) The facts did not disclose an offence under s. 4, because the intoxicating liquor which the respondents were consuming had not been sold or supplied to them by the licensee of the premises on which the consumption was taking place. (ii) The word "consume" in s. 4 must be construed as meaning "consume only after sale or supply by the licensee."

The magistrate dismissed the informations, and the appellant now appealed.

W. Hanbury Aggs for the appellant.

The respondents were not represented.

LORD HEWART, C.J., stated the facts, referred to the contentions, and continued: The magistrate decided that "consume" in the Licensing Act, 1921, s. 4 (b), had the more limited meaning contended for by the respondents. Attention has been directed in the course of the argument to *Blakey* v. *Harrison* (1), *Thompson* v. *Davison* (2), and *M'Elfrish* v. *Barlow* (3). But when those cases are examined it is apparent that the decisions turned on the particular words of particular orders or regulations, and they do not seem to afford much light on the question which has to be determined here. Speaking for myself, I think that this word "consume" in s. 4 (b) is to be construed in its natural and obvious meaning. There is no reason why a different meaning should be put on it unless, as was said in one of the cases already mentioned, the literal construction of it would involve a result so unreasonable that the legislature cannot be thought to have contemplated it; in other words, it is not necessary to torture the expression into meaning something artificial if its natural meaning is not repugnant to reason. Looking at this statute as a whole, and looking not least at the care which is taken to secure, as far as legislation can, an interval during the afternoon when intoxicating liquor is not to be sold or supplied, one sees nothing repugnant to the purpose of the statute in a provision which would prevent, for example, the purchase of intoxicating liquor in one set of licensed premises shortly before the permitted hours came to an end, followed by the migration, in a procession or otherwise, of the purchasers to adjoining licensed premises where that liquor might be consumed, inasmuch as it had not been sold or supplied on those licensed premises. I think that "consume" means what it says, and that the question whether the liquor which is being consumed in hours not permitted was sold or supplied on those licensed premises is not relevant. An ingenious argument might, perhaps, be framed on the words following "consume" in s. 4 (b)—namely, "or take from any such premises or club any intoxicating liquor"; but the argument would be, I think, more ingenious than convincing, and its merits, such as they might be thought to be, would depend on giving a too limited meaning to the words "take from." In these circumstances, I think this decision was erroneous, and that the case ought to go back to the magistrate with directions to convict.

ROCHE, J.—I entirely agree with my Lord in the broad ground on which he puts this case. I only desire to add that, speaking for myself, I think that, even if the test adopted by the magistrate were the correct one, which, in my opinion, it is not, still there ought to have been a conviction. The intoxicating liquor consumed was a mixture of whisky and soda. The soda, a material ingredient to make it either palatable, or, perhaps, even possible, to drink this whisky, was supplied on these licensed premises; and accordingly, taking the more limited ground, I think there should have been a conviction in this case.

BRANSON, J.—I agree. I see no reason to construe the word "consume" in any but its ordinary sense. It is interesting to observe that in *Blakey* v. *Harrison* (1) the court felt itself compelled to assent to the argument that "consume" should receive a more limited meaning by reason of the absurdity which would otherwise arise—that the landlord of licensed premises could not drink a glass of his own beer with his lunch unless some such construction as this was given to the words. But now one of the exceptions in s. 5 prevents that situation from arising. Therefore, the only reason why the court was forced to the conclusion to which it came in *Blakey* v. *Harrison* (1) has been removed by the statute which we are now considering.

Appeal allowed; Case remitted.

Solicitors: *F. Venn & Co.*, for *Walter Moon*, Liverpool.

[*Reported by* J. F. Walker, Esq., *Barrister-at-Law.*]

SALFORD CATTLE MARKET SALEROOMS, LTD. *v.* OSBORNE

[King's Bench Division (Lord Hewart, C.J., Shearman and Branson, JJ.), April 24, 1923]

[Reported 92 L.J.K.B. 1018; 129 L.T. 686; 87 J.P. 134; 21 L.G.R. 468; 27 Cox, C.C. 515]

Shop—Hours of closing—Customers entering shop before closing hour and remaining thereafter—Shops (Early Closing) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 58), *Schedule*, *Part I*, *art.* 1 (*a*), *art.* 2 (1).

The appellants were the occupiers of a shop where retail sales by auction were carried on. On certain dates (other than Saturdays) about 200 persons, who had entered before 8 p.m., remained on the premises after that hour. After that hour no new customers were admitted, but furniture was sold by auction to some of those present. The appellants were convicted of not closing the shop by the appointed hour under the Shops (Early Closing) Act, 1920, Schedule, Part I, art. 1 (a) of which provides: "Every shop shall be closed for the serving of customers not later than 8 o'clock in the evening on every day other than Saturday. . . ." By art. 2, "This order shall not prevent—(1) the serving of a customer where it is proved that the customer was in the shop before the closing hour or that reasonable grounds existed for believing that the article supplied after the closing hour to a customer was required in a case of illness. . . ."

Held: article 2 (1) only applied where there was an emergency, or where the customer, through some accident or delay, remained in the shop after the closing hour to make a purchase, and, therefore, the appellants were rightly convicted.

Notes. Article 1 (a) and art. 2 (1) of the schedule to the Shops (Early Closing) Act, 1920, are re-enacted in s. 2 (1) and s. 3 (a) of the Shops Act, 1950.

Distinguished: *Moore* v. *Tweedale*, [1935] All E.R.Rep. 292.

As to shop hours, see 17 Halsbury's Laws (3rd Edn.) 194 et seq.; and for cases see 24 Digest (Repl.) 1107 et seq. For the Shops Act, 1950, s. 2, see 29 Halsbury's Statutes (2nd Edn.) 191.

Case Stated by the stipendiary magistrate for the county borough of Salford.

On Oct. 11, 1922, informations were laid by the respondent, H. Osborne, medical officer of health of the county borough of Salford, against the appellants, the

Salford Cattle Market Salerooms, Ltd., for that they (i) on Monday, Aug. 21, 1922, being then and there the occupiers of a shop in Cross Lane in the said county borough, where the retail trade or business of retail sales by auction was then and there being carried on, did not close the shop for the serving of customers not later than 8 o'clock in the evening contrary to the provisions of the order set out in Part I of the Schedule to the Shops (Early Closing) Act, 1920; (ii) on Friday, Aug. 25, 1922, they similarly contravened the order on the same premises.

The following facts were admitted or proved: (a) (i) after the closing hour, 8 p.m., on Aug. 21, 1922, Fred Davies and Sam Stott, inspectors duly appointed under the Shops Acts, 1912 to 1920, were together present at the appellants' saleroom and saw thirteen articles of furniture offered for sale and sold between the closing hour, 8 p.m., and 9.10 p.m.; (ii) in addition to the articles mentioned in the preceding paragraph, certain other articles were offered for sale by auction but were not sold; (iii) after the closing hour about 200 persons remained in the appellants' saleroom, and of these persons approximately 100 were still present at 9.10 p.m.; (b) (i) after the closing hour, 8 p.m., on Aug. 25, 1922, the inspectors were together present at the appellants' saleroom and saw a large number of articles offered for sale by auction and sold between the closing hour, 8 p.m., and 8.45 p.m.; (ii) immediately after the articles last mentioned had been offered for sale and sold, the appellants' auctioneer announced to the persons then present in the saleroom that he proposed to close the sale by auction, and that, if any person desired to purchase any article, he would offer such article for sale by auction. There being no reply to the announcement, the appellants' auctioneer then declared that the sale by auction was concluded; (iii) in addition to the articles last mentioned, certain other articles were offered for sale by auction, but were not sold; (iv) after the closing hour about 250 persons remained in the appellants' saleroom, and of these approximately 160 were still present at 8.45 p.m.; (c) the door of the appellants' saleroom was closed at the hour of 8 o'clock on each of the occasions, and no person was allowed to enter the said saleroom after that hour on either of the occasions.

It was contended by the respondent that: (a) the appellants did not close the shop for the serving of customers on the dates before mentioned not later than the hour of 8 o'clock in the evenings of those days, contrary to the provisions of the order set out in the Schedule to the Shops (Early Closing) Act, 1920; (b) the sales before mentioned did not come within art. 2 (1) of Part I of the Schedule; and (c) the appellants had committed offences against the order. It was contended by the appellants that, inasmuch as the sales after the hour of closing on the said days were only to persons who had entered the saleroom before the closing hour of 8 o'clock, the appellants had not acted contrary to the provisions of the order.

The magistrate came to the conclusion that in each case the appellants were guilty of an offence under the order, and fined them £3 in respect of each offence. The appellants now appealed.

Kenneth W. Chambers for the appellants.

Eastman, K.C., and *J. C. Jolly* for the respondent.

LORD HEWART, C.J., stated the facts, and continued: In those circumstances, it was contended by the respondent that the appellants did not close the shop for the serving of customers on the days referred to in the informations, and the appellants contended that, as the sales after the closing hour were only to persons who had entered the saleroom before the closing hour, the appellants had not acted in contravention of the order.

It is provided by art. 1 (a) of Part I of the order contained in the Schedule to the Shops (Early Closing) Act, 1920, as follows:

> "Every shop shall be closed for the serving of customers not later than eight o'clock in the evening on every day other than Saturday and not later than nine o'clock in the evening on Saturday, and in the case of a contravention of this provision the occupier of the shop shall be liable to a penalty."

By art. 2 provision is made for what are obviously regarded as particular and occasional emergencies: A

"This order shall not prevent—(1) the serving of a customer where it is proved that the customer was in the shop before the closing hour or that reasonable grounds existed for believing that the article supplied after the closing hour to a customer was required in a case of illness."

Counsel who has argued on behalf of the appellants admitted very frankly that his argument goes to this length, that the provisions of art. 2 amount to saying that business may be carried on in every respect as usual with a number of persons, however large, who may be induced to enter the shop before the closing hour. It is not necessary to attempt to lay down an exhaustive definition of what is permitted by art. 2, but, on the materials before the magistrate, it is quite clear that he had ample grounds for coming to the conclusion that what was complained of in these informations was not protected by the exceptions in art. 2. There is obviously a clear difference between giving a general invitation to buy after the closing hour—urging the public to be present in large numbers before eight o'clock in order that articles may be offered for sale—and, on the other hand, serving in an emergency after eight o'clock a customer who happens to have entered the shop before the closing hour. In other words, there is a contrast between the general keeping of a shop open in order to invite persons to become customers, and, on the other hand, serving in an emergency a particular customer who happens to be caught, so to speak, in the shop by the arrival of the closing hour. I do not attempt to give an exhaustive description of what is permitted by art. 2, but I have no doubt whatever that there were ample materials on which the magistrate could conclude that art. 2 did not permit what was complained of in these informations. I think, therefore, that the appeal must be dismissed. B C D E

SHEARMAN, J.—I am of the same opinion. I do not desire to lay down any general principles on matters which can be more specifically dealt with if they should arise. But it is clear that the shop is to be closed at a certain hour for the serving of customers, the scheme being that customers are to be served only during the permitted hours. There is an exception as to the serving of a customer when it is proved that the customer was in the shop before the closing hour. Though it is not necessary to decide it, that seems to me to point in this direction, that the customer must have entered with the intention of making a purchase within the permitted hours; but the present case is very far removed from the exception. The appellants invited people to enter and take part in one of these auctions which were to go on as long as anyone was prepared to buy, and the invitation was that people should enter just before eight o'clock when the doors would be closed, and that they would then become a privileged class and could not be interfered with by other persons entering afterwards and offering to buy. It is clear that there was ample evidence on which the magistrate could find that the appellants did not come within the exception, and the appeal must be dismissed. F G H

BRANSON, J.—I agree. It seems to me that the distinction between this case and the case which would come within art. 2 is this: In this case it is obvious that persons were invited to enter before eight o'clock in order that they might become customers after eight o'clock. Article 2 appears to me to point to the case of a customer who enters with the intention of doing business within the permitted hours, and who through some accident or delay is still in the shop when the closing hour arrives, and who remains in the shop after the closing hour for the purpose of effecting a purchase. The distinction between that case and the present case is almost infinite, and, in my opinion, the magistrate was right in the conclusion at which he arrived. I

Appeal dismissed.

Solicitors: *Lewis W. Taylor*, for *Billinge & Whittaker*, Manchester; *L. C. Evans*, Salford.

[*Reported by* J. F. Walker, Esq., *Barrister-at-Law.*]

A

WHEAL REMFRY CHINA CLAY, BRICK, AND TILE CO., LTD. *v.* TRURO CORPORATION

[KING'S BENCH DIVISION (Lord Hewart, C.J., Shearman and Branson, JJ.), April 27, 1923]

B

[Reported [1923] 2 K.B. 594; 92 L.J.K.B. 1033; 129 L.T. 827; 87 J.P. 201; 21 L.G.R. 646; 27 Cox, C.C. 521]

Harbour—Pollution—Emptying waste products into non-navigable portion of river—Resulting pollution of navigable portion—Harbours Act, 1814 (54 *Geo.* 3, *c.* 159), *s.* 11.

C The Harbours Act, 1814, s. 11, provides: "If the owner, master, or other person having the charge or command of any . . . craft whatsoever, or any person working any quarry, mine, or pit, near to the sea, or to any such harbour, haven, or navigable river as aforesaid, or any other person or persons whatsoever, shall cast, throw, empty, or unlade, or cause or procure to be cast, thrown, emptied, or unladen, either from or out of any such . . . craft, or from D the shore any ballast, stone, slate, gravel, earth, rubbish, wreck, or filth, into any of such ports . . . harbours . . . or navigable rivers . . . as aforesaid, so as to tend to the injury or obstruction of the navigation thereof, or in any place or situation on shore where the same shall be liable to be washed into the sea, or into any such ports . . . harbours . . . or navigable rivers, either by ordinary or high tides, or by storms or land floods: all and every such person and E persons so offending shall for every such offence [be liable to a penalty]."

The appellants were the owners of china clay works close to the upper and non-navigable part of a river, and whatever rubbish or waste products were not retained in the appellants' tanks and trays found their way to the river and were carried into the navigable part of it which emptied into a harbour. There were no docks, harbours, or moorings belonging to His Majesty in or near the F navigable river or harbour.

Held: section 11 of the Act of 1814 was not confined to harbours or navigable rivers in or near which were docks, dockyards or moorings belonging to His Majesty (*Michell* v. *Brown* (1) (1858), 1 E. & E. 267, followed); the appellants had emptied the rubbish and waste products into the navigable river within the meaning of s. 11 (*United Alkali Co.* v. *Simpson* (2), [1894] 2 Q.B. 116, G applied); and, therefore, they had committed an offence against s. 11.

Notes. As to pollution of harbours, see 33 HALSBURY'S LAWS (2nd Edn.) 618; and for cases see 44 DIGEST 120 et seq. For the Harbours Act, 1814, s. 11, see 23 HALSBURY'S STATUTES (2nd Edn.) 1112.

Cases referred to:

H (1) *Michell* v. *Brown* (1858), 1 E. & E. 267; 28 L.J.M.C. 53; 32 L.T.O.S. 146; 23 J.P. 548; 5 Jur.N.S. 707; 7 W.R. 80; 120 E.R. 909; 44 Digest 128, *1036*.

(2) *United Alkali Co.* v. *Simpson*, [1894] 2 Q.B. 116; 63 L.J.M.C. 141; 71 L.T. 258; 58 J.P. 607; 42 W.R. 509; 10 T.L.R. 438; 38 Sol. Jo. 419; 10 R. 235, D.C.; 44 Digest 122, *985*.

Case Stated by justices for Pydar in the county of Cornwall.

I On Nov. 14, 1922, Joseph Bowden, bailiff of the Truro Corporation, harbour authority of the port and harbour of Truro (the respondents), preferred an information against the appellants, Wheal Remfry China Clay, Brick and Tile Co., Ltd., charging that they did, on May 2 and 11, Aug. 16, Sept. 13 and 15, and Oct. 2 and 3, 1922, and on divers other dates at the parish of St. Enoder, then being the owners of certain china clay works, worked by the appellants near a navigable river, cast, throw, empty or unlade, or cause or procure or permit to be cast, thrown, emptied or unladen, certain gravel, earth, rubbish or filth, to wit, mica or other waste products from their works, into a place or situation on shore,

whereby the same was liable to be washed into the navigable portion of the River Fal, within the said port of Truro, by storms or land floods, contrary to s. 11 of the Harbours Act, 1814. A

The following facts were admitted or proved. The appellants were the owners of china clay works worked by them close to the River Fal at Wheal Remfry, which was situate about three miles below the source and about seven miles in a straight line, or about eleven and a half miles following the windings of the river, above Ruan Sett Bridge, the highest point of tidal ebb and flow in the river. At Wheal Remfry, the river was about 10 ft. wide and about 2 ft. deep, and between that point and Ruan Sett Bridge there was a drop of about 500 ft. There were no docks, dockyards, arsenals, wharfs or moorings belonging to His Majesty (except an ancient quay, jetty or wharf at Mylor, twenty-two miles from Wheal Remfry) near the works, nor within the port of Truro. There was no shore at or near Wheal Remfry, but there were the banks of the river, and Wheal Remfry was adjacent thereto. The chief business of the appellants was that of excavating and purifying china clay. As this was associated with sand and mica, it was commercially essential to separate these substances from the china clay by diluting the mass with water and allowing the water to flow, first through sand pits and then through a series of filters known as "micas," where the mica, together with a small quantity of china clay, was deposited. Further processes left a deposit of china clay, and it was admitted by the appellants' surveyor that whatever rubbish or waste products, notwithstanding efforts by the appellants to retain them, were not retained in the appellants' tanks and trays found their way to the river and ran as far as the river went. It was also admitted that waste products flowed beyond Ruan Sett Bridge. On the said dates, an effluent containing mica or other waste products in quantities was caused or permitted to be emptied by the appellants into the Fal at or near their works. There was evidence that such mica or waste products were liable to be washed into the navigable portion of the river within the port and harbour of Truro by storms or land floods. Save as appears in para. (b) below, it was not proved where the appellants stored any of the above substances. B C D E

The respondents contended that: (a) the appellants were at all material times persons working a mine, quarry or pit near to a navigable river, and (b) the appellants had caused or procured to be cast, thrown, emptied or unladen, gravel, rubbish or filth, namely, mica or other waste products from their works, in a place or situation on shore where the same was liable to be washed into a river there situate, into the navigable portion of the River Fal, either by storms or land floods. The appellants contended that: (a) they were not persons working a mine, quarry or pit near to a navigable river within s. 11 of the Act of 1814; (b) there was no evidence that rubbish was caused to be emptied into a place or situation on shore whereby the same was liable to be washed into a navigable river; (c) if waste products were so emptied such act was not an offence within the section; (d) there was no shore within the meaning of the section at or near the appellants' works. The justices convicted the appellants, who now appealed. F G H

Schiller, *K.C.*, and *W. H. Moresby* for the appellants.

Hawke, *K.C.*, and *R. P. Croom-Johnson* for the respondents.

LORD HEWART, C.J., stated the facts, and continued: There has been some argument as to the true scope and meaning of s. 11 of the Harbours Act, 1814. Apart from authority it would seem to be abundantly clear from the title of the Act and from the preamble that it distinguishes and does not confuse two separate things; one is the "better regulation of the several ports, harbours, roadsteads, sounds, channels, bays, and navigable rivers in the United Kingdom," and the other is the better regulation "of His Majesty's docks, dockyards, arsenals, wharves, moorings, and stores therein." So far I have read from the title; and if one looks at the preamble, one finds these words, I

> "and that such further and other provisions should be made as hereinafter mentioned, for the better regulation and protection of the several ports,

harbours, havens, roads, roadsteads, sounds, channels, creeks, bays, and navigable rivers in the United Kingdom."

But in fact the section has been construed in *Michell* v. *Brown* (1), and, on a different point, relevant, however, to the present controversy, in *United Alkali Co.* v. *Simpson* (2). Having regard to the decisions in those two cases, and, indeed, to the plain meaning of the words, which, when they speak of "navigable rivers" in general, restrict the mischief which the statute is directed against to that which is likely to tend to the injury or obstruction of the navigation of the rivers, I think the questions involved in this Case Stated become purely questions of fact, that there is evidence on which the justices could decide as they did, and that this court cannot, if it would, disturb those findings. I may say that it appears to me that those findings were right. The justices rightly construed the Act, and, having so construed it, they were entitled on the facts to come to the determination at which they arrived.

It has been argued by counsel for the appellants that the particular mode employed by the appellants to empty or to cause the emptying of rubbish is something which was not contemplated by the authors of the Act, which is now 109 years old. That may be so. There are those who, even in legislation, build better than they know. But if it be clear what mischief was aimed at, and what was the kind of act that was prohibited or made subject to a penalty, then, if sufficiently general and clear words were used, it matters not that the ingenuity of mankind or the progress of business has, in the course of time, brought into existence new modes of creating that mischief, even if it is caused by a process unknown at the time of the passing of the Act. Therefore, I think that this appeal ought to be dismissed.

SHEARMAN, J.—I am of the same opinion. The appellant company was formed to dig up china clay and to purify it by an elaborate process, and the result is that a quantity of liquid refuse containing solid matter is poured into a stream and finds its way down to a navigable river. This has been found by the justices to tend to be an injury to navigation. In other words they found that it might tend to silt up the harbour, and they very properly convicted the appellants.

The main argument put before us was an historical one. It was said that, when this Act was passed in 1814, it was not intended to do more than prevent persons from shooting rubbish out of ships or from the seashore. No doubt at that time no one thought of the disastrous effects often resulting from harbours being silted up by solid matter brought down a river, nor did anyone contemplate the digging of china clay. The digging of china clay in large quantities in Cornwall was quite unknown at that time, though I do not forget that this Act is not confined to Cornwall. The legislature did not at that time contemplate elaborate scientific processes, china clay works, sewage works and things of that kind, which might cause the introduction of solid matter into rivers. But we have not to consider whether the legislature had these things in mind when they framed the statute. What we have to consider is whether the appellants' act, for which the information was preferred, comes within the plain terms of the section. It seems to me, and I have been guided a good deal by *United Alkali Co.* v. *Simpson* (2), that the appellants did cause to be cast, thrown or emptied into the navigable river the earth or rubbish which was washed down by the non-navigable river; and I think that this, with the other facts as found by the justices, comes clearly within the first part of the section. Therefore, I think that this was a proper conviction and that the appeal should be dismissed.

BRANSON, J.—I agree. Counsel for the appellants' first point was that s. 11 of this statute applied only to such harbours and navigable rivers in or near which are docks, dockyards or moorings belonging to His Majesty. That point, it seems to me, has been decided against him in *Michell* v. *Brown* (1).

His second point was that, on the facts that were found or admitted, there was

no evidence to show that the appellants had put anything into this navigable river or harbour. The facts of the case established clearly that they put into tanks and trays on their works the material which ultimately got into the river and tended to do the mischief. His contention was that, because this material found its way into the river through the unnavigable upper reaches of it, and not directly into the navigable part of the river, the case did not come within the section. It seems to me that that part of his argument is shown to be wrong by the decision in *United Alkali Co.* v. *Simpson* (2). I think that if authority be needed to show that a man who puts into the upper and unnavigable reaches of a navigable river substances of such a nature that he must know that they will be carried down to the navigable reaches and there become deposited does himself put the substances into the river within the meaning of the section, it is to be found in that case. For these reasons, I agree with the judgment which my Lord has pronounced.

Appeal dismissed.

Solicitors: *Robbins, Olivey & Lake*, for *Nalder & Son*, Truro; *Whatley & Son*, for *F. Parkin*, Truro.

[*Reported by* J. F. WALKER, ESQ., *Barrister-at-Law.*]

RUSSELL *v.* BEECHAM AND ANOTHER

[COURT OF APPEAL (Bankes, Scrutton and Atkin, L.JJ.), October 25, 26, 1923]

[Reported [1924] 1 K.B. 525; 93 L.J.K.B. 441; 130 L.T. 570; 40 T.L.R. 66; 68 Sol. Jo. 301]

Landlord and Tenant—Lease—Forfeiture—Covenant not to "part with" premises —"Part with"—Premises sublet—Covenant in ambiguous language—Strict construction—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict.*, *c.* 41), *s.* 14 (1), (6).

By a covenant in a lease for 30 years the lessee undertook that he would not "assign or part with this lease or the premises hereby demised or any part thereof" without the licence and consent in writing of the lessor or his trustees. The lease contained a proviso for re-entry for breach of covenant by the lessee. In November, 1921, the lessee, without the consent of the original lessor or his trustees, sublet part of the demised premises for a term of three years without giving the lessee notice under s. 14 (1) of the Conveyancing and Law of Property Act, 1881 [now Law of Property Act, 1925, s. 146]. The trustees of the original lessor brought an action against the lessee to recover the demised premises on the ground that the lessee had committed a breach of the covenant not to part with the premises or any part thereof.

Held: by BANKES, L.J., and ATKIN, L.J., that, on a true construction of the covenant, the words "part with" meant "part with entirely or completely" and did not apply to parting with possession of only a part of the lessee's interest in the premises which was what the lessee had done, and where, as here, a covenant which entailed a forfeiture was in ambiguous language it would be construed strictly; by SCRUTTON, L.J., that the exception from the requirements of s. 14 (1) contained in s. 14 (6) of the Act of 1881 applied to parting with possession of the whole of the premises demised and not to parting with possession of a part of the term, and, consequently, s. 14 (6) did not apply to the present case; and, therefore, in the absence of a notice under s. 14 (6) the action could not be maintained.

Document—Construction—Common form of words—Construction by courts over many years.

Per BANKES, L.J.: Where a particular form of words has, for a considerable number of years, been recognised by the courts as having received a particular construction, the court should accept that construction because it must realise that a number of transactions have been entered into and documents drawn up in that form on the faith of the construction placed on it by the courts.

Notes. Not followed: *Abrahams* v. *MacFisheries*, [1925] All E.R.Rep. 194; *Carrington Manufacturing Co.* v. *Saldin* (1925), 133 L.T. 432. Considered: *Cook* v. *Shoesmith*, [1951] 1 K.B. 752.

As to covenants against assignment and underletting, see 23 HALSBURY'S LAWS (3rd Edn.) 629–637; and as to forfeiture, see ibid., p. 665 et seq. For cases see 31 DIGEST (Repl.) 408 et seq., 512 et seq. For Law of Property Act, 1925, see 20 HALSBURY'S STATUTES (2nd Edn.) 427. As to the construction of instruments generally, see 11 HALSBURY'S LAWS (3rd Edn.) 396 et seq.; and for cases see 17 DIGEST (Repl.) 253 et seq.

Cases referred to:

(1) *Doe d. Pitt* v. *Hogg* (1824), 4 Dow. & Ry.K.B. 226; 2 L.J.O.S.K.B. 121; 31 Digest (Repl.) 414, *5428*.

(2) *Crusoe d. Blencowe* v. *Bugby* (1771), 3 Wils. 234; 2 Wm. Bl. 766; 95 E.R. 1030; 31 Digest 435, *5630*.

(3) *Jackson* v. *Simons*, [1923] 1 Ch. 373; 92 L.J.Ch. 161; 128 L.T. 572; 39 T.L.R. 147; 67 Sol. Jo. 262; 31 Digest (Repl.) 418, *5473*.

(4) *Church* v. *Brown* (1808), 15 Ves. 258; 33 E.R. 752, L.C.; 31 Digest (Repl.) 409, *5384*.

Also referred to in argument:

Doe d. Lloyd v. *Powell* (1826), 5 B. & C. 308; 8 Dow. & Ry.K.B. 35; 108 E.R. 115; sub nom. *Doe* v. *Lloyd*, 4 L.J.O.S.K.B. 159; 31 Digest (Repl.) 412, *5416*.

Corbett v. *Plowden* (1884), 25 Ch.D. 678; 54 L.J.Ch. 109; 50 L.T. 740; 32 W.R. 667, C.A.; 35 Digest 337, *790*.

Peebles v. *Crosthwaite* (1897), 13 T.L.R. 198, C.A.; 31 Digest 417, *5458*.

Appeal from a decision of BAILHACHE, J., in a non-jury action.

The plaintiffs were the trustees of the will of the seventh Duke of Bedford. By a lease dated Nov. 9, 1899, the eleventh duke, as tenant for life under the will of the seventh duke, demised unto Robert Smith, a messuage known as No. 36, Bedford Place, Bloomsbury, for a term of thirty years from Mar. 25, 1899, at a rent of £100 a year payable quarterly. The lease contained the following covenant:

"The lessee shall not nor will during the last ten years of the said term hereby granted assign or part with this lease or the premises hereby demised or any part thereof without the licence and consent in writing of the said duke or the said trustees or his or their steward or agent first had and obtained."

The lease also provided:

". . . in case the said lessee shall not truly observe perform and keep all and singular the covenants and provisions herein on the part of the said lessee contained then it shall be lawful for the said trustees notwithstanding the waiver of any previous right of re-entry into the premises hereby demised or any part thereof in the name of the whole to re-enter and the same to re-possess as if this lease had never been made but without prejudice to any rights or remedies which may then have accrued to the said duke or the said trustees in respect of the rent covenants conditions and agreements hereinbefore reserved and contained."

By an assignment of Sept. 29, 1921, the term became vested in the first defendant, Sir Thomas Beecham, for the residue thereof. By a mortgage dated Sept. 29, 1921,

the first defendant mortgaged the term referred to except the last day thereof to the second defendant, H. H. Matthews, as security for repayment of a loan of £700 and interest thereon. By a second mortgage of even date Beecham mortgaged the term except the last two days thereof to Matthews, subject to the above-named mortgage of £700, as security for repayment of a loan of £1,730 and interest. Both these mortgages were executed with the consent in writing of the plaintiffs. In both mortgages it was expressly provided that the powers of leasing conferred on mortgagors by s. 18 (1) of the Conveyancing and Law of Property Act, 1881 [see now Law of Property Act, 1925, s. 99], should not be exercisable by the borrower, Beecham, and that the said borrower thereby attorned and became tenant at will to the lender, Matthews, of the said premises at the yearly rent of a peppercorn during such times as the respective sums of £700 and £1,730 or any part thereof should remain owing on the security of the respective mortgages. The second mortgage also provided that s. 17 of the Conveyancing Act, 1881, [now s. 93 of Act of 1925], should not apply to that indenture. By an agreement in writing dated Nov. 23, 1921, Beecham agreed to let to one Edwin Grice the two principal rooms on the ground floor of the demised premises for three years from Sept. 29, 1921, at a rent of £100 a year, with an option to Grice to continue the tenancy for successive periods of three years so long as the landlord or his assigns should remain lessee of the premises. This agreement was made without the licence or consent of the Duke of Bedford or his trustees. Grice went into possession of the two rooms. On Aug. 15, 1922, the plaintiffs, without serving on the defendant Beecham any notice in writing under s. 14 (1) of the Conveyancing Act, 1881 [now s. 146 of Act of 1925], issued a writ claiming possession of the premises demised by the lease of Nov. 9, 1899, alleging that the sub-letting to Grice was a breach of the covenant not to assign or part with the lease or the premises thereby demised or any part thereof without the licence and consent in writing of the Duke of Bedford or his trustees. The second defendant, Matthews, did not appear at the trial. By the Conveyancing Act, 1881:

> "Section 14 (1). A right of entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money to the satisfaction of the lessor, for the breach. . . . (6). This section does not extend—(i) To a covenant or condition against the assigning, underletting, parting with possession, or disposing of the land leased. . . ."

Bailhache, J., gave judgment for the defendant Beecham on the ground that, as this defendant had no power to let to Grice, the supposed tenancy of the latter was a mere nullity and the parting with possession to him of the two rooms was not, therefore, a breach of the covenant in the lease of Nov. 9, 1899. The plaintiffs appealed.

Rayner Goddard, K.C., and *F. J. Tucker* for the plaintiffs.
Sir H. Maddocks, K.C., and *Herbert Jacobs* for the defendant.

BANKES, L.J.—This case lies in a small compass, but it is important and raises some difficult points. There is no dispute about the facts. The plaintiffs, trustees of the Bedford estate, demised the premises in question for thirty years in November, 1899, and Sir Thomas Beecham, at all material times, was the assignee of the reversion. In 1921 he mortgaged his interest in the premises, retaining in himself one or two days, and, therefore, maintaining his position in law as assignee, but mortgaging the premises by sub-demise to a man named Matthews. The mortgage deed excluded the right of the mortgagor to grant leases

A in pursuance of the provisions of the Conveyancing Act, 1881. Consequently, it seems that Sir Thomas Beecham's position after the date of the mortgage deed was that he was allowed to remain in possession of those premises as tenant at will. After the date of the mortgage, on Nov. 23, 1921, he entered into an agreement with one Grice under which he agreed to let, and Grice agreed to take, two principal rooms on the ground floor of this house and a third room in the rear for B a period of three years from Sept. 29, 1921, at a specified rent. The tenant was to have the option of continuing the tenancy for successive periods of three years so long as the landlord or his assignees should remain lessees of the premises.

The action was brought in August, 1922, in the first instance against Sir Thomas Beecham only, but, by amendment, against the mortgagee also. The claim was for recovery of possession for breach of covenant, the breach alleged being this C agreement to let the premises to Grice for this period. It is said that this letting to Grice constituted a parting with possession of the premises, which in itself was a breach of covenant. Apart from any authority, if the covenant which was said to have been broken contained those words I do not think anybody could contend for a moment that this letting by Beecham to Grice was not a parting with possession of the premises. But that is not the question we have to decide. The D question is whether, having regard to the peculiar terms of this covenant, what Beecham did in letting to Grice was a parting with the premises or part thereof. The matter came before BAILHACHE, J., and he decided the matter on the ground, as I understand his judgment, that the agreement between Beecham and Grice might be treated as a void agreement, and, therefore, did not affect the position of the assignee or that of the mortgagee. I am not prepared to take that view of E the legal position of these parties, and I do not desire to say anything more in reference to that point, because I do not think it is necessary to deal with that matter in order to decide this appeal. The two points pressed are, first, that on the true construction of the covenant there has been no breach of it, and, secondly, that, even assuming there was a breach, the plaintiffs were not entitled to maintain this action on the ground that they had not served the notice required under F s. 14 (1) of the Conveyancing Act, 1881.

I will deal with the last point first. The contention, as I understand it, is that under s. 14 (1) a notice was necessary, because this case did not fall within the exception contained in sub-s. (6) (i), which provides that sub-s. (1) which requires notice shall not extend to a covenant or condition against the assignment, under-letting, parting with possession, or disposing of the land leased. It is said that G really what has occurred here, assuming that parting with the possession is a breach of the covenant, is not a parting with the possession of the premises but a parting with the possession of part of the premises, which is quite a separate covenant from the covenant not to part with possession, and that, as a result, a covenant not to part with possession of part of the premises not being specifically mentioned in the section, a notice was required, and as no such notice was given, H the action cannot be maintained. If it were necessary to decide the case on that point, I should have liked to take further time to consider it, because I realise that the effect of accepting the contention of counsel for the defendants is very far-reaching, and I do not propose to offer any opinion on that particular point.

I am, however, prepared to decide the case on the other point in reference to the construction of the covenant. It seems to me, on the authorities, that this I special and peculiar form of words has received a particular construction, and, in my opinion, where a particular form of words has, for a considerable number of years, been recognised by the courts as having received a particular construction, the court shall accept that construction, because it must realise that a number of transactions have been entered into and documents drawn up in this form of words upon the faith of the construction that the courts have placed upon the particular form of words. Nothing is easier if a person desired to create a forfeiture in the event of a tenant parting with the possession, as opposed to parting with his interest, than to say so, but it is noticeable that in this particular covenant the

word "possession" is not used. I will refer to the words of the covenant, which are these:

> "The lessee shall not nor will during the last ten years of the said term hereby granted assign or part with this lease or the premises hereby demised or any part thereof without the licence and consent in writing of the said duke or the said trustees. . . ."

It is noticeable that the words "assign or part with" are used in reference to two subject-matters—one, the lease; the other, "the premises hereby demised or any part thereof"—and I think the decisions go to this length, that "assign or part with this lease" does not mean anything other than parting absolutely with, and in substance there is no difference between "assign" or "part with the lease."

The first case I want to refer to is *Doe d. Pitt* v. *Hogg* (1), where there was an action for ejectment to recover possession for breach of a covenant that the lessee would not "grant any underlease for any term whatsoever; or let, set, assign, transfer, set over or otherwise part with the said messuage or tenement hereby demised, this present indenture of lease or his or their term or interest by these presents granted or any part thereof." The complaint was that the lease had been deposited as security for a loan. ABBOTT, C.J., in his judgment, say this (4 Dow. & Ry. at p. 228):

> "I am clearly of opinion that the effect of the covenant is only to restrain the lessee from completely alienating the legal interest in the premises to the prejudice of the landlord, without his consent in writing. Now here the lease has not been parted with in that, which I take to be the fair construction of the words of the covenant. All that the lessee does is to deposit the lease as security for beer supplied to the house, which I think he was at liberty to do."

BAYLEY, J., says (ibid. at p. 229), with reference to the covenant in *Crusoe d. Blencowe* v. *Bugby* (2):

> "The question was there whether the fact of the lessee having granted an underlease of the premises worked a forfeiture, and the court said, 'the courts have always held a strict hand over these conditions for defeating leases. Very easy modes have always been countenanced for putting an end to them. The lessor, if he pleased, might certainly have provided against the change of occupancy, as well as against an assignment, but he has not done so by words which admit of no other meaning. Assign, transfer, and set over are mere words of assignment—otherwise do, or put away, signifies any other mode of getting rid of the premises entirely, and cannot be confined to the making of an underlease.' That is an authority in point, and the words here must receive the same construction. The lessee has only deposited the lease as a security, which it was competent for him to do. There is no 'parting with the legal interest' within the meaning of the covenant."

It will be seen that BAYLEY, J., there reads all these words as the equivalent of parting with the legal interest. In those circumstances it seems to me that the court has put upon the expression "part with the premises" or "part with the indenture" a certain construction; and it has excluded, on the reasoning adopted in *Doe d. Pitt* v. *Hogg* (1) and in *Crusoe's Case* (2), the mere change of occupancy which in *Crusoe's Case* (2) the court points out might have been easily provided for by the inclusion of words which, in the language of BAYLEY, J., admitted of no other meaning. I am confirmed in this being the view this court ought to take by the fact that one knows from one's own knowledge that it is common form to insert in a covenant of this kind a provision that the tenant shall not part with possession. Those words being omitted from this clause, in view of the authority of these two cases—*Doe d. Pitt* v. *Hogg* (1) and *Crusoe d. Blencowe* v. *Bugby* (2)—I think that the view that this court ought to take of this covenant is in substance the view which was taken of the covenant in those two cases, and that we ought to say that the landlord, not having made plain beyond question that the intention of

A the parties is that the mere parting with possession of the premises should work forfeiture, the tenant is entitled to succeed and that this action must fail with the usual consequences, and the appeal be dismissed with costs.

SCRUTTON, L.J.—This is an action for forfeiture of a leasehold interest, and it is obviously a case of some difficulty, for the learned judge below has held that B a leasehold interest is not forfeited on a particular ground, and my Lord who has just given judgment thinks the learned judge below was wrong on the ground on which he decided it, but that he can arrive at the same result on another ground and he declines to express an opinion whether the judgment can also be supported on a second ground, which is one of considerable importance. I am in the position that I think the judgment can be supported on the second ground, and I decline to C give an opinion whether it can be supported on the first ground.

The covenant is one against assigning or parting with the leasehold premises hereby demised or any part thereof without the licence and consent in writing of the duke, and no notice has been given specifying the particular breach complained of and requiring the lessee to remedy the breach, if it be capable of remedy, and in any case requiring the lessee to make compensation in money, which is required D by s. 14 of the Conveyancing Act, 1881, before rights of re-entry can be enforced. There is an exception to that provision in sub-s. (6) of s. 14 of the Act:

> "This section does not extend—(i) to a covenant or condition against the assigning, underletting, parting with the possession, or disposing of the land leased."

Unless the covenant comes within these words, notice is required. No notice was E given in this case. A similar point came before ROMER, J., in *Jackson* v. *Simons* (3), where the covenant was not to assign or underlet or part with the demised premises or any part thereof or part with or share the possession or occupation thereof of any part thereof, and it was alleged that the lessee had shared the possession with another person. No notice was given, and ROMER, J., held that a covenant against sharing possession with another person was not a covenant coming F within sub-s. (6) (i) against parting with the possession, that it was a different covenant not included in the exception, and, therefore, that notice was required under s. 14 (1). In this covenant there is nothing about sharing possession, but there is a covenant against parting with the premises or any part thereof. Is a covenant against parting with possession of part of the premises covered by the words "part with the possession of the land leased"? I might be slow myself in G coming to a conclusion on the point, but I find that LORD ELDON, whose doubts were said to be more valuable than other men's certainties, in *Church* v. *Brown* (4) (15 Ves. at p. 265), said that a covenant to part with the possession of the premises did not restrain a tenant from parting with part of the premises, that the two were different covenants, and when one was considering whether one or the other was a usual covenant one had to take into consideration that they were two different H covenants. I am content to follow LORD ELDON and not to reserve the question whether LORD ELDON was right; and from that point of view this judgment is supportable, because a notice was required unless this covenant came within s. 14 (6), and, in my view, LORD ELDON has decided that a covenant not to part with part of the premises is a different covenant from a covenant not to part with the premises. Therefore, notice was required, notice was not given, and, conse- I quently, the action must fail.

On the point on which my Lord has decided I am going to give no decision; if it were necessary to give a decision, I should require further time to consider all the conveyancing cases which have been referred to. If I were left without any authorities to construe this covenant, I should have thought it was clear that Sir Thomas Beecham had parted with part of the premises when he had, under the agreement, let Mr. Grice into possession. But I have not got to construe these words as they stand without reference to previous authorities. These covenants have been built up as the result of decisions of the courts in the past. The words

have been altered because of the decisions of the courts in the past. One has to consider in construing a covenant as it stands at the present day what the courts in the past have held it to mean, and there is undoubtedly very considerable ground for thinking that the conclusion I should come to, if I construed this covenant without reference to previous authorities, is not the conclusion I ought to come to having regard to the construction which has been put on similar words, or these words, in cases in the past. I decide this case on the ground which appears to me sufficient to support the judgment of the learned judge, but for reasons which are not the same reasons as the learned judge gave for his judgment.

ATKIN, L.J.—I agree that this appeal must be dismissed. The learned judge dismissed the action on the ground that that which the defendant had done in granting an underlease to Grice was of no legal validity, and, therefore, his act did not come within the covenant. I am not prepared to decide the case upon that ground. The learned judge, in giving his reasons for his decision, said that if a person in whom an original term is vested sublets on a seven years' lease with the consent of the lessor, the sub-lease is good—so it is—and, if the sub-lessee is not restrained from sub-letting, a letting by him to a yearly tenant would be good as against the original termor; that also is right. Then he says that if, on the other hand, the seven years' lessee were restrained from underletting, a tenancy from year to year created by him would be bad as against the original termor and the yearly tenant would be, as against such termor, a trespasser. That seems to me to be unfounded. There is no doubt that if a person has, in fact, a term, the mere fact that he is restrained by covenant from assigning or underletting does not prevent his assignee or undertenant from acquiring an estate, although he acquires it subject to a right of forfeiture at the instance of a superior landlord. Here the position of Sir Thomas Beecham was a somewhat peculiar, though not an unusual, one, because he was a tenant for a term of years and had mortgaged by way of sub-demise to Mr. Matthews, retaining a reversion of two days out of the original term so that he became by the mortgage and sub-demise expressly a tenant at will of the mortgagee. These were the circumstances in which he granted the lease to Grice. The plaintiffs say that there was a breach of the covenant, because the covenant not to part with the premises or any part thereof means not to part with possession of the premises or any part thereof, and that, therefore, the creation of the tenancy of Grice, and the letting Grice into possession, was a breach of the covenant. I am not prepared to say that it was a breach of the covenant. I think this covenant is very difficult to construe; I am not proposing to lay down any definite construction of it. It is quite plain that the words "part with" are in themselves capable of being ambiguous. A man, if asked whether he has parted with his house, might answer in two ways. He might say: "No, I have not parted with my house, though I have let it furnished for six months to a tenant"; he might say: "Yes, but only for six months." It appears to me, therefore, that the words "part with" are capable of being used as meaning part with entirely or part with for a time. That is in ordinary usage, but in dealing with covenants in leases we are not dealing with words merely in their ordinary usage; we have to construe them with reference to decisions of the courts. It is in respect of the construction placed upon them by decisions of the courts that they are inserted in the document, they have for years regulated the relations of landlord and tenant, and I think it would be very ill-advised to disturb a construction that has been put upon words by courts of law when that construction has prevailed for a number of years. It appears to me that *Doe d. Pitt* v. *Hogg* (1) is a decision that "part with" used in a covenant of this kind means "part with entirely or completely." That case only confirms *Crusoe d. Blencowe* v. *Bugby* (2) decided in 1771, where, though the words are not "part with," the principle which led the court in *Doe d. Pitt* v. *Hogg* (1) to come to its conclusion is clearly established. It appears to me that in this case the lessor has used ambiguous words, and I do not think he can complain if, in a covenant which entails a forfeiture, a strict meaning is put on the words, and if the

court declines to support the forfeiture, the cause of which has not been expressed in reasonably plain and unambiguous language. For that reason which I think is the reason given by my Lord I think this appeal should be dismissed. On the ground relied on by SCRUTTON, L.J., and the construction of s. 14 of the Conveyancing Act, 1881, I prefer to say nothing one way or the other.

Appeal dismissed.

Solicitors: *H. Dade & Co.*; *Taylor & Humbert.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

THOMPSON *v.* THOMPSON

[CHANCERY DIVISION (Sargant, J.), April 16, 1923]

[Reported [1923] 2 Ch. 205; 92 L.J.Ch. 544; 129 L.T. 461; 67 Sol. Jo. 555]

Estoppel—Estoppel by record—Administration action—Order carrying funds to separate account—No final determination of rights of parties—Funds exceeding £1,000—Jurisdiction of master.

The carrying over of funds to a separate account under an order in an administration action is a purely administrative matter; it does not operate as a judgment or declaration of right in favour of the persons indicated as the owners by the title of the account; and it does not have the effect of finally and conclusively determining the rights of the parties so as to exclude the real owner if not so indicated. Where the funds exceed £1,000 the master has no jurisdiction to make an order carrying the funds over to a separate account, even if such an order was to be regarded merely as one for the convenience of the subsequent administration of the fund.

Notes. Considered: *Re Potts-Chatto, Potts-Chatto* v. *Potts-Chatto* (1945), 173 L.T. 406.

As to estoppel by record, see 15 HALSBURY'S LAWS (3rd Edn.) 176 et seq.; and for cases see 21 DIGEST 142 et seq. As to administration actions, see 16 HALSBURY'S LAWS (3rd Edn.) 432; and for cases 24 DIGEST (Repl.) 815 et seq.

Cases referred to:

(1) *Hancock* v. *Watson*, [1902] A.C. 14; 71 L.J.Ch. 149; 85 L.T. 729; 50 W.R. 321, H.L.; 37 Digest 105, *397*.

(2) *Re Jervoise* (1849), 12 Beav. 209.

(3) *Peareth* v. *Marriott* (1882), 22 Ch.D. 182; 52 L.J.Ch. 221; 48 L.T. 170; 31 W.R. 68, C.A.; 21 Digest 157, *199*.

(4) *Edgar* v. *Plomley*, [1900] A.C. 431; 69 L.J.P.C. 95; 82 L.T. 573; 49 W.R. 142; 16 T.L.R. 395, P.C.; 43 Digest 1020, *4606*.

(5) *Re Eyton, Bartlett* v. *Charles* (1890), 45 Ch.D. 458; 59 L.J.Ch. 733; 63 L.T. 336; 39 W.R. 135; 21 Digest 179, *300*.

(6) *Cloutte* v. *Storey*, [1911] 1 Ch. 18; 80 L.J.Ch. 193; 103 L.T. 617, C.A.; 21 Digest 173, *271*.

Also referred to in argument:

Badar Bee v. *Habib Merican Noordin*, [1909] A.C. 615; 78 L.J.P.C. 161, P.C.; 21 Digest 168, *253*.

Dibbs v. *Goren* (1849), 11 Beav. 483; 50 E.R. 904; 23 Digest (Repl.) 438, *5080*.

Petition raising questions as to the validity of an order made by a master in an administration action.

By the will of the testator, John Thompson, which was made on Feb. 8, 1864, and took effect on his death on Sept. 14, 1874, his residuary estate, after payment of debts and legacies and subject to an annuity to his widow (who died in 1886), was directed to be divided into six equal shares, one for each of his five daughters, Emily (Mrs. Gisby), Adela (Mrs. Tulk), Georgiana (Mrs. Hodges), Cecilia and Ann Ellen, and the remaining share for the widow and three children of his late son John Thompson. After settling the share of his said late son the testator directed that the original share of each of his five daughters should be held by his trustees upon trust to pay the income to her during her life for her separate use without power of anticipation (and with a provision for forfeiture in case of attempted alienation as therein mentioned), and after the death of each daughter upon trust to apply the income of her share as the trustees should think fit for the maintenance and education of her children until they attained the age of twenty-five years, and then to divide such share and the income thereof between such children equally, and, if only one such child should attain that age, then upon trust for such one absolutely. If any of the said five daughters should not have a child who should attain the age of twenty-five years, then as to as well the original share of such daughter as any share or shares the income whereof might accrue to her under the provision now in statement, the trustees were to hold such share or shares and the income thereof upon trust during the lives and life of others of the said five daughters and the survivors and survivor of them to pay and apply such income to the persons and in the manner to whom and in which the income of the original share and shares of the said other daughters respectively in the said residuary estate were thereinbefore made payable and applicable. On the death of the last survivor of the said five daughters or on her forfeiture under the preceding trusts of the said income, then in trust for such of the children of the said five daughters and of the testator's son John Thompson as should be living at the death of the last survivor of the said five daughters or at the date of such forfeiture as last aforesaid equally individually per capita.

An action for the administration of the testator's estate and the execution of the trusts of his will was commenced shortly after his death, and a decree therefor was pronounced on Nov. 7, 1874. By an order on further consideration made on July 8, 1878, a sum of £13,333 6s. 8d. Consols was provided for the purpose of meeting the annuity for the testator's widow and placed to a separate account for that purpose, various sums of Consols and cash were carried over to five separate accounts. The first was called "The account of the testator's daughter Emily Gisby for life, subject to duty on the capital," and four others were similarly labelled as being for the account of the testator's four other daughters. A sixth amount of Consols and cash was ordered to be paid in equal shares to the trustees of settlements which had been executed by the three daughters of the testator's deceased son John Thompson. Subsequently, on the death of the testator's widow, the fund set aside to secure her annuity was as to five-sixths parts ordered to be carried over to each of the said five separate accounts in favour of the testator's five daughters, and as to the remaining sixth part was dealt with for the benefit of those claiming under the said three settlements of the three daughters of the testator's said deceased son. Under the two last mentioned orders the income of the sums carried over to the said five separate accounts was directed to be paid to the testator's five daughters respectively for life or until further order.

The first of the testator's daughters to die was Ann Ellen Thompson. She died on Aug. 15, 1900, having, by her will dated July 17, 1896, bequeathed the residue of her personal estate to one Henry Armstrong and appointed him sole executor. By an order made on summons in chambers by the master on Jan. 15, 1901, it was ordered (in the presence of, among other persons, the said Henry Armstrong) that the apportioned amount down to her death of the income of the funds in court to her separate account should be paid to Henry Armstrong as her executor, and that the whole residue of the funds standing to that account, after provision for duty and costs, should be carried over to an account entitled "The account of

A the children of testator's five daughters and of his son John Thompson living at the forfeiture by or the death of the last survivor of his said daughters subject to duty," and that the interest as it accrued due on the funds so to be carried over should be paid in fourths to the said Emily Gisby, Adela Tulk, Georgiana Hodges and Cecilia Thompson. It was now admitted on all sides that this order was wrong. The trusts in favour of the children of each of the testator's daughters B were void for remoteness, and for the like reasons all the trusts over on failure of such children were also void. Therefore, on the principle of such cases as *Hancock* v. *Watson* (1), the original gift in favour of each of the daughters stood, and the funds standing to the credit of Ann Ellen Thompson for life in fact formed part of her estate and should have been paid to her executor, Henry Armstrong. He and his solicitors, however, seemed to have been entirely ignorant of his rights. C He had sworn her estate as being of the value of some £283 only, and his solicitors accepted without demur the apportioned amount of the dividends on the funds in court as being all that was his. He died a few days after the order—namely, on Jan. 20, 1901—and his legal personal representatives were not served with any subsequent proceedings in the administration action, as indeed was not necessary had Ann Ellen Thompson been a tenant for life only. There seemed to have D been nothing to call his or their attention specially to the doubts that were entertained subsequently as to the efficacy of the settlements purporting to have been effected by the testator's will of the shares of the testator's five daughters.

Mrs. Georgiana Hodges died on Feb. 22, 1905, having had one child only—namely, Matilda Louisa Hodges—who mortgaged her share in the testator's estate to the London Assurance by an indenture of Mar. 31, 1886. Subsequently, doubts E seemed to have been entertained by the mortgagees as to this lady's title to the share, for by deed poll dated May 31, 1888, Mrs. Georgiana Hodges assigned all her share in the testator's estate to her daughter, and the latter, by an indenture of the same date assigned the said share to the London Assurance by way of confirmation of the previous mortgage. By an order made by Buckley, J., on April 13, 1905, upon the petition of the London Assurance and the legal personal F representative of Mrs. Georgiana Hodges it was declared that there was no intestacy with regard to the share of the testator's estate given to his said daughter, and it was, among other things, ordered that part of the securities in court to the credit of "the account of the testator's daughter Georgiana Hodges for life subject to duty on the capital" should be sold and the proceeds paid to the London Assurance as mortgagees. Mrs. Emily Gisby died intestate on Nov. 14, G 1909, having had two children, Emily Dorothy Gisby and George Henry Gisby, both of whom mortgaged their shares. By an indenture dated Mar. 4, 1890, Mrs. Emily Gisby assigned her share in the testator's estate to her said two children in equal shares, and they subsequently confirmed the mortgages they had already made. On Mrs. Gisby's death, therefore, her children and their mortgagees were entitled, whether their share had vested in them or their mother. H By an order dated Jan. 11, 1910, and made on petition, the funds representing Mrs. Gisby's share were ordered to be paid out to the said two children and their mortgagees. Mrs. Adela Tulk died on April 10, 1915. On her death a contest arose as to one-third of the funds representing her share between the Law Reversionary Society claiming as derivative assignees of shares or interests of her children and certain trustees of a settlement effected by the said Adela Tulk in I her lifetime. By an order made on petition by Younger, J., on May 21, 1915, and subsequently affirmed by the Court of Appeal, it was declared that the trusts of the will of the testator of the income and capital of the original share of each of his five daughters were invalid as regards the share of the said Adela Tulk and that she was absolutely entitled to her said original share in the said residuary estate. It was ordered that the third share in question be transferred to the trustees of the settlement made as aforesaid by the said Adela Tulk. Notwithstanding the doubts that had been raised as aforesaid as regard the shares of Mrs. Gisby and Mrs. Hodges and the decision arrived at with regard to the share of

Mrs. Adela Tulk, no corresponding doubt appeared to have been entertained as to the correctness of the order of Jan. 15, 1901. By orders made successively by the master in chambers on the deaths of Mrs. Hodges, Mrs. Gisby and Mrs. Tulk the income of the funds standing to the credit of the separate account directed by the order of Jan. 15, 1901, were directed to be paid first to Mrs. Gisby, Mrs. Tulk and Miss Cecilia Thompson in equal thirds, then to Mrs. Tulk and Miss Cecilia Thompson in moieties, and finally to Miss Cecilia Thompson alone. Miss Cecilia Thompson died on Dec. 30, 1922, and the present petition was presented for the purpose of dealing with three sets of funds—namely (i) the funds standing to the credit of the account of the testator's daughter Cecilia Thompson for life subject to duty on the capital; (ii) a comparatively small fund set aside to a separate account to meet duties on capital under the specific provisions of the testator's will; and (iii) the funds representing the original share of the testator's daughter Ann Ellen Thompson, which had been carried to the separate account created by the order of Jan. 15, 1901. The only question calling for report arises with regard to the third fund, consisting of £266 13s. 9d. India Stock and £8,271 16s. 3d. Consols. It is whether the right to this fund was conclusively determined by the order of Jan. 15, 1901, to belong to the children of the testator's five daughters, and of his son John Thompson living at the death of the said Cecilia Thompson, so as to operate as res judicata and bar the right of the legal personal representatives of Ann Ellen Thompson.

Greene, *K.C.*, and *A. Adams* for the petitioners.
Spens for the trustees.
Tyrrell for other parties interested.
Alexander Grant, *K.C.*, and *G. D. Johnston* for the executors of Harry Armstrong.

April 16. **SARGANT, J.**, read the following judgment.—On this petition the first and main question to be decided is whether an order made in the year 1901 by a master in chambers for the carrying over of a fund of over £9,500 nominal in securities and cash to a separate account has operated as a res judicata, so as to deprive the persons really entitled to the capital of the fund in favour of the persons named or indicated in the title of the separate account. [His Lordship stated the facts and continued:] The petitioners and certain of the respondents claim that this fund had been conclusively determined by the order of Jan. 15, 1901, to belong to the children of the testator's five daughters, and of his son John Thompson living at the death of the said Cecilia Thompson. On the other hand, the last-named respondents, who are the personal representatives of Henry Armstrong, deny that the order in question has any such effect as claimed, and rely on the original absolute title of Ann Ellen Thompson to her share in the testator's residuary estate. On the conclusion of the arguments at the end of last term I indicated that my decision was in favour of the legal personal representatives of Henry Armstrong, but that in view of the importance of the matter I thought it well to give a considered and written judgment.

The decision depends mainly on the answer to two questions, which are not altogether independent of one another. The first is whether the carrying over of funds to a separate account operates as a judgment or declaration of right in favour of the persons indicated as the owners by the title of that account and conclusively bars the real owner if not so indicated. The second is whether the order of Jan. 15, 1901, was made in excess of the jurisdiction of the master, particularly if it would have so far-reaching an effect as would result from an affirmative answer to the first question.

As regards the first of these questions, some stress was laid for the petitioners on the observations by Lord Langdale in *Re Jervoise* (2) as to the great importance of accuracy in the titles of separate accounts. But when these remarks are carefully examined they do not, in my judgment, carry the petitioners home. It is, undoubtedly, the case that the carrying over of funds to a separate account in an administration action has at least the primâ facie effect of liberating them from

the general questions and liabilities in the pending action and of enabling them to be subsequently dealt with in the absence of persons who are not mentioned or indicated by the title of the account, read in the light of the terms of the will or settlement in course of administration. A wrong or insufficient description in such a title might, therefore, result in the funds carried to the separate account being subsequently dealt with in the absence, and possibly to the prejudice, of persons who were really concerned. Such a consideration is in itself sufficient to account for the warning of LORD LANGDALE as to the necessity of accuracy in the framing of the title to such separate accounts, but it is quite another thing to suppose that LORD LANGDALE implied that the title of a separate account conclusively declared and determined the persons entitled to the funds comprised in that account. Had he any such proposition in his mind, he would, in my judgment, have enunciated it in much stronger and more definite terms. He was, I think, using language which referred to convenience and accuracy and facility of administration only and was not concerned with definite and conclusive ascertainment and declaration of rights. *Peareth* v. *Marriott* (3) was also relied on for the petitioners. There an order had been made in chambers, and acted on for some time, that an annuity to a wife should be paid subject to income tax, and this order obviously implied a declaration or decision that the annuity was so subject, as indeed the Court of Appeal obviously thought it was. In these circumstances the Court of Appeal, affirming BACON, V.-C., had no difficulty in deciding that the matter was res judicata, and could not be re-opened. There had been a decision involving the payment of a smaller annual sum only and neglecting the right to a larger annual sum. The order was one deciding rights, not merely facilitating administration. Again, *Edgar* v. *Plomley* (4), when carefully considered, was a case which is rather against than in favour of the claim of the petitioners here. There third parties had acquired rights in reliance on the freedom from outside liabilities indicated by the separate account, and the decision was expressly based on that circumstance. The general trend of the observations in the judgment in that case indicates that the mere carriage to a separate account does not operate as a res judicata between the original parties. *Re Eyton* (5) was to precisely the same effect. There funds had been carried to the separate account of an annuitant with a direction to pay the income to her for life, and she had subsequently charged her interest. CHITTY, J., held that the title of the chargees prevailed over a claim against the annuitant for breach of trust, but intimated that this claim would have been a good claim against the annuitant herself, and that in that case the money might have been recalled or stopped from the separate account. The remarks in *Cloutte* v. *Storey* (6) recognise and affirm the same principle.

It is not immaterial to observe, as indicating the purely administrative character attached to the carriage of funds to separate accounts, that the length of the title of any such account must not ordinarily exceed thirty-six words, while in the case of many trusts it would certainly be difficult, and might probably be impossible, to frame a title of that length which would describe or define the trusts with complete accuracy. It may be noticed that in this very case the original order on further consideration framed a title for each of the five separate accounts of the shares of the testator's five daughters, which was inaccurate if considered as a declaration or definition of the trusts on which the shares were respectively held. The title in each case denoted that the testator's daughter took for life. In fact her life interest was in each case subject to a gift over on attempted alienation. But it could not, I think, be seriously suggested that the brevity of the title involved a corresponding enlargement of her interest. In short, the title of an account is for most purposes, at any rate as between the persons originally entitled, a short label for the purpose of convenient subsequent administration.

Next I have to consider whether the order of Jan. 15, 1901, so far as it directed the carrying over of the funds in question to a separate account, was in excess of the jurisdiction of the master. The funds largely exceeded the sum of £1,000, and so could not have been ordered to be paid out on summons under Ord. 55, r. 2 (2)

even by an order of the judge in person; and the limitations imposed by this sub-rule would, I think, apply to a summons for transfer of a fund to the credit of a different action. Nor is there any other sub-rule of r. 2 of Ord. 55 which appears expressly to authorise the making in chambers of such an order as that now in question. It was indeed suggested that the words of sub-r. 18, namely: "Such other matters as the judge may think fit to dispose of at chambers," would authorise the making of the order, and it was pointed out to me that the forms both in the current and the previous editions of DANIELL'S CHANCERY FORMS include forms of summons for the carrying over to separate accounts of securities exceeding £1,000. But though this would indicate that the judge in person might make such an order, it by no means follows that the master in chambers could or should do so. I have spoken on the point to the chief master, who happens also to be the master who made this particular order, and I understand from him that no general direction has been given by a judge for the making of such orders in chambers, and that it is not his ordinary practice to make such orders, though, of course, he has no particular recollection of the circumstances attending the making of an order so far back as 1901. These remarks apply to an order for carrying a fund, or, at any rate, a fund exceeding £1,000, to a separate account, even if such an order is to be regarded merely as one for the convenience of the subsequent administration of the fund. But the objections to such an order are much graver if, as argued for the petitioners, it amounts to a declaration of right and can be relied on as creating a res judicata. An order with these consequences is obviously one that is not and should not be within the jurisdiction of a master in Chancery chambers. It is a matter for the judge and for him alone. In this connection it is not immaterial to observe the language of the first proviso to r. 15 of Ord. 55. It would be lamentable if a master could, by carrying a fund to a separate account in favour of one or more persons, effect indirectly in a pending action the equivalent of what he is expressly forbidden to do in an action commenced by originating summons—that is, put a construction on the language of a document such as the will in this case. I may add that the case is one in which, had it been necessary, I should have extended the time for appealing from the order made by the master in chambers so as to set right in the future the obvious error that has been made. I say in the future, because it may well be that leave to appeal would not have been given except on the terms that past payments of income should not be disturbed.

In my judgment, therefore, the destination of the fund standing to the account now in question being that named in the third payment schedule to the petition, is not governed by the terms of the title of the account, but has to be determined in accordance with the original rights of the beneficiaries under the testator's will, and must be paid out to the three last-named respondents as the legal personal representatives of the testator's deceased daughter Ann Ellen Thompson. A further question might have arisen whether to any and what extent repayment might be demanded by them of the income which has been wrongly paid to the surviving sisters and sister of Ann Ellen Thompson. But the three last-named respondents have not pressed any claim in this respect on the terms that they shall receive this fund free of costs, and it is not necessary, therefore, for me to consider this further question.

Solicitors: *Wrentmore & Son*, for *Gisby & Son*, Ware; *Long & Gardiner*, for *Bradley, Chitty & Scorer*, Dover.

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law.*]

MOTOR UNION INSURANCE CO., LTD. *v.* BOGGAN

[House of Lords (Earl of Birkenhead, Lord Atkinson, Lord Shaw, Lord Wrenbury and Lord Carson), June 14, 1923]

[Reported 130 L.T. 588; 67 Sol. Jo. 656]

Insurance—Theft—Condition—Exception—"Loss arising in consequence of riot, civil commotion"—"Riot"—Need to prove tumult or noise—"Civil commotion."

If the five elements mentioned in *Field* v. *Metropolitan Police Receiver* (1), [1907] 2 K.B. 853 (see note infra), are present there is a "riot" even though there is no tumult or noise.

By an exceptions clause in an insurance policy under which the respondent insured a motor car with the appellant company against loss or damage by, inter alia, theft, the insurers were not to be liable for "loss or damage arising during . . . or in consequence of . . . riot, civil commotion . . ." On Nov. 7, 1920, the respondent's chauffeur, while driving the car, was held up by four armed men, who blindfolded and removed him and took away the car. According to the evidence of a police sergeant there was no serious disturbance in the county at the time, but the police had been called in from a few outlying stations (on the ground, as their Lordships found, that they would not be safe if attacked), four motor cars had been taken and not returned, receipts being given in three cases, and there had been some raids for shot-guns and to seize mails. On a claim by the respondent under the policy,

Held: the onus was on the insurers to prove that the respondent's loss fell within the exceptions clause; the inference to be drawn from the facts was that the loss was due to civil commotion and riot within the meaning of the exceptions clause; and, therefore, the insurers had discharged the onus which was on them, and the respondent's claim failed.

Notes. In *Field's Case* (1) it was held that to constitute a riot five elements were necessary—(i) a number of persons not less than three; (ii) a common purpose; (iii) execution or inception of the common purpose; (iv) an intent by the persons concerned to help one another, by force if necessary, against any person opposing them in the execution of the common purpose; (v) force or violence displayed in such a manner as to alarm at least one person of reasonable firmness and courage.

Considered: *London and Lancashire Fire Insurance Co., Ltd.* v. *Bolands, Ltd.*, [1924] All E.R.Rep. 642. Referred to: *Levy* v. *Assicurazioni Generali*, [1940] 3 All E.R. 427.

As to exceptions clauses in insurance policies, see 22 Halsbury's Laws (3rd Edn.) 221, 305–308; and as to riot and similar offences, see ibid., vol. 10, p. 582 et seq. For cases see 29 Digest 417–419 and 15 Digest (Repl.) 785 et seq.

Cases referred to:

(1) *Field* v. *Metropolitan Police Receiver*, [1907] 2 K.B. 853; 76 L.J.K.B. 1015; 97 L.T. 639; 71 J.P. 494; 23 T.L.R. 736; 51 Sol. Jo. 720; 5 L.G.R. 1121, D.C.; 15 Digest (Repl.) 791, *7428*,

(2) *Cooper* v. *General Accident, Fire and Life Assurance Corpn., Ltd.* (1923), 92 L.J.P.C. 168; 128 L.T. 481; 39 T.L.R. 113, H.L.; 29 Digest 418, *3266*.

Appeal by the insurers, defendants in the action, from an order of the High Court of Appeal for Ireland (Sir John Ross, L.C., O'Connor, M.R., and Henry, C.J.) confirming an order of the Court of Appeal in Southern Ireland (Ronan, L.J., and Dodd, J., O'Connor, L.J., dissenting) of July 17, 1922, refusing the insurers' application that the whole of the findings, verdict, and judgment of Molony, C.J., given for the assured, plaintiff in the action, at the trial, be set aside and that in lieu thereof judgment should be entered for the defendants.

The facts appear fully from their Lordships' opinions. A

S. L. Brown, K.C., T. S. F. Battersby, K.C., and *James Henry* (all of the Irish Bar) for the appellants.

Swayn, K.C., and *Devitt* (both of the Irish Bar) for the respondent.

EARL OF BIRKENHEAD.—This is an appeal from an order of the High Court of Appeal for Ireland, which confirmed an order of the Court of Appeal of B Southern Ireland refusing an application by the appellants that the judgment of the Lord Chief Justice for Ireland should be set aside. I regret, if only for sentimental reasons, that in what is probably one of the last appeals, if not the last, that will come to this House from Southern Ireland, it should be necessary for me to give a judgment which overrides decisions of so many Irish judges, but having formed, as I have formed, a clear view upon the issues which are presented, C it is necessary that I should state it.

The matter which falls to be decided arises upon a policy of insurance which was effected by the respondent with the appellants upon a Ford motor car of which he was the owner. The date of expiry of the policy was June 12, 1921, and the part of the policy with which we are most closely concerned is exception "(c)." The exceptions are, of course, the risks which are not covered by the policy, and the D relevant exception is in the following words:

> "Loss or damage arising during (unless it be proved by the insured that the loss or damage was not occasioned thereby) or in consequence of earthquake, war, invasion, riot, civil commotion, military or usurped power."

The words "unless it be proved by the insured that the loss or damage was not E occasioned thereby" are enclosed within brackets and they may be dismissed with the observation that one is not to forget in construing this exception that the onus is, as the learned counsel for the respondent very properly pointed out, upon the appellants here. It is, therefore, necessary for the appellants here to satisfy your Lordships, as it was an obligation upon them to satisfy the courts below, that this loss or damage was the result of riot or civil commotion, or both. Let me address F myself for the moment to the evidence upon this point. I am first bound to notice that the evidence of Meyer, the chauffeur, is that on the night of Nov. 7, 1920, he "was travelling at a good rate of speed, three or four men appeared across the road, each of them armed with a revolver. They used some words which I could not catch. One came over and asked me where I was going to. I told him I was bringing the man alongside me to Duncormick. He told us to get out of the G car. He then brought us up the road about twenty or thirty yards. He told me he was taking the car from me. I was then blindfolded and brought across the land to an outhouse. I was told to sit down. I was kept there three and a half to four hours. They took my permit. I was blindfolded again. They brought me to a different road and let me go. Two men stayed with me the entire time." I pause to observe there that the circumstances are not those of normal theft; they H differ in almost every important incident from what one would expect would happen in the case of an ordinary theft. In the case of an ordinary theft of a motor car the thieves might be expected to remove themselves as quickly as possible from the scene of the theft, but there is in this case exactly what Lord Finlay commented on in *Cooper* v. *General Accident, Fire and Life Assurance Corpn., Ltd.* (2)—the assumption of strength and of organisation which differs I profoundly from the circumstances of an ordinary theft. I will quote a passage from the observations of Lord Finlay which seems to me to be very much in point. He said:

> "All these circumstances go to show that those who engage in this abstraction must have been acting with some force behind them which made them feel they were masters of the situation, and it appears to me to be quite inconsistent with the idea that it was any ordinary motor thief who was guilty of the removal of this car."

I have the same feeling about this case, that the manner in which the situation was handled by the armed men who took this car made it perfectly plain that, in their judgment, they had little to fear from the police or any other authority, and that they were in LORD FINLAY'S phrase, "the masters of the situation." Had *Cooper's Case* (2) not been decided by this House, I should have formed the same view of the present case as that which I have indicated to your Lordships; that any court of final appeal which was bound by the authority of *Cooper's Case* (2) could reach a different conclusion in the present case would appear to me to be quite impossible.

Before I exhaust the evidence I must make an observation upon what was stated by Sergeant White. The learned counsel for the respondent appeared, I thought, rather surprisingly, to imagine that the evidence of Sergeant White afforded assistance to the case he was pressing upon your Lordships. I myself take the other view. I think that, if Sergeant White had not been called and had not given the evidence he gave, it would be more difficult for the insurance company to discharge the onus imposed upon them, and I think the assured greatly assisted the insurance company by calling this particular witness. What did he say? In the first place he had been a sergeant of the Royal Irish Constabulary for fourteen years. "On Nov. 7, 1920, there was no serious disturbance in the county. The police had not at that time been called in except from a few outlying stations." It ought to be most carefully noticed that we are not exclusively concerned with the state of affairs at Wexford; we are dealing here with a motor car, and we must take the ambit and the known range of a motor car, and it is apparent that, in dealing with a policy of insurance on a motor car, the relevant area within which you must ask whether or not there was disturbance or civil commotion is that area over which a motor car of a reasonable compass and range may be expected to travel. Applying oneself to that standard, what do we find? We find on the evidence of the sergeant that they had actually called in the police from a few of the outlying stations and the stations outlying over a range which obviously could be compassed by an ordinary motor car. Why were the police withdrawn from outlying stations? The learned counsel suggested that it might have been through exaggerated or alarmist apprehensions, or even premature apprehensions. We must not draw any such inference; we must assume, if the grave step is taken by the constituted police authority of withdrawing the police from barracks in outlying stations, that it is because they have reached the conclusion that the police were not safe in those stations, and, if it was the fact that the police had formed a view that even in some few outlying stations the representatives of law and order were not safe, because they were liable to be attacked, we get a very clear view of what was the state in those respective districts. The sergeant continues: "There was no martial law until Jan. 4. In fact it is a circumstance not without significance that only seven or eight weeks after the events of this particular day martial law was proclaimed, a period which corresponds very closely with the interval which existed in *Cooper's Case* (2) between the theft and the proclamation, and he adds that four cars had been commandeered and not returned, and receipts had been given in three cases.

I am bound to take note of what was said by LORD CAVE and LORD FINLAY in *Cooper's Case* (2). They took judicial notice of the fact that in the kind of disorders which were prevalent in Ireland at that time motor cars were extremely useful and on many occasions they had in fact been commandeered. I observe what was said by the noble and learned Lords who spoke in that case, and, applying that knowledge, I am bound to take it from them. I say here that we have the evidence of the police that in four other cases cars had been commandeered, and I ask myself: What is the right inference to draw from the proved facts in this case? I can only draw one inference, and it is that this was a case in which the car was taken by men who were working, and were purporting to work, in the interests of those who were carrying out disorder and engaged in violent courses in Ireland of which the motive was not the motive of private gain. We are not

concerned closely to inquire whether we are to see in the act which was done a case of civil commotion, or a case of riot, although, if I were myself bound to arrive at a conclusion upon this point, I should say that, in my judgment, it was both civil commotion and riot. Civil commotion is, in my judgment, established by those parts of the evidence to which I have directed attention. I am unable to agree with the view pressed upon us by the learned counsel for the respondent that, in order to constitute those ingredients which in law amount to riot, it is necessary that there should be noise. It is a doctrine which, I confess, is novel to me. I should agree with the learned counsel if he had said that in nearly all cases where there is a riot, there is also to be found an amount of noise. There is disturbance, and there is tumult, and it is, no doubt, because one of the ordinary habits of men who create a riot, or behave riotously, is also to behave noisily that this confusion has arisen, but the absurdity of accepting a definition of riot, which would exclude from its scope a body of twenty or thirty men who did every other act which constitute riot except that of making a noise is too manifest to require any labouring at my hands. Being, therefore, of the opinion that the courts below should have drawn the inference from the proved and admitted facts that there was here both civil commotion and a riot, I am of opinion that the appellants have discharged the onus which the exception imposed upon them, and that this appeal ought to be allowed with costs, and I so move your Lordships.

LORD ATKINSON.—I agree.

LORD SHAW.—I agree.

LORD WRENBURY.—John White, sergeant in the Royal Irish Constabulary, was a witness called by the respondent, the owner of the motor car. Having regard to that fact I am able from his evidence, and the inference which I draw from it, to arrive very clearly at the conclusion that there was here riot and civil commotion. He says there was no serious disturbance in the county. From that I infer that there was disturbance, although he is not prepared to go so far as to say that it was serious. He says that the police had not been called in except from a few outlying stations. From that I am entitled to infer that they had been called in from some stations, and that the stations from which they had been called in were outlying stations, meaning, as I infer, stations at which they were not under sufficient protection from attack, if attack were made upon them. He says, further, that on a few occasions about four cars had been commandeered, and not returned, and receipts given in three cases. A motor car, as we know, in the circumstances which prevailed in Ireland, could very well be used for the purpose of revolutionaries, and in White's district four cars had been commandeered. So four cars had been taken, as I infer, for the purpose of helping revolutionaries, and I am assisted in that by the fact that receipts had been given in three cases. A motor thief does not usually give a receipt. The object of giving a receipt, I have no doubt, was that the person who seized the motor car was saying in substance: "I am not a motor thief, I am responsible for the car I have taken, and I give this to you as a proof that it has been taken away from you by superior force." The sergeant says, further, that there had been some raids for sporting guns and for mails. This, again, must have been within his district, that is to say, that within his district sporting guns which, we all know, were taken for the purpose of being used for military purposes, had been taken and the mails had been seized. To my mind, that is the clearest evidence of a state of disorder in this county, and it seems to me to be a disorder which amounts to civil commotion.

What further do we know on the head of riot? A man is driving a motor car along a country road and he is stopped by four men with revolvers. That is a violent act. He is stopped by four men with revolvers, and they blindfold him and detain him for some two hours while they drive the car away, and they ultimately release him. The relevance of blindfolding, if there is any particular relevance in it, I think is that it was intended to assist them in concealing the

identity of the persons who were commandeering the car. He was taken into a house, and they did not want him to know what house he was taken to because that might be the means of tracing the men. It has been argued that there can be no riot unless there is tumult, noise, violence, rapid movement or something of the kind. I confess I do not assent to that at all. It appears to me that in this case the five elements of a riot, which were considered in *Field* v. *Metropolitan Police Receiver* (1), were satisfied. There were more than three persons; they had the common purpose of commandeering this car; they executed their purpose; they had intent to help one another; they each had a revolver they were going to use if necessary; they used force or violence, not actually, because it was not necessary to use it, but they threatened force or violence, and I have no doubt that it was done in such a manner as to cause some alarm to the man who was blindfolded and kept for two hours in a cottage while they were getting away.

It appears to me that as regards the construction of this policy O'CONNOR, L.J., was well founded in that which he said. He says:

> "I am of opinion that the true meaning and scope of this policy is that where the arm of the ordinary law is paralysed by commotion, disturbance, or riot, the insurers are not liable to theft by armed men."

I think that is well founded, and I think it is shown here that the ordinary law—these men knew that the law was incapable of interfering with them—was paralysed and there was a state of commotion, disturbance, or riot. I think that the appeal succeeds.

LORD CARSON.—I concur. I should be quite satisfied to base my judgment upon the reasons given by the dissenting judge, O'CONNOR, L.J. When I recollect that since that decision was given we have had the decision of your Lordships' House in *Cooper's Case* (2) I think this matter is put beyond all doubt.

Appeal allowed.

Solicitors: *Theodore Goddard & Co.*, for *O'Neill & Collins*, Dublin; *Hopgood, Mills, Steele & Co.*, for *Huggard & Brennan*, Dublin.

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

LONG *v.* GOWLETT

[CHANCERY DIVISION (Sargant, J.), February 14, 15, 16, 21, 22, March 28, 1923]

[Reported [1923] 2 Ch. 177; 92 L.J.Ch. 530; 130 L.T. 83; 22 L.G.R. 214]

Estoppel—Estoppel by record—Easement—Claim of right to water and of access to river banks—Dismissal of action—Subsequent purported exercise of easement—Action of trespass—Right to water and access pleaded in defence.

An estoppel by record operates in respect of the whole right claimed, and not merely in respect of the particular claim which failed.

In 1911 the defendant, owner of a water mill situated on a river, brought an action against the predecessors in title of the plaintiff, an upper riparian owner, in which he claimed an injunction restraining the plaintiff's predecessors from interfering with the free and uninterrupted passage and flow of the water in the river to the mill and a declaration that he was entitled to pass and re-pass along the banks of the river to repair the banks and cut weeds. That action failed. In 1921 the present plaintiff began an action for an injunction restraining the defendant from trespassing on the river and its

banks, and by his defence the defendant pleaded his right to the water and to pass and re-pass on the banks in precisely the same terms as those in which he had claimed that right in his action in 1911.

Held: the right pleaded by the defendant in both the actions was one entire right to go on both banks or either bank of the river for the purposes he mentioned, and the right claimed in the earlier action could not be confined to a right relating to one bank which was not in question in the second action; and, therefore, the dismissal of the earlier action was incompatible with the existence of the right claimed, and the matter was res judicata.

Easement—Sale of land—Implied grant—Use of close by common owner of two closes—Sale of other close—Rights of purchaser—Conveyancing Act, 1881 44 & 45 *Vict.*, *c.* 41), *s.* 6 (2).

Where the common owner and occupier of Whiteacre and Blackacre has crossed Blackacre as a convenient way between Whiteacre and a destination, such as a neighbouring village, a purchaser of Whiteacre will not acquire as a "privilege, easement, right, or advantage" within s. 6 (2) of the Conveyancing Act, 1881 [now Law of Property Act, 1925, s. 62 (2)], a right to pass over Blackacre in the same way as that in which the common owner had been accustomed to pass unless the action of the common owner had been attributable to some privilege, easement, right, or advantage, however precarious, arising out of the ownership and occupation of Whiteacre altogether apart from the ownership and occupation of Blackacre. There must be some diversity of ownership and occupation of the two closes sufficient to refer the act or acts relied on, not to mere occupying ownership, but to some privilege or advantage attaching to the owner and occupier of Whiteacre as such and de facto exercised over Blackacre. The only two exceptions to this rule appear to be those of ways of necessity and of continuous and apparent easements. An intermittent and non-apparent user or practice as in the case of the use of a way over Blackacre by the common owner stands on a completely different footing from the visible access of light to an existing window.

Broomfield v. *Williams* (1), [1897] 1 Ch. 602, distinguished.

Easement—Water—Right to "full and free liberty of stream"—Right to go on stream and banks to cut weeds and repair banks.

By a conveyance dated Oct. 11, 1845, a mill was conveyed to a predecessor of the defendant "together with the full and free liberty of the stream water watercourse and river there running and over which the said mill stands."

Held: those words did no more than prevent the grantor from interfering with the flow of the stream to the mill or complaining of the backing up of the water, and did not affirmatively give to the grantee a definite right to go on the banks or in boats on the river to repair the banks, cut weeds, or do other acts to preserve the flow of the water.

Easement—Sale of land—Grant—Words in particulars of sale.

Particulars of sale stated that a mill had "a full and constant supply of water from the river G. which runs through the property."

Held: the words were merely the statement of a physical fact and did not express or imply that the purchaser would be granted special rights of entry over the land of the vendor for the purpose of repairing the banks of the river or cutting weeds therein.

Notes. As to estoppel by record, see 15 Halsbury's Laws (3rd Edn.) 176 et seq.; as to the creation of easements by implication of law and the right to water, see ibid., vol. 12, pp. 538–543 and p. 594 et seq. For cases see 21 Digest 142 et seq. and 19 Digest 38 et seq., 145 et seq. For Law of Property Act, 1925, see 20 Halsbury's Statutes (2nd Edn.) 427.

Cases referred to:

(1) *Broomfield* v. *Williams*, [1897] 1 Ch. 602; 66 L.J.Ch. 305; 76 L.T. 243; 45 W.R. 469; 13 T.L.R. 278; 41 Sol. Jo. 348, C.A.; 19 Digest 36, *183*.

(2) *Badar Bee* v. *Habib Merican Noordin*, [1909] A.C. 615; 78 L.J.P.C. 161, P.C.; 21 Digest 168, *253*.

(3) *James* v. *Plant* (1836), 4 Ad. & El. 749; 6 Nev. & M.K.B. 282; 6 L.J.Ex. 260; 111 E.R. 967, Ex. Ch.; 19 Digest 17, *50*.

(4) *Watts* v. *Kelson* (1871), 6 Ch. App. 166; 40 L.J.Ch. 126; 24 L.T. 209; 35 J.P. 422; 19 W.R. 338, L.JJ.; 19 Digest 45, *250*.

(5) *Bayley* v. *Great Western Rail. Co.* (1884), 26 Ch.D. 434; 51 L.T. 337, C.A.; 19 Digest 35, *178*.

(6) *White* v. *Williams*, [1922] 1 K.B. 727; 91 L.J.K.B. 721; 127 L.T. 231; 38 T.L.R. 419; 66 Sol. Jo. 405, C.A.; 19 Digest 198, *1505*.

(7) *Midland Rail. Co.* v. *Gribble*, [1895] 2 Ch. 827; 64 L.J.Ch. 826; 73 L.T. 270; 44 W.R. 133; 12 R. 513, C.A.; 19 Digest 81, *490*.

Also referred to in argument:

Barrs v. *Jackson* (1842), 1 Y. & C.Ch. Cas. 585; 7 Jur. 54; 62 E.R. 1028; on appeal (1845), 1 Ph. 582, L.C.; 21 Digest 165, *232*.

Humphries v. *Humphries*, [1910] 2 K.B. 531; 79 L.J.K.B. 919; 103 L.T. 14, C.A.; 21 Digest 177, *294*.

Langmead v. *Maple* (1865), 18 C.B.N.S. 255; 5 New Rep. 277; 12 L.T. 143; 13 W.R. 469; 144 E.R. 441; sub nom. *Longmead* v. *Maples*, 11 Jur.N.S. 177; 21 Digest 208; *492*.

Wheeldon v. *Burrows* (1879), 12 Ch.D. 31; 48 L.J.Ch. 853; 41 L.T. 327; 28 W.R. 196, C.A.; 19 Digest 45, *253*.

Polden v. *Bastard* (1865), L.R. 1 Q.B. 156; 7 B. & S. 130; 35 L.J.Q.B. 92; 13 L.T. 441; 30 J.P. 73; 14 W.R. 198, Ex. Ch.; 19 Digest 20, *60*.

Bainbrigge v. *Baddeley* (1847), 2 Ph. 705; 41 E.R. 1115, L.C.; 21 Digest 217, *535*.

Toulmin v. *Copland* (1848), 2 Ph. 711.

Hunter v. *Stewart* (1861), 4 De G.F. & J. 168; 31 L.J.Ch. 346; 5 L.T. 471; 8 Jur.N.S. 317; 10 W.R. 176; 45 E.R. 1148, L.C.; 21 Digest 201, *442*.

Moss v. *Anglo-Egyptian Navigation Co.* (1865), 1 Ch. App. 108; 35 L.J.Ch. 179; 12 Jur.N.S. 13; 14 W.R. 150, L.C.; 21 Digest 201, *444*.

Flitters v. *Allfrey* (1874), L.R. 10 C.P. 29; 44 L.J.C.P. 73; 31 L.T. 878; 23 W.R. 442; 21 Digest 165, *235*.

Re Allsop and Joy's Contract (1889), 61 L.T. 213; 21 Digest 165, *237*.

Roberts v. *Fellowes* (1906), 94 L.T. 279; 19 Digest 150, *1026*.

Waterpark v. *Fennell* (1855), 5 C.L.R. 120; 19 Digest 25, *b*.

North Eastern Rail. Co. v. *Lord Hastings*, [1900] A.C. 260; 69 L.J.Ch. 516; 82 L.T. 429; 16 T.L.R. 325, H.L.; 19 Digest 11, *15*.

Kay v. *Oxley* (1875), L.R. 10 Q.B. 360; 44 L.J.Q.B. 210; 33 L.T. 164; 40 J.P. 277; 19 Digest 35, *176*.

International Tea Stores Co. v. *Hobbs*, [1903] 2 Ch. 165; 72 L.J.Ch. 543; 88 L.T. 725; 51 W.R. 615; 19 Digest 37, *193*.

Hansford v. *Jago*, [1921] 1 Ch. 322; 90 L.J.Ch. 129; 125 L.T. 663; 65 Sol. Jo. 188; 19 Digest 50, *282*.

Wardle v. *Brocklehurst* (1859), 1 E. & E. 1058; on appeal (1860), 1 E. & E. 1065; 29 L.J.Q.B. 145; 1 L.T. 519; 6 Jur.N.S. 319; 8 W.R. 241; 120 E.R. 1209, Ex. Ch.; 19 Digest 33, *162*.

Browne v. *Flower*, [1911] 1 Ch. 219; 80 L.J.Ch. 181; 103 L.T. 557; 19 Digest 180, *1302*.

Barkshire v. *Grubb* (1881), 18 Ch.D. 616; 50 L.J.Ch. 731; 45 L.T. 383; 29 W.R. 929; 19 Digest 35, *177*.

Action for a declaration and an injunction.

The plaintiff was the riparian owner of both sides of the River Granta at Linton, Cambridgeshire, and the defendant was the owner of the land on both sides of the river immediately below the plaintiff's land and of an ancient water-mill called Hadstock Mill standing on part of that land. Their title to the land arose as follows. By an indenture of conveyance, dated Oct. 11, 1845, John Kidman

conveyed to one John Reeve the mill at Linton and its surrounding land or curtilage and certain adjoining land. In that conveyance the mill and its surroundings are described in the following terms:

> "All that the dwelling-house mill house Water Grist Mill Great Mill Breast Mill and Over Shot Mill commonly called or known by the name of Hadstock Mill or Mills together with all the outhouses buildings yards orchards and gardens thereunto belonging. And all the streams waters banks sluices drains bridges overshotts dams watergates waterways backwaters and all and singular the timber cells waterwheels stones going gears utensils and materials for grinding and fixtures being the property of the said John Kidman (party hereto) in upon and belonging to the said mill and millhouse. And also all that land meadow and pasture ground to the said mill and millhouse belonging and known as parcel thereof containing by estimation one acre be the same more or less together with the full and free liberty of the stream water watercourse and river there running and over which the said mill stands as the same is now or has been used and occupied with the said mill which said hereditaments and premises situate and being in the parishes of Hadstock and Linton aforesaid or one of them are now in the occupation of the said John Reeve."

This conveyance also included an assurance of higher riparian land (which was then copyhold) of John Kidman on the south bank above the mill grounds. This land, either alone or together with land already belonging to John Reeve by allotment, seems to have brought his riparian ownership up to the Pembroke College boundary on that bank. Both the mill and its curtilage and the higher riparian land assured by this indenture are mentioned herein as being at the time in the occupation of John Reeve. John Reeve died in 1883, and by an indenture of conveyance dated Jan. 31, 1884, the devisees in trust of his will assured (among other hereditaments) Hadstock Mill and other the lands and hereditaments comprised in the conveyance of Oct. 11, 1845, to a purchaser Frederick Searle Nichols. Under this conveyance, which carries a plan, the purchaser became entitled to the whole of the land on the south bank of the River Granta from Hadstock Mill up to the Pembroke College boundary. So far as regards Hadstock Mill and other the hereditaments comprised in the conveyance of Oct. 11, 1845, the parcels in the conveyance of Jan. 31, 1884, are substantially identical with those in the conveyance of Oct. 11, 1845. By an indenture of conveyance dated Jan. 14, 1891, the devisees under the will of John Kidman (who had died in the year 1847) conveyed the land on the north bank of the river from the mill curtilage up to the Pembroke College boundary to one Johann Gotlieb Brinckmann, who proceeded to build a house thereon and to form a pleasure garden and orchard along the north bank of the river. The exact terms of this conveyance are immaterial. It does not contain any reservation or exception in favour of the grantees under the previous conveyance of the land on the south bank—that is, the conveyance of Oct. 11, 1845. Mr. F. S. Nichols died in 1906, having devised all his property to his widow. Mrs. Nichols continued the working of the mill for a short interval, but in October, 1908, she put up for sale by auction in lots the property conveyed to him by the indenture of conveyance of Jan. 31, 1884. At this auction lot 1 comprised Hadstock Mill with its curtilage, including the land on the north bank up to that conveyed to Brinckmann by the conveyance of 1891 and the land on the south bank up to a fence opposite the lower or west boundary of the land so conveyed to Brinckmann, and this lot was purchased by the defendant Gowlett. Lot 2 comprised the whole of Nichols' land on the south bank of the river from the fence just mentioned up to the boundary of the Pembroke College land; and this lot was purchased by Brinckmann, so that he became entitled to the land on both sides of this length of the river. The actual conveyances of lot 1 to the defendant and of lot 2 to Brinckmann were deferred until an enfranchisement of them, or of part of them, had been effected, and until a dispute between the purchasers as to the true boundary between the two lots, particularly on the south

side of the river, had been adjusted by the execution of an agreement dated Sept. 7, 1909, and made between the defendant, of the one part, and Brinckmann, of the other part. But ultimately lot 1 was conveyed to the defendant by an indenture of Sept. 7, 1909, and lot 2 was conveyed to Brinckmann by an indenture of Sept. 14, 1909. It is clear, and was admitted on behalf of the defendant, that in all the circumstances of the case, and particularly having regard to the purchases having been made at the same auction, these two conveyances must be treated as simultaneous, and that no advantage can be claimed by the defendant through his conveyance having actually been executed a week earlier than Brinckmann's. In fact, however, the hereditaments conveyed to the defendant were described in much the same terms as those in which they had previously been described, and included as before "the full and free liberty of the stream watercourse water and river there running and over which the said mill stands as the same is now or has been used and occupied with the said mill."

On May 10, 1911, the defendant began an action against Brinckmann in the Chancery Division. By his statement of claim in that action he based his claim on the following allegations, amongst others. By para. 2: "On the plaintiff's said land and abutting on the said river is an ancient water mill known as Linton Mill otherwise Hadstock Mill now and for several years past in the occupation of the plaintiff. For many and in particular for more than forty years last past the said mill and the owners and occupiers thereof have enjoyed as of right the free and uninterrupted passage and flow of water in the said river to the said mill for the purpose of working the same and the plaintiff is entitled by prescription or in the alternative by virtue of a lost grant to have the flow of water in the said river to the said mill in its ancient and accustomed quantity unimpeded by weeds or other obstructions and undiminished by leakage or percolation and for the purpose of working the said mill in its ancient and accustomed manner." By para 3: "The defendant is and has at all material times been the occupier of the lands adjoining the plaintiff's said land and on both sides of the said river and higher up upon the course thereof than the plaintiff's said land on both sides of the river." By para. 4: "The plaintiff and his predecessors in title have been for many and in particular for forty years and upwards entitled to an easement or right to pass and re-pass along the banks of the said river on both sides thereof above the plaintiff's said land with or without workmen and servants and with or without barrows and tools and piles clay or other materials for the purposes of inspecting and repairing the said banks and cutting the weeds in the said river and other purposes of a like nature." By para. 5: "The defendant has by means of a fixed iron railing placed across the north bank of the said river and by planting shrubs and bushes in divers places along the north bank of the said river obstructed the access of the plaintiff his workmen and servants to and along the said bank for any purpose whatever and has obstructed or prevented the plaintiff from enjoying the said easement aforesaid over such bank and has trespassed upon the plaintiff's said right or easement." The present defendant claimed in that action, among other things, an injunction to prevent Brinckmann from interfering with the defendant's right of access to the said north bank. By his defence Brinckmann pleaded, by para. 4, "The defendant denies that the plaintiff or his predecessors in title has or have been for many or for forty years or upwards or in fact entitled to any easement or right to pass along the banks of the said river on both sides or either side thereof above the plaintiff's land whether with or without workmen or servants or with or without barrows or tools or piles clay or other materials for the purposes of inspecting or repairing the said banks or either of them or cutting the weeds in the said river or for any other purpose or purposes of a like or any nature." By para. 5, after stating that he had before action offered to give the plaintiff [the present defendant] access to the north bank of the river by a certain roadway (which the defendant had refused) and that he, Brinckmann, was willing before action brought to allow the defendant to have access along the south bank for the purpose of

repairing it, he denied that the plaintiff was entitled to any such right or easement as alleged in para. 5 of the statement of claim, or that he, Brinckmann, had trespassed on any such right or easement. The defence admitted by silence the statements in the claim as to the actual obstruction of the access claimed to and along the north bank. In that state of the record the action came on to be heard before NEVILLE, J., with the result that, on Nov. 21, 1911, judgment was given dismissing the action with costs.

Mr. Brinckmann died on Dec. 19, 1917, and by an indenture of conveyance dated July 3, 1918, his executors and trustees conveyed to the present plaintiff in fee simple the lands on the north and south banks of the river which had been acquired by the deceased as aforesaid. It is common ground in the present proceedings that the plaintiff is, as regards these lands, the successor in title and privy of Brinckmann. In 1920 dispute arose between the parties with regard to the use by the defendant, Gowlett, of the river. In a letter dated Sept. 20, 1920, and written by the defendant to the plaintiff the defendant said:

> "Dear Sir, I am negotiating with an engineer as to means of getting utmost horse-power from the river at Linton and shall be glad if you will let me know whether there is any risk of bank-bursting or leakage by the backwater which you have recently cut; if there is no risk, I shall not trouble you to fill in that backwater. Please do not divert the stream in such a way (or any other) again, nor intercept the flow of the river, as question of horse-power is of greater importance to my business now than ever."

The plaintiff answered that on Sept. 22, 1920:

> "Dear Sir, Your letter of the 20th to hand. Nothing has been done to interfere with the flow of water to your Mill. I have a perfect right to clear a little mud from what you term a backwater, which is all that has been done and I should hardly have thought it necessary for you to write to me about this."

The defendant answered on Sept. 28, 1920:

> "Dear Sir, As your letter of 22nd is no answer to the question re the state of the river bank, I am willing to come, or send, to inspect latter. The riparian ownership gives access straight along the bank, but the late owner of your property preferred that I should send through his entrance gates whenever I wished to inspect the north bank of the river. Please let me know which way you prefer to be used."

In April, 1921, as the parties were unable to come to an agreement in the matter, the plaintiff put timbers across the river between his banks, with the result of preventing the defendant from using a boat above that point. The defendant removed this timber as being an obstruction to the general right which he claimed of using boats on the river; he had not then limited his claim as regards boats to the use of them for cutting weeds. Some further negotiation ensued, but without result, and on July 6, 1921, the plaintiff issued his writ in this action.

By the statement of claim the plaintiff stated his ownership within certain limits of both banks and the bed of the river as a natural and non-navigable stream or water-course, and his consequential right to place a bridge across it between his banks, complained of the defendant's claim to pass and re-pass in a boat, of his removal of the bridge and of his cutting weeds in the bed and on the banks, and sought: (i) A declaration negativing the defendant's right to pass or re-pass in a boat, or otherwise, for any purpose whatsoever over such part or parts of the river as formed part of the plaintiff's land; (ii) an injunction to restrain the defendant from trespassing on the river and the adjacent banks; and (iii) damages for the trespasses already committed by the defendant. By his defence the defendant, after setting up that the existing banks of the river were artificial embankments, pleaded a right to the flow of water to his mill undiminished by weeds or obstruction, leakage or percolation, in precisely the same terms in which he had

claimed the right in para. 2 of the statement of claim in the previous action. He then by the same paragraph claimed a right to pass and re-pass along the banks of the river to inspect and repair and cut weeds, in precisely the same terms in which he had claimed the right in para. 4 of the statement of claim in the previous action; but added a claim to pass and re-pass in a boat for that purpose. By paras. 3 and 4 of his defence he founded the rights claimed on prescription, or, alternatively, on lost grant. And by para. 8 he denied that the acts complained of by the plaintiff were trespasses or unlawful, and claimed the right to repeat them. By a counter-claim the defendant repeated paras. 1 to 6 inclusive of his defence, and asked for a declaration of right corresponding with the assertion of right contained in para. 2 of his defence. The plaintiff, by his reply and defence to the counter-claim, after certain formal denials in paras. 1 and 2, proceeded by para. 3 to set up the common ownership by Nichols of the mill and the plaintiff's land on the south bank and the subsequent sale of both by auction as negativing any acquisition of rights by prescription. Also by paras. 4 and 5 he pleaded by way of res judicata the judgment against the defendant in the former action. Thereupon the defendant, by para. 2 of his rejoinder, alleged that for many years previous to Oct. 3, 1908, Mrs. Nichols or her predecessors in title, and during the period between Oct. 3, 1908, and Sept. 7, 1909, the defendant, respectively entered on the south side of the river now belonging to the plaintiff for the purpose of repairing the bank and cutting weeds, and stated the terms of the grant to the defendant in the indenture of conveyance of Sept. 7, 1909, and claimed that either by virtue of the express terms of that conveyance or by virtue of the general words implied by s. 6 (2) of the Conveyancing Act, 1881 [see now Law of Property Act, 1925, s. 62 (2)], the defendant had granted to him an easement in accordance with para. 1 of the counter-claim. The defendant also pleaded that in the former action he did not claim to pass and re-pass along both banks of the river, and that that action related only to a claim to pass along the north bank thereof, and that his claim under the indenture of Sept. 7, 1909, was not in issue.

Alexander Grant, *K.C.*, and *J. G. Wood* for the plaintiff.

Wilfrid Greene, *K.C.*, and *Dighton Pollock* for the defendant.

Cur. adv. vult.

Mar. 28. **SARGANT, J.,** read the following judgment. The plaintiff is the riparian owner of both sides of the River Granta at Linton in the county of Cambridge. The defendant is the owner of the land on both sides of the said river, immediately below the plaintiff's land, and of an ancient water mill called Hadstock Mill, erected on part of the defendant's land. The course of the river through the plaintiff's land and for some distance above is, generally speaking, from east to west, and it is, in my judgment, the same that it has been for some hundreds of years, as is indicated by the fact that the boundary between the counties of Essex and Cambridge is for some distance along the bed of the river. I reject the suggestion of the defendant (though the point may be of small consequence) that the ancient or natural course of the river was along a ditch on the plaintiff's land to the south of the river. On the contrary, this ditch has, in my judgment, been caused by the flow through an artificial drain which was constructed under the river to drain land lying to the north of the river above the plaintiff's land. The land higher up the river on both sides, that is, to the east of the plaintiff's land, belongs to Pembroke College, Cambridge. The general lie of the land on both sides of the river is shown by some very careful sections that were prepared by a surveyor, Mr. Green, who gave evidence for the plaintiff. The land on the right bank or north of the river is higher than that on the south, and there is no danger of any considerable overflow on the north bank, which would affect the flow of the water to the defendant's mill. Indeed, the defendant himself admitted that the only result of an overflow on the north bank would be to submerge some part of the plaintiff's land and garden there, and not to carry any part of the overflow past the defendant's mill. On the other hand, the land on

the south bank of the river slopes away from the bank to the extent of some 3 ft. or 4 ft. in 150 ft. to 200 ft., while the normal height of the river is within some 12 in. of the top of the bank. It is obvious, therefore, that the maintenance of the full or normal head of water in the river for the purposes of the defendant's mill depends on the stability of the south bank of the river. If the south bank were to be allowed to fall into disrepair, or were gradually washed away, the utility of the defendant's mill (so far as dependent on water power) would be seriously affected, and might ultimately disappear, the overflow on the south reaching the river at a point below the mill. It is, however, observable, that with the bank in its present condition the first point at which an overflow would occur (and, therefore, apart from accidents the crucial point) is not on the plaintiff's land, but on the land higher up the river on the south side belonging to Pembroke College. At this point the normal level of the river is within five inches of the top of the bank; that is, the bank is some seven inches lower than at any point on the plaintiff's land.

It must, I think, be taken that the south bank of the river, both on the plaintiff's land and higher up, is not entirely a natural bank, but that it has gradually been raised and maintained over a very long period of time to prevent the overflow of the river on that side. How far this has been done to protect the land adjoining the bank from the risk of overflow, which would obviously be increased by the breaking up of the water by the defendant's mill, and how far it has been done to ensure that a proper head of water should be secured to the mill, it is impossible to say. There is no trace of any actual agreement on the subject between the upper and lower riparian proprietors prior to the year 1845, when the story opens, or indeed since that date. Probably, as in so many cases, it was a case of the various parties looking after their own immediate interests. The upper riparian proprietors, such, for instance, as Pembroke College, had a sufficient interest in preserving their lands from overflow to render it worth their while to keep up their part of the south bank; and the lower riparian proprietor—namely, one Kidman, who in 1845 owned the land on both banks from the Pembroke College boundary down to and including the mill—had an interest both in preserving his adjoining land on the south from flooding, and in keeping up a sufficient head of water for his mill. Had Pembroke College neglected the south bank, with consequential damage to the mill, that would, no doubt, have resulted in complaint from Kidman and negotiation between him and the college. On the other hand, had Kidman by act or neglect increased the damming effect of the mill so as to render the college land more liable to flood, that would probably have resulted in complaint from them. As it is, I cannot infer, nor indeed have I been asked to infer, anything more prior to the year 1845 than a general acquiescence in the existing state of things. It is, however, the fact that the lands above the plaintiff's land are, and probably have been for a long time past, very liable to floods, as indeed one would expect in the case of a sluggish river of this kind (the surveyor took the water level as the same throughout the whole length of the river which he surveyed) flowing at a normal level above the surface of the adjacent lands. It is not, however, necessary to pay any further regard to what may be considered to be the legal relations between the upper and lower riparian owners on this part of the Granta, for I understand counsel for the defendant to disclaim expressly the suggestion that the upper riparian lands of the plaintiff (whether the banks or the bed of the river) were subject to any right on the part of the defendant which arose merely from the relative position on the river of their respective tenements. He based himself solely on the rights arising either by virtue of certain conveyances or on those arising under the Prescription Acts from user for the requisite periods prior to his defence and counter-claim.

[His Lordship stated the facts as above set out and continued:] In that state of the facts and the pleadings, the first question that I have to deal with is that of res judicata. Counsel for the defendant admitted that the former action did so operate, and completely estopped the defendant, as regards any right to come

on the north bank for the purpose of repair or removing weeds under any title whatsoever. But he contended that the subject-matter of that action was limited to this smaller right; and that the judgment dismissing the action did not necessarily include, or operate as an estoppel in respect of any similar right with regard to the south bank. I am, however, unable to take this view. The right pleaded and relied on in that action was one entire right to come on both banks, or either bank, of the river for the purposes in question, and, though the act of obstruction complained of was only in regard to the north bank, it was pleaded as a violation of the right as alleged, that, is as an entirety. The act of obstruction being admitted by the then defendant—predecessor of the present plaintiff—and no distinction being drawn by him between any right in respect of the north bank and any similar right in respect of the south bank (for the statements contained in para. 5 of the defence in that action as to the attitude of the then defendant as to both the north bank and the south bank were, in my view, merely indications of neighbourly friendliness, and were not in any way admissions of right conflicting with his general denial in para. 4 of the defence), it seems to me that the complete dismissal of the action was incompatible with the existence of the right claimed, and involved the negation of it. It will also be noticed in the present action, again, what was throughout claimed on the pleadings by the present defendant is the same entire and apparently indivisible right in respect of both banks which was claimed in the former action, though the right is somewhat extended so as to include a right to clear away the weeds not only from the banks, but by means of boats—a right very difficult to dissociate from a right in respect of the banks, in view of the fact that half the bed of the river on each side is primâ facie held and passes with any ownership or conveyance of the adjoining bank.

I may add that of the cases quoted to me as to the extent of the res judicata in the present action—namely, whether it applied to both banks or to the north bank only—that most in point seems to me to be a decision of the Privy Council in *Badar Bee* v. *Habib Merican Noordin* (2). In order, however, that the questions between the parties might be determined on their merits, should my view as to the extent of the estoppel created by the former action be wrong, I allowed on terms an amendment of the pleadings by the defendant so as to set up (i) a claim to use the south bank of the river for repairing it and for cutting weeds under the grant in the indenture of Sept. 7, 1909, and (ii) a claim to pass over the bed of the river by boats for the purpose of cutting weeds, either by prescription as to the whole, or, as to the northern half of the bed, by virtue of the grant in the conveyance of 1845, and as to the southern half by virtue of the grant in the indenture of Sept. 7, 1909. These less extensive rights have to be considered separately with relation to the respective sources from which they are claimed to have originated.

I will consider, first, the right claimed to use boats over the northern half of the river bed under the grant in the conveyance of Oct. 11, 1845. The claim is based on the grant of Hadstock Mill and its curtilage

> "together with the full and free liberty of the stream watercourse water and river there running and over which the said mill stands as the same is now or has been used and occupied with the said mill."

These words primâ facie indicate that the grantee is to stand in the same position with regard to the use and flow of the stream in connection with the mill as the grantor had stood whether with regard to the use of the water against lower riparian proprietors or with regard to the right to receive the flow of the stream or to back it up in relation to upper riparian proprietors. They do not in terms refer to the flow of the stream otherwise than in the mill grounds and curtilage, and have no apparent connection with the plaintiff's lands on the south bank (which are only conveyed later in the deed by way of a covenant to surrender) or to the half bed of the river adjacent thereto. Still less do they refer to the plaintiff's lands on the north side of the river, including the bed of the river

adjacent thereto. For though those lands at that time belonged to Kidman and A
were retained by him, there is no mention of them or of their extent, and no attempt to give any express rights in regard thereto. The grantee under that deed would by virtue of the covenant to surrender in the later part of the deed acquire the plaintiff's lands south of the river and half of the adjacent bed, and have the ordinary rights of a riparian owner, which would, under the ordinary give and take and courtesy of neighbours, include boating over the whole bed of B
the river. But it is, in my opinion, an untenable claim to say that the words of grant I have read do more than prevent the grantor from interfering with the flow of the stream to the mill or complaining of the backing up of the water, or give affirmatively to the grantee a definite right of coming in boats over the northerly half of the bed of the river along the grantor's land for the purpose of cutting weeds or doing other like acts to preserve the flow of the stream. No authority C
has been quoted to me for any such construction, and it is not immaterial to observe that the first use of a boat for that purpose of which there is any evidence is at a date some years after the purchase by Nichols from Reeve in 1884. I need hardly add that the general words of the conveyance of 1845 as to easements, advantages, &c., "belonging or in any wise appertaining" to the mill are clearly insufficient to pass any such right as claimed, even had boats been previously used D
by Kidman for the purpose.

I turn now to the claim of the defendant by prescription to pass over the bed of the river by boats for the purpose of cutting weeds. The earliest date at which the user of boats for this purpose is suggested is a few years after the purchase of the mill in 1884 by Nichols; and, therefore, a few years only before the purchase of the land on the north by Brinckmann. It is, therefore, absolutely necessary, if E
the plaintiff would succeed on this ground, that he should establish a user as of right of a boat for this purpose during the whole, or, at all events, a great part of the period between 1891 and 1908, when Nichols owned and occupied the south bank and Brinckmann owned and occupied the north bank. But the facts during this period are altogether insufficient to establish any such user as of right. Nichols and Brinckmann had married sisters, and were on the friendliest terms; F
and, indeed, this connection seems to have been the reason for Brinckmann building a house and settling at Linton. Wright, the servant of Nichols, and the principal witness on this part of the case, was allowed by Nichols from time to time to assist Brinckmann's man in repairing the north bank; was "tipped" by Brinckmann for so doing; and said that Brinckmann took no more notice of him than of one of his own men. Further, Brinckmann himself was interested in the G
cutting of the weeds, though probably not to the same extent as Nichols, and used himself to cause them to be cut, at any rate along the north bank. Finally, when the opposite banks of an ordinary non-navigable stream are in separate ownership and occupation, the ordinary every-day relationships between the two riparian owners admit of the user of the stream by either of them for such purposes as boating and fishing, without any meticulous examination of the question H
whether the boat or the blades of the oars, or the lure of the fish, may be on the one side or the other of the medium filum of the bed. It would be a monstrous result if the continuance of such a state of things during the statutory period should be liable to create a legal easement, and the anomaly would be the greater, if the acts relied on were not acts obviously to the prejudice of the opposite riparian owner, but, on the contrary, either natural in character or for the common I
benefit of both. Although there is no limit to the kinds of easements that may be acquired by grant or prescription, and, therefore, it is theoretically possible that a riparian owner on one side of a river might acquire an easement over the opposite half of the bed to use a boat for the purpose of cutting weeds, it is obviously very difficult to establish that there has in fact been a user of such a privilege in avowed excess of the ordinary use by a riparian owner, and as of right. Indeed, the liability to have such inferences drawn from occasional excess of their strict legal rights, would put a stop to the exhibition, between opposite riparian owners,

of the ordinary amenities and courtesies of neighbours. In my judgment, the defendant is very far indeed from having established in his favour any right by prescription to use boats on the river between the plaintiff's lands for the purpose of weed cutting.

Finally, I have to deal with the right, said to have been created by the conveyance of Sept. 7, 1909, of entering on the south bank of the plaintiff's land for the purpose of repairing the bank and cutting weeds therefrom. Some reliance was placed by the defendant on the circumstance that the parcels relating to the mill, which are included in the first part of the schedule to this conveyance, expressly mention (as in the previous indenture of 1845)

> "the full and free liberty of the stream watercourse water and river there running and over which the said mill now stands as the same is now or has been occupied with the said mill."

As to this, however, the same reasons prevent me from giving the desired effect to these words as against upper riparian lands which have already prevented me from giving such an effect in the case of the like words in the indenture of 1845. There is this additional reason for taking this view, so far as the conveyance to the defendant in 1909 is concerned—namely, that the matter has, in my judgment, to be considered on the basis that the defendant and Brinckmann were both purchasers at the auction in 1908, and that the conveyances to them respectively in the year 1909, though separated by an interval of some seven days, must in all the circumstances of the case, and having regard to the delay occasioned in each case by intermediate arrangements for enfranchisement of part of the property sold and for the adjustment of the boundaries between the properties, be considered as contemporaneous conveyances. This being so, I do not think that the defendant can, by virtue of the express insertion in the parcels of his conveyance of the words previously used as to the full and free liberty of the stream, be considered as placed in a better position with regard to Brinckmann than was contemplated by the particulars and conditions under which they both purchased. The statement in those particulars with reference to lot 1, that the mill had "a full and constant supply of water from the River Granta which runs through the property," seems to me merely to state a physical fact, and not to express or imply that the purchaser of lot 1 would be granted special rights of entry over lot 2 for the purpose of repairing the banks of that lot or cutting weeds.

It is, however, on other words expressed or implied in the conveyance of Sept. 7, 1909, that the main argument of the defendant has been based. Under the Conveyancing Act, 1881, s. 6 (2) (I refer to this subsection, as it is the one dealt with in the argument, though I am not sure that it is not the very similar language of sub-s. (1) that is the more applicable) it is enacted that:

> "A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, water-courses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof." [See now Law of Property Act, 1925, s. 62 (2).]

The defendant says, and says truly, that during the common ownership and occupation by Nichols and his widow of the defendant's land (or lot 1) and of the plaintiff's land (or lot 2) the common owner and occupier was accustomed, when occasion arose, to proceed from the south bank within lot 1 to the south bank within lot 2, and to repair the south bank and cut weeds within the limits of lot 2. On these facts it is contended for the defendant that this constituted a

"privilege, easement, right, or advantage" over or in relation to lot 2, which at the time of the conveyance was occupied or enjoyed with lot 1, and, accordingly, that this advantage passed to the defendant by virtue of the express words of the subsection as included in the conveyance by virtue of the statute. The argument is not based in any way on the existence of any continuous and apparent easement existing over lot 2 in favour of lot 1; indeed, any such claim would be incompatible with the evidence, which clearly establishes that there was no defined way at all along the south bank. The claim is founded upon there having been a statutory introduction into the conveyance to the defendant of words equivalent to or identical with those either expressly contained or statutorily introduced in the corresponding conveyances in such cases as *James* v. *Plant* (3); *Watts* v. *Kelson* (4); *Bayley* v. *Great Western Rail. Co.* (5); and *White* v. *Williams* (6). It is, therefore, necessary for the purpose of dealing with the matter on this footing to consider whether, during the common ownership and occupation of lot 1 and lot 2 by Mr. Nichols and his widow, and, therefore, at the date of the conveyance, there was a "privilege, easement, right, or advantage" of the kind now claimed, which can properly be said to have been "demised, occupied, or enjoyed" with lot 1 over lot 2. It is very difficult to see how this can have been the case. No doubt, the common owner and occupier did in fact repair the bank of lot 2, and cut the weeds there; and no doubt also this repair and cutting would ensure not solely for the benefit of lot 2 (which comprised, amongst other things, a lawn tennis court), so as to prevent its being flooded, but also and very likely to a greater extent for the benefit of lot 1. But there is nothing to indicate that the acts done on lot 2 were done otherwise than in the course of the ownership and occupation of lot 2, or that they were by way of using a "privilege, easement, or advantage" over lot 2 in connection with lot 1. The common owner and occupier of Whiteacre and Blackacre may in fact use Blackacre as an alternative and more convenient method of communication between Whiteacre and a neighbouring village. But it has never been held, and would I think be contrary to principle to hold, that (in default of there being a made road over Blackacre forming a continuous and apparent means of communication) a sale and conveyance of Whiteacre alone would carry a right to pass over Blackacre in the same way in which the common owner had been accustomed to pass. As it seems to me, in order that there may be a "privilege, easement, or advantage" enjoyed with Whiteacre over Blackacre so as to pass under the statute, there must be something done on Blackacre not due to or comprehended within the general rights of an occupying owner of Blackacre, but of such a nature that it is attributable to a privilege, easement, right, or advantage, however precarious, which arises out of the ownership and occupation of Whiteacre, altogether apart from the ownership or occupation of Blackacre. It is difficult to see how, when there is a common ownership of both Whiteacre and Blackacre, there can be any such relationship between the two closes as (apart from the case of continuous and apparent easements or that of a way of necessity) would be necessary to create a "privilege, easement, right, or advantage" within the words of s. 6 (1) of the statute. For this purpose it would seem that there must be some diversity of ownership or occupation of the two closes sufficient to refer the act or acts relied on, not to mere occupying ownership, but to some advantage or privilege (however far short of a legal right) attaching to the owner and occupier of Whiteacre as such and de facto exercised over Blackacre.

Let me illustrate my meaning from the latest case on the subject—namely, *White* v. *Williams* (6). Assume that the facts had been that the grantor of Tydden Mawr had been the absolute owner in possession both of that upland farm and of the 772 acres of the adjoining mountain which were called Craig Goch, and that he had been accustomed for many years past, and as a regular practice, to remove his sheep from Tydden Mawr and to depasture them on Craig Goch during certain months of the year, it seems to me indisputable that, on a sale and conveyance of Tydden Mawr alone, the purchaser would not have obtained from

A the words of the statute the right to take his sheep from Tydden Mawr and graze them on Craig Goch during the months in question. I understood counsel for the defendant not to contend otherwise. The vendor would have been enjoying in fact at the date of the conveyance the advantage of taking his sheep from Tydden Mawr and grazing them on Craig Goch; but that advantage would have been one that he possessed and enjoyed as the owner and occupier of Craig Goch, B and not as an advantage enjoyed with or as an incident of his ownership and possession of Tydden Mawr.

Counsel for the defendant was challenged to produce from the very many cases in which, on a conveyance of Whiteacre, an easement over Blackacre has been held to pass under the statutory words or their equivalent, a single case in which both the closes in question had been in common ownership and occupation, or in C which there had not been an actual enjoyment over Blackacre on the part of an owner or occupier of Whiteacre who was not the owner and occupier of Blackacre. Neither from among the cases cited to me, nor from any other case in the books, was he able (with one solitary exception) to produce such a case as required. The exception, however, is one of high authority—namely, that of *Broomfield* v. *Williams* (1)—and it is necessary to examine it with some attention. In that case D the common owner of a house and of adjoining land over which light had in fact been received through the windows of the house, sold and conveyed the house by a conveyance after the date of the Conveyancing Act, 1881, but had retained the adjoining land. It was held by the Court of Appeal that, although the retained land was marked on the plan on the conveyance as "building land" the vendor was not at liberty subsequently to build on the retained land so as to interfere E substantially with the access of light to the windows of the house. A. L. SMITH, L.J., it is true, based his judgment solely on the principle that the grantor was not entitled to derogate from his grant; and this was quite sufficient to support the actual decision. But the other two members of the court relied, mainly, if not exclusively, on the express words of s. 6 (2) of the Act, and the decision is, therefore, undoubtedly binding on me with regard to the access of light, and also F with regard to any other "privilege, easement, right, or advantage" that is on the same footing as "light." But such an easement or advantage as is now claimed is, in my judgment, very different from light, or a right to light. The access of light to a window over adjoining land is a physical fact plainly visible to any one buying a house. It is extremely similar to a continuous and apparent easement. It is mentioned in the subsection in the midst of a number of physical features G ending with the word "watercourses," and the special position of light to an existing window as compared with other easements is fully recognised in the Prescription Act, which makes the acquisition of an easement of light depend on the enjoyment of the light simpliciter, and not, as in the case of other easements, on enjoyment as of right. The fact, therefore, that the inclusion of light in the subject-matter of conveyance in s. 6 (2) has been held to entitle the grantee to H the light coming to an existing window does not necessarily involve the further inclusion of non-perceptible rights or advantages, corresponding with intermittent practice or user as between two tenements of the common owner and occupier of both. Such an intermittent and non-apparent user or practice stands, in my judgment, on a completely different footing from the visible access of light to an existing window. The importance of such a distinction is specially obvious in a I case like the present, where there is a contemporaneous sale by a common owner to two separate purchasers of adjoining lots completely divided by a physical boundary. If the contention of the defendant is correct, it would be necessary in any such case for the purchaser to inquire how the common owner and occupier had been accustomed to make use of each close in connection with the other. Would the plaintiff, for instance, in this case be entitled, as against the defendant, to an alternative way over lot 1 to reach lot 2, because while both lots were in common ownership and occupation, it was the practice of Mr. and Mrs. Nichols by way of lot 1 to repair the south bank of lot 2? Any number of similar puzzles

would arise, if the law were as the defendant would have it. The fact that the common owner and occupier sells two adjoining closes separately is, in my mind, a negation of the intention to preserve access between them: compare such a case as *Midland Rail. Co.* v. *Gribble* (7). The only two exceptions to this rule appear to be those of ways of necessity and of continuous and apparent easements. Had the general words of s. 6 (2) any such effect as is suggested by the defendant—and it must be remembered that these words were not new, but represented conveyancing practice for many years previously—it is difficult, if not impossible, to understand how there have not been numerous cases in which, on a severance of two closes, a subsisting practice by the common owner and occupier of both has not been given effect to by way of legal easement as a result of general words of this kind.

Something has been said on behalf of the defendant as to the importance of this case to millers in general, and as to the danger which a decision in favour of the plaintiff might cause to the legitimate rights or expectations of this class of persons. This argument would carry greater weight if the defendant's claim were based on any general claim of right in such cases as between upper and lower riparian owners, and not on the special rights said to have been created by the particular facts and documents in this case. As it is, my decision depends on the special facts of this case, and is not one of any very general application as regards mills. Nor do I think that even in this particular case the defendant is in any real danger. I gathered from the plaintiff, and anticipate, that he has no intention of abandoning the reasonable attitude which was adopted by Brinckmann in the former proceedings, and has been adopted by the plaintiff himself in the witness box. The plaintiff, as far as I can see, was forced into bringing the present proceedings by the broad and aggressive claims of right made by the defendant. And I have no reason to doubt that, when these proceedings are at an end, the plaintiff will allow the defendant, not as a matter of strict right, but as one of neighbourly courtesy, sufficient opportunity of clearing away weeds and repairing the bank along the plaintiff's length of the river; and that none the less, because the result of so doing would enure to the advantage of the plaintiff as well as of the defendant. I propose to grant a declaration and an injunction as claimed by the plaintiff, and I award him 40s. damages for the defendant's trespass. The defendant must pay the plaintiff's costs of the action to be taxed. The counter-claim is dismissed with costs.

Solicitors: *Bird & Eldridge*, for *Ernest Vinter*, Cambridge; *Young & Sons*.

[*Reported by* L. Morgan May, Esq., *Barrister-at-Law*.]

KELANTAN GOVERNMENT *v.* DUFF DEVELOPMENT CO., LTD.

[House of Lords (Viscount Cave, L.C., Lord Shaw, Lord Sumner, Lord Parmoor and Lord Trevethin), February 15, 16, 19, March 22, 1923]

[Reported [1923] A.C. 395; 129 L.T. 356; 39 T.L.R. 337; 67 Sol. Jo. 437]

Arbitration—Setting aside award—Error of law on its face—Construction of deed—Question of construction specifically referred—Construction by arbitrator differing from that by court—Need to show illegality by arbitrator—Evidence—Circumstances in which deed executed—Intention of parties—Implication of covenant in deed.

An award by an arbitrator may be set aside for an error of law on the face of it. The question of the construction of a written document is, generally speaking, a question of law, but where a question of construction is the very thing referred for arbitration—as by a clause in an indenture providing: "Any and every dispute difference or question which shall at any time arise between the parties hereto touching the construction meaning or effect of these presents or of any clause or thing herein contained . . . shall be referred to" arbitration—the decision of the arbitrator on that point cannot be set aside by the court only because the court would itself have come to a different conclusion. If it appears by the award that the arbitrator has proceeded illegally—for instance, that he has decided on evidence which in law was not admissible, or on principles of construction which the law does not countenance—then there is error in law which may be ground for setting aside the award, but the mere dissent of the court from the arbitrator's conclusion on construction is not enough for that purpose. Unless it can be shown by something appearing on the face of the award that the arbitrator has proceeded illegally, his award must stand.

An arbitrator is entitled to have regard to the circumstances in which a deed came to be executed not only for the purpose of making intelligible the terms of the deed and applying them to the facts, but also for the purpose of implying in the deed a covenant which was not expressed therein, but which he is satisfied by the evidence of the circumstances surrounding the execution the parties intended to agree to.

Constitutional Law—Foreign sovereign State—Immunity from suit—Garnishee proceedings—Costs of unsuccessful legal proceedings—Competency of appeal to House of Lords in those proceedings.

The appellants moved to set aside an award made by an arbitrator on a dispute arising on a deed of agreement made between the appellants and the respondents. The motion was dismissed by Russell, J., with costs, as was also an appeal by the appellants to the Court of Appeal. The respondents then sought to garnishee certain moneys which were due to the appellants from Crown agents, but the appellants resisted the application on the ground that, as they were an independent sovereign State, the court had no jurisdiction to make any order respecting their property. On an appeal by the appellants to the House of Lords the respondents took the preliminary objection to the competency of the appeal that the appellants were not entitled at one and the same time to recognise and to refuse to recognise the jurisdiction of the English courts, including that of the House.

Held: the House was reluctant to deprive the appellants of the opportunity of asking to have reversed, on the merits of the case, an order of the Court of Appeal standing on record against them; if the decision of the House were in favour of the appellants it would relieve them of a heavy liability, while, if they failed, it would strengthen the power of the respondents to enforce the

award; and in those and other circumstances of the case the House would hear the appeal.

Notes. Considered: *F. R. Absalom, Ltd.* v. *Great Western (London) Garden Village Society, Ltd.*, [1933] All E.R.Rep. 616. Applied: *Barton* v. *Blackburn* (1933), 150 L.T. 327. Referred to: *A/S Tankexpress* v. *Compagnie Financiere Belge Petroles S.A.*, [1948] 2 All E.R. 939.

As to setting aside an award, see 2 HALSBURY'S LAWS (3rd Edn.) 55–61; and as to the immunity from suit of foreign States, see ibid., vol. 7, p. 265 et seq. For cases see 2 DIGEST (Repl.) 676 et seq. and 11 DIGEST (Repl.) 611 et seq. For Arbitration Acts, 1889 and 1950, see 2 HALSBURY'S STATUTES (2nd Edn.) 4 and ibid., vol. 29, p. 89.

Cases referred to:

(1) *Hamlyn & Co.* v. *Wood & Co.*, [1891] 2 Q.B. 488; 60 L.J.Q.B. 734; 65 L.T. 286; 40 W.R. 24; 7 T.L.R. 731, C.A.; 12 Digest (Repl.) 684, *5266*.

(2) *The Moorcock* (1889), 14 P.D. 64; 58 L.J.P. 73; 60 L.T. 654; 37 W.R. 439; 5 T.L.R. 316; 6 Asp.M.L.C. 373, C.A.; 12 Digest (Repl.) 686, *5274*.

(3) *Adams* v. *Great North of Scotland Rail. Co.*, [1891] A.C. 31, H.L.; 2 Digest (Repl.) 678, **1467*.

(4) *Knox* v. *Symmonds* (1791), 1 Ves. 369; 30 E.R. 390; 2 Digest (Repl.) 555, *905*.

(5) *Doe d. Stimpson* v. *Emmerson* (1847), 2 New Pract. Cas. 283; 9 L.T.O.S. 199; 2 Digest (Repl.) 656, *1760*.

(6) *Holmes Oil Co.* v. *Pumpherston Oil Co.* (1891), 18 R. (Ct. of Sess.) 52.

(7) *A.-G. for Manitoba* v. *Kelly*, [1922] 1 A.C. 268; 91 L.J.P.C. 101; 126 L.T. 711; 38 T.L.R. 281, P.C.; 2 Digest (Repl.) 460, *262*.

(8) *Re King and Duveen*, [1913] 2 K.B. 32; 82 L.J.K.B. 733; 108 L.T. 844; 2 Digest (Repl.) 657, *1764*.

(9) *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways Co. of London*, [1912] A.C. 673; 81 L.J.K.B. 1132; 107 L.T. 325; 56 Sol. Jo. 734, H.L.; 2 Digest (Repl.) 650, *1712*.

(10) *Landauer* v. *Asser*, [1905] 2 K.B. 184; 74 L.J.K.B. 659; 93 L.T. 20; 53 W.R. 534; 21 T.L.R. 429; 10 Com. Cas. 265; 2 Digest (Repl.) 649, *1708*.

(11) *Wolveridge* v. *Steward* (1833), 1 Cr. & M. 644; 3 Moo. & S. 561; 3 Tyr. 637; 3 L.J.Ex. 360; 149 E.R. 557, Ex. Ch.; 17 Digest (Repl.) 397, *2026*.

(12) *James* v. *Cochrane* (1852), 7 Exch. 170; 21 L.J.Ex. 229; 155 E.R. 903; on appeal (1853), 8 Exch. 556, Ex. Ch.; 17 Digest (Repl.) 399, *2044*.

(13) *Knight* v. *Gravesend and Milton Waterworks Co.* (1857), 2 H. & N. 6; 27 L.J.Ex. 73; 29 L.T.O.S. 83; 157 E.R. 3; 17 Digest (Repl.) 398, *2032*.

(14) *Holgate (Holdgate)* v. *Killick* (1861), 7 H. & N. 418; 31 L.J.Ex. 7; 5 L.T. 358; 10 W.R. 19; 158 E.R. 536; 2 Digest (Repl.) 692, *2064*.

(15) *Fuller* v. *Fenwick* (1846), 3 C.B. 705; 16 L.J.C.P. 79; 8 L.T.O.S. 162; 10 Jur. 1057; 136 E.R. 282; 2 Digest (Repl.) 656, *1759*.

(16) *McRae* v. *Lemay* (1889), 18 S.C.R. 280; 16 A.R. 348; 2 Digest (Repl.) 659, **1316*.

(17) *Hodgkinson* v. *Fernie* (1857), 3 C.B.N.S. 189; 27 L.J.C.P. 66; 6 W.R. 181; 140 E.R. 712; 2 Digest (Repl.) 656, *1762*.

Also referred to in argument:

The Newbattle (1885), 10 P.D. 33; 54 L.J.P. 16; 52 L.T. 15; 33 W.R. 318; 5 Asp.M.L.C. 356, C.A.; Digest Practice 907, *4479*.

Baird v. *Fortune* (1861), 5 L.T. 2; 25 J.P. 691; 7 Jur.N.S. 926, H.L.; 17 Digest (Repl.) 325, *1311*.

Bonnin v. *Neame*, [1910] 1 Ch. 732; 79 L.J.Ch. 388; 102 L.T. 708; 2 Digest (Repl.) 482, *374*.

Re Carlisle, Clegg v. *Clegg* (1890), 44 Ch.D. 200; 59 L.J.Ch. 520; 62 L.T. 821; 38 W.R. 638; 2 Digest (Repl.) 489, *416*.

Bristol Corpn. v. *John Aird & Co.*, [1913] A.C. 241; 82 L.J.K.B. 684; 108 L.T. 434; 77 J.P. 209; 29 T.L.R. 360, H.L.; 2 Digest (Repl.) 488, *412.*

Grey v. *Pearson* (1857), 6 H.L.Cas. 61; 26 L.J.Ch. 473; 29 L.T.O.S. 67; 3 Jur.N.S. 823; 5 W.R. 454; 10 E.R. 1216, H.L.; 17 Digest (Repl.) 274, *794.*

Lyon v. *Johnson* (1889), 40 Ch.D. 579; 58 L.J.Ch. 626; 60 L.T. 223; 37 W.R. 427; 2 Digest (Repl.) 483, *382.*

Re Nuttall and Lynton and Barnstaple Rail. Co. (1899), 82 L.T. 17, C.A.; 2 Digest (Repl.) 581, *1130.*

The Parlement Belge (1880), 5 P.D. 197; 42 L.T. 273; 28 W.R. 642; 4 Asp.M.L.C. 234, C.A.; 11 Digest (Repl.) 628, *516.*

Randegger v. *Holmes* (1866), L.R. 1 C.P. 679; 2 Digest (Repl.) 489, *414.*

Rashleigh v. *South Eastern Rail. Co.* (1851), 10 C.B. 612; 16 L.T.O.S. 282; 138 E.R. 242; 17 Digest (Repl.) 398, *2030.*

Tolhurst v. *Associated Portland Cement Manufacturers (1900), Ltd.*, *Tolhurst* v. *Associated Portland Cement Manufacturers (1900), Ltd.*, *and Imperial Portland Cement Co., Ltd.*, [1903] A.C. 414; 72 L.J.K.B. 834; 89 L.T. 196; 52 W.R. 143; 19 T.L.R. 677, H.L.; 31 Digest (Repl.) 409, *5387.*

Appeal from an order of the Court of Appeal (Lord Sterndale, M.R., Warrington and Younger, L.JJ.) dismissing an appeal from the order of Russell, J., refusing to set aside an award.

By an indenture dated July 15, 1912, and made between the Crown Agents for the Colonies on behalf of the government of Kelantan, of the one part, and the respondents, the Duff Development Co., Ltd., of the other part, after a recital showing that the respondents were entitled under an agreement with the Ruler of Kelantan to certain rights and privileges over certain districts in that State, and after a recital that it was the intention of the government to make certain railways and roads in and through that concession, it was agreed that the existing agreement should, as from Dec. 31, 1912, be cancelled in consideration of a payment by the government to the respondents of sums amounting to £300,000 and for the other considerations appearing in the deed. The deed further provided:

"4. The government will (subject as hereinafter provided) grant to the company the sole right of selecting to hold in perpetuity at a yearly quit rent of 25 cents per acre such blocks of State lands within the concession not exceeding in the aggregate 50,000 acres as the company shall select Provided that (a) the blocks shall be selected within twelve calendar months after the government shall have delivered to the company a plan showing the definite line of route proposed to be adopted by the government for a railway intended to be made by the government from Pahang to Siamese territory through the concession or part thereof such plan to be delivered as soon as the general line of route has been settled Provided that the government shall be at full liberty in constructing the said railway to make all such deviations from the line of route shown on the said plan as may be thought fit. . . .

8. The government will also if required by the company so to do at any time after the construction of the railway referred to in cl. 4 shall have been completed up to a point on a line running east and west through Manson's Shaft grant to the company (subject as hereinafter provided) an exclusive licence for a period of five years computed from the date when the construction of the said railway shall have been so completed (of which date the certificate of the government's engineer-in-charge of the works shall be conclusive evidence) to prospect for minerals over the area within a radius of five miles from Manson's Shaft with the right to call for a mining lease or mining leases for a term or terms expiring on the 10th day of October, 1940, of any lands to be selected by the company within that area not exceeding in the whole 3,000 acres. . . .

18. The government will within four years from the date hereof make a cart road within the concession from a point upstream of Kuala Tui to the

railway referred to in cl. 4 in such line or route of such materials and mode of construction as the government may think fit and the company shall surrender and give up or cause to be surrendered and given up to the government without any compensation whatsoever a strip of land one chain wide for the purposes of such road to over or in relation to which the company or any person claiming under it may be entitled or have any right title or interest under these presents or any grant lease or licence made or to be made hereunder. . . .

21. Any and every dispute difference or question which shall at any time arise between the parties hereto touching the construction meaning or effect of these presents or of any clause or thing herein contained or the rights or liabilities of the parties hereunder or otherwise howsoever relating to the premises shall be referred to the arbitration of a sole arbitrator to be agreed upon between the parties or failing agreement to be nominated by the Secretary of State for the Colonies for the time being and this shall be deemed a submission to arbitration within the Arbitration Act, 1889, or any statutory modification or re-enactment thereof for the time being in force the provisions whereof shall apply so far as applicable."

The plan referred to in cl. 4 of the deed of cancellation was duly delivered to the respondent company, and the company, in pursuance of that clause, selected certain blocks of the aggregate area of 50,000 acres. But neither the railway nor the road referred to in the deed was in fact constructed; and the company, alleging an obligation on the part of the government to construct both the road and the railway, claimed damages from the government for their breach of the stipulations in the deed. The parties being unable to agree upon an arbitrator, application was made to Lord Milner, the Secretary of State for the Colonies, to appoint an arbitrator under cl. 21 of the deed; and the Secretary of State, by an instrument under his hand dated April 12, 1920, after recitals showing that the company claimed damages for the failure of the government in accordance with the provisions of the deed of cancellation to construct a railway or to make a road as therein provided, and that such claim was disputed by the government, appointed Sir Edwin Arney Speed to be the sole arbitrator to whom those matters of dispute should be referred. By the direction of the arbitrator pleadings were delivered, which showed that the failure to make a railway and road was admitted, and that the only questions to be determined by the arbitrator were questions as to the construction and effect of the deed. The arbitrator's award was dated Nov. 17, 1921, and was in somewhat unusual form. The arbitrator thereby declared that he had been pressed to state his views on the points of law raised in the proceedings, and that, as to the alleged implied obligation on the part of the government to build a railway, his award was based on a full consideration of all the cases quoted in the arguments, including *Hamlyn & Co.* v. *Wood & Co.* (1) and *The Moorcock* (2), passages from which cases he quoted in the award. He proceeded:

"I am of opinion that any attempt to construe the deed of cancellation of July 15, 1912, without taking into account (A) the natural features of the country wherein the obligations of the agreement were intended to be performed and (B) the position of the parties and the circumstances attending the preliminary negotiations and the conclusion of the agreement must lead to a construction which involves a failure of consideration which cannot have been within the contemplation of either party and will rob the transaction of such efficacy as both parties must have intended that at all events it should have."

The arbitrator found and awarded as follows:

"(i) That the government was by the express terms of the deed of cancellation under contract to construct a cart road within the concession from a point upstream, i.e., south of Kuala Tui to a railway running from Pahang to Siamese Territory within a period of four years from July 15, 1912. (ii) That it was an implied term of the contract that the said road should commence on the west side of the river, should proceed in a northerly direction, and should

have its terminus on the line of the said railway and within the concession. (iii) That it was an implied term of the contract that the said railway should be constructed within the time limited for the completion of the said road and should be so constructed as to admit of the construction of the said road having a terminus as aforesaid. (iv) That the government has failed to fulfil the said terms of the contract and that by reason of such failure the company had suffered damage."

The arbitrator directed an inquiry as to the nature and amount of such damage. On Dec. 22, 1921, the appellant government served upon the respondents notice of a motion in the Chancery Division of the High Court of Justice asking that the award might be set aside on grounds which were stated as follows:

"(i) That there is error of law appearing on the face of the award. (ii) That the arbitrator has wrongly construed the deed of cancellation referred to in the award. (iii) That the arbitrator has wrongly implied terms of and in the said deed as set out in his award. (iv) That in construing the deed of cancellation the arbitrator has wrongly taken into account 'the circumstances attending the preliminary negotiations and the conclusion of the agreement.' (v) That the arbitrator wrongly received evidence of the said circumstances."

The motion was heard by RUSSELL, J., who refused it with costs; and an appeal from his decision was also refused with costs. The Kelantan government appealed on the grounds (inter alia) that there was error in law apparent on the face of the award; in construing the deed of cancellation the arbitrator had wrongly taken into account "the circumstances attending the preliminary negotiations and the conclusion of the agreement" and had wrongly received evidence thereof; had wrongly construed the deed of cancellation; and had wrongly implied covenants and terms therein; the implication that the cart road should "proceed in a northerly direction" was not justified by any language of the deed itself, and was inconsistent with the express provision of cl. 18 of the deed that the cart road should be made in such line or route as the government might think fit; having regard to the language of the deed no covenant could be implied on the part of the government to build a railway from Pahang to Siamese Territory or to do so within a period of four years from July 15, 1912; and that the covenants and terms implied by the award were not based upon or justified by any language to be found in the deed, but were based on mere speculation as to the possible or probable intention of the parties not disclosed by the language of the deed.

Upjohn, K.C. (*W. E. Vernon* with him), for the appellants.
Maugham, K.C. (*Stafford Cripps* with him), for the respondents.

Their Lordships took time for consideration.
Mar. 22. The following opinions were read.

VISCOUNT CAVE, L.C.—This is an appeal from an order of the Court of Appeal in England, affirming an order of RUSSELL, J., who refused a motion to set aside an award. [His Lordship stated the facts as set out above and continued:] Upon the appeal coming on for hearing, a preliminary objection was raised on behalf of the respondents. It appeared that, after the decision of the Court of Appeal upon the question of setting aside the award, the respondent had applied to the court for a garnishee order against the property of the government of Kelantan in this country for the amount of the costs of the application and appeal (which exceeded £5,000), and also for an order, under s. 12 of the Arbitration Act, 1889, to enforce the award. In answer to these applications, the government had contended that, being a sovereign State, it was not subject in respect of its public property to the orders of the High Court, and this objection had been allowed by RUSSELL, J., and on appeal by the Court of Appeal. On these facts the respondents contended that the appellant government, having repudiated any liability in this country in respect either of the award or of the orders of the courts in respect of costs, was precluded from now coming to any tribunal in this country—including this House—for an

order to set aside the award. This contention was based partly on the view that the appellant government could not at the same time repudiate the jurisdiction of the British courts and appeal to those courts for relief, and also upon the view that, in the circumstances which had now arisen, this appeal was an appeal for costs only. There was force in this objection. The position of a government which at once repudiates the jurisdiction of a court and appeals to it for protection does not accord with one's sense of what is right and fair; and if the point could have been raised at an earlier stage—for instance, at the time when the application to RUSSELL, J., to set aside the award was made—I do not say—although it is not necessary to decide the matter—that effect would not have been given to it. But there was serious difficulty in giving effect to the objection as a ground for refusing to hear this appeal. There was an order of the Court of Appeal standing on record against the appellant, and your Lordships were reluctant to deprive the appellant of the opportunity of asking to have that order reversed. Further, it appeared that a decision on this appeal would by no means be abortive. If the decision were in favour of the appellant government, it would, of course, relieve it of a heavy liability; if against it, the decision would not only—as counsel for the appellant pointed out—make the award finally binding upon the parties in Kelantan, but would also be a strong ground for an application by the respondents to the Colonial Office—which controls the government of Kelantan—to give directions for carrying out the award. Further, it was evident that if the orders of the Court of Appeal relating to the application for a garnishee order, and for an order to enforce the award, should be set aside on appeal to this House—as to which I say nothing—the appellant would, if this appeal were stopped in limine, be in the position of having the award and the orders for costs enforced against it, and of having lost its opportunity of taking the opinion of the House of Lords on the merits of the case. Adequate security had been given for the costs of this appeal. Your Lordships accordingly decided—and I entirely agreed—that the objection must be overruled and that the appeal must be heard.

Before dealing specifically with the points raised on the appeal, it is desirable to refer to a question which was mentioned—although not decided—in the judgments of the learned judges of the Court of Appeal and was again raised in the argument before this House—namely, the question whether there was not here such a reference to the arbitrator on the construction of the deed of cancellation that his conclusions on that point must be accepted as final and not open to be questioned on application to the court. In my opinion, there was in this case a reference to the arbitrator of the questions which had been raised on the construction of the deed of cancellation. The arbitration clause in the deed applied in terms to every dispute, difference, or question which might be raised between the parties touching the "construction meaning or effect" of the deed. The appointment of the arbitrator showed that differences had been raised as to construction, and the arbitrator was appointed to determine those differences. In the pleadings delivered in pursuance of the arbitrator's direction, the questions of construction were again clearly raised. Lastly, the appellant, in his Case delivered for the purpose of this appeal, stated that, among the points to be determined by the arbitrator were—"(i) What, upon the true construction of the deed of cancellation, was the nature and extent of the obligation of the government in regard to the making of the cart road? (ii) Whether, upon the true construction of the deed of cancellation, the government had entered into a covenant with the company to construct the railway, and if so on what terms, and what was the nature and extent of the obligation of the government under such covenant?" The reference, therefore, was a reference as to construction.

If this be so, I think it follows that, unless it appears on the face of the award that the arbitrator has proceeded on principles which were wrong in law, his conclusions as to the construction of the deed must be accepted. No doubt an award may be set aside for an error of law appearing on the face of it; and no doubt a question of construction is—generally speaking—a question of law. But

where a question of construction is the very thing referred for arbitration, then the decision of the arbitrator upon that point cannot be set aside by the court only because the court would itself have come to a different conclusion. If it appears by the award that the arbitrator has proceeded illegally, for instance, that he has decided on evidence which in law was not admissible, or on principles of construction which the law does not countenance, then there is error in law which may be ground for setting aside the award, but the mere dissent of the court from the arbitrator's conclusion on construction is not enough for that purpose. The fact that, under s. 4 of the Arbitration Act, 1889 [see now Arbitration Act, 1950, s. 4], the court has a discretion to refuse a stay of proceedings when a difficult question of law is raised, or that, under s. 19 of the same Act [see s. 21 of the Act of 1950], an arbitrator may be required to state a Special Case for the opinion of the court on any question of law, is not material; for in this case no question of stay was raised, and the appellants, although at one time disposed to ask for a Special Case, did not press their request, but left the matter for the arbitrator to deal with. This being so, it appears to me that, unless it can be shown by something appearing on the face of the award that the arbitrator has proceeded illegally, his award must stand.

The above view is fully supported by the authorities. In *Adams* v. *Great North of Scotland Rail. Co.* (3) LORD HALSBURY treated the point as settled. After referring to LORD THURLOW'S judgment in *Knox* v. *Symmonds* (4) he proceeds (1 Ves. at pp. 39, 40):

> "And in the Court of Common Pleas, forty years ago, in a case in which the arbitrator had a question of law submitted to him according to the ordinary forms of pleading, the court, having come to the conclusion that the decision of the arbitrator was, in the sense in which they understood the words, erroneous in deciding upon a question of law on demurrer, nevertheless held that the parties, having submitted that question to the arbitrator, it was for the arbitrator to determine it; in their own language, the parties had agreed to accept the arbitrator's decision upon the question of law, as well as his decision upon the facts: *Doe d. Stimpson* v. *Emmerson* (5). In the Court of Queen's Bench, thirty years ago, that decision was adopted as being the law which would guide the court in the decision of such questions."

To the same effect are the decisions of this House in *Holmes Oil Co.* v. *Pumpherston Oil Co.* (6) and of the Judicial Committee of the Privy Council in *A.-G. for Manitoba* v. *Kelly* (7); and in *Re King and Duveen* (8), CHANNELL, J., stated the rule concisely as follows ([1913] 2 K.B. at pp. 35, 36):

> "It is no doubt a well-established principle of law that if a mistake of law appears on the face of the award of an arbitrator, that makes the award bad, and it can be set aside . . . ; but it is equally clear that, if a specific question of law is submitted to an arbitrator for his decision, and he does decide it, the fact that the decision is erroneous does not make the award bad on its face so as to permit of its being set aside. Otherwise it would be futile ever to submit a question of law to an arbitrator."

British Westinghouse Electric and Manufacturing Co. v. *Underground Electric Railways Co. of London* (9) is clearly distinguishable, as in that case the award was set aside, not because this House differed from the opinion of the arbitrator on the question referred to him, but because that opinion appeared on the face of the award to be founded upon a previous decision of the Divisional Court which this House considered to be wrong. *Landauer* v. *Asser* (10), on which counsel for the appellant mainly relied, was not a case of construction, and the point now under discussion does not appear to have been raised.

I come, therefore, to the conclusion that the award in the present case cannot be set aside merely because the arbitrator may be thought to have been mistaken in his construction of the deed of cancellation, but can be set aside only if it appears on the face of the award that he has proceeded on evidence which was

inadmissible, or on wrong principles of construction, or has otherwise been guilty of some error in law. Upon this footing two points are raised on behalf of the appellant government. First, it is said that the statement in the award that the arbitrator has taken into account "the circumstances attending the preliminary negotiations and the conclusion of the agreement" shows that he in fact took into account the negotiations themselves, and drew from them an inference as to the contract by which the parties intended to be bound. If he did so, he was in error; but I do not think that the statement can fairly be so read. The circumstances attending the preliminary negotiations are different from the negotiations themselves, and, although the phrase is not a happy one, I think that it means no more than that the arbitrator had regard to the facts existing before and down to the date of the deed. But it is said that, even so, it appears by the award that he has used his knowledge of those facts for a wrong purpose; that he was entitled to have regard to the surrounding circumstances for the purpose of making intelligible the terms of the deed, and of applying them to the facts, but not for the purpose of implying in the deed a covenant which was not expressed therein. I know of no authority for so limiting the ordinary rule. No doubt surrounding circumstances may not be used for the purpose of adding to a deed a stipulation to which the parties did not intend by that deed to agree; but if a judge or an arbitrator, knowing the terms of a deed and the circumstances surrounding its execution, is satisfied by those means that the parties intended by that instrument to agree to terms which, although not clearly expressed, are in his belief to be implied in it, there is no reason why he should not give effect to his opinion. This view is consistent with such authorities as *Wolveridge* v. *Steward* (11), *James* v. *Cochrane* (12) and *Hamlyn & Co.* v. *Wood & Co.* (1), and is in accordance with the statements of the law contained in *Knight* v. *Gravesend and Milton Waterworks Co.* (13) (2 H. & N. at p. 11). In the last-mentioned case, POLLOCK, C.B., said:

> "It is admitted that there is no covenant, in express terms, contained in the deed; but wherever it is manifest from expressions in a deed, that the parties must have intended to stipulate that a particular thing should be done by either of them, there is an implied covenant to do it. . . . But in fact every case where a covenant is implied must stand upon its own foundation, and there is great difficulty in arguing from the analogy of other cases. The question always is, what is the reasonable conclusion to be drawn from all the matters to which the court are entitled to look?"

In my opinion, therefore, the first point taken on behalf of the appellant cannot be sustained.

Secondly, it is argued that the conclusions of the award are inconsistent with the terms of the deed in two respects—namely, in the finding (in cl. 2) that it was an implied term of the contract that the road thereby agreed to be made should proceed in a northerly direction, and also in the finding (in cl. 3) that it was an implied term of the contract that the railway therein referred to should be constructed, and constructed within a given time. The finding that the road was to proceed in a northerly direction appears to me to be in no way contradictory to the terms of the contract. The contract contains—as WARRINGTON, L.J., pointed out—a provision which to some extent points to that conclusion; and it may very well be that the evidence of the surrounding circumstances—of which this House has no knowledge—was such as to make it impossible to give any other construction to the deed. A stipulation that the road shall proceed in a northerly direction does not appear to me to be inconsistent with the express stipulation that its "line of route" shall be laid down by the government. The finding of the arbitrator, that there is to be implied in the deed a contract to construct the railway, has caused me more doubt, but, upon the whole, I have come to the conclusion that it affords no ground for setting aside the award. I might myself have experienced difficulty in finding such an implication in the contract, but this is immaterial, as the question is one of construction which—as I have indicated—it is for the arbitrator and

not for the courts to determine. The implication of a covenant to construct the railway is certainly not contrary to the deed of cancellation. There are provisions in the deed which cannot have full effect unless the railway is made; such, for instance, as the stipulation in cl. 4 for the selection of blocks of land after the line of route of the railway has been settled, the provision in the same clause for deviations from such line of route, the stipulation in cl. 8 for the grant of a mining lease after the construction of the railway has been completed, and the agreement in cl. 18 to make a cart road to the railway within four years. These stipulations may not be enough by themselves to lead to an implication of a contract to construct the line; but I am not prepared to say that these considerations, coupled with evidence of facts of which the courts know nothing, and into which they are not entitled to inquire, cannot properly have led the arbitrator to his conclusion. In these circumstances, I have come to the conclusion that this objection also fails.

For the above reasons I am of opinion that this appeal fails and should be dismissed with costs, and I move your Lordships accordingly. But I desire to add an observation which arises out of the preliminary objection taken by the respondents to the hearing of this appeal. Although that objection was overruled and the appellant government was allowed to argue this appeal, I think it right to say that it is now incumbent on that government and on the British Colonial Office, under whose directions it carries on its operations, to consider carefully whether and to what extent the plea of sovereignty can justly be insisted upon in order to prevent the enforcement of the award and of the orders of the courts for payment of costs. The appellant government has appealed to the British courts to declare whether the award is binding upon it; and now that this question has been finally determined in favour of the respondents, it would not, I think, be creditable to the appellant government—which claims the dignity of a sovereign State—that the respondents should be deprived by a technical plea, not only of the fruits of that decision, but even of the costs of obtaining it.

LORD SHAW and **LORD SUMNER** concurred.

LORD PARMOOR.—A deed, referred to as the deed of cancellation, to which the appellants and respondents are parties, dated July 15, 1912, contains an arbitration clause in the following terms: [His Lordship read cl. 21 of the deed]. It is important to note the direction in this clause, that any and every dispute at any time arising between the parties touching the construction, meaning, or effect of the deed shall be referred to arbitration. On April 12, 1920, Lord Milner, the Secretary of State for the Colonies, acting under the authority of the above arbitration clause, appointed Sir Edwin Arney Speed, as sole arbitrator, to decide certain matters in dispute recited in the deed of appointment. So far as is material to the present appeal, the recital states that the respondents have suffered, and are suffering, and must continue to suffer, material damage, and loss, and increased cost of working their estates and business, by reason of the failure of the government, in accordance with the before recited provisions of the deed of cancellation, to construct the said railway and/or to make the said road as therein provided, and that the appellants do not admit any of the claims of the respondents, as before recited, or any liability to the respondents in respect of non-construction and making of the said railway, and/or the said road, and that a difference has, therefore, arisen between the appellants and the respondents within the terms of cl. 21. It was agreed that the arbitrator should, in the first instance, determine the rights of the parties, leaving over, for future consideration, any question of damage. The arbitrator made his award on Nov. 7, 1921, setting out the legal principles which he had adopted, and the heads of the evidence which he had admitted. The appellants moved to set aside the award on grounds stated in an affidavit sworn on Dec. 22, 1921. RUSSELL, J., dismissed the motion. This judgment was confirmed in the Court of Appeal.

It has long been established, as a fundamental principle in the law of arbitration, that, so long as an arbitrator acts within his jurisdiction and without fraud or

misconduct, an award cannot be set aside by a court, unless there is an error in law which appears on the face of the award, or in some document so closely connected therewith that it must be regarded as part of his award, or unless the umpire states that, if he has made a mistake of law or fact, he leaves it to the court to review his decision. In any case it would hardly be necessary to quote authorities for the above proposition, but the whole matter was fully discussed in a recent case decided in the Privy Council, *A.-G. for Manitoba* v. *Kelly* (7). It is sufficient to quote the following passage ([1922] 1 A.C. at p. 281):

> "In a submission, in which the parties have agreed, that the decision of the umpire, on the matters referred to him, shall be final, the courts will not inquire whether the conclusion of the umpire on the matters referred to him is right or wrong, unless an error appears on the face of the award, or on some document so closely connected with it that it must be regarded as part of his award, or unless the umpire himself states that he has made a mistake of law or fact, leaving it to the court to review his decision—*Holgate* v. *Killick* (14); *Fuller* v. *Fenwick* (15); *McRae* v. *Lemay* (16); *Adams* v. *Great North of Scotland Rail. Co.* (3); *British Westinghouse Co.* v. *Underground Electric Railways Co. of London* (9)."

To the cases referred to in the above quotation may be added *Hodgkinson* v. *Fernie* (17), referred to by Lord Haldane in his judgment in the *Westinghouse Case* (9). A passage from the same judgment in the Privy Council states, affirmatively, that an award can be impeached when an error in law appears on the face of the award, or on some document so closely connected with it that it must be regarded as part of the award, if the question of law is not one which has been specifically referred to the arbitrator ([1922] 1 A.C. at p. 283):

> "Where a question of law has not specifically been referred to an umpire, but is material in the decision of matters which have been referred to him, and he makes a mistake, apparent on the face of the award, an award can be set aside on the ground that it contains an error of law apparent on the face of the award; but no such issue arises in the present appeal. In *British Westinghouse Co.* v. *Underground Electric Railways Co. of London* (9) it was held that where an arbitrator had made an award expressed to be made on the basis of an erroneous opinion given upon a Special Case stated by an arbitrator under the Arbitration Act, 1889, in regard to questions of law arising in the course of the reference, the award is subject to appeal, if that opinion is erroneous."

It is not necessary to go into the very special conditions which existed in the *Westinghouse Case* (9), but, in my opinion, the present appeal does not depend upon the decision in that case.

It is not competent to examine extrinsic evidence for the purpose of determining whether an arbitrator has made an error of law, within the limits of his jurisdiction, where there is no allegation of fraud or misconduct. The extrinsic evidence, therefore, considered by Russell, J., should not have been admitted, and was properly rejected by the Court of Appeal. There are adequate remedies provided in the Arbitration Act, 1889. A court, by exercising its discretion under s. 4, or under s. 19 of that Act, can ensure that, in any proper case, a matter of law may be brought for decision before the courts, either at a preliminary stage, or before the arbitrator has made his award. In other words, an agreement to refer matters in dispute to an arbitrator does not deprive either party of his right to the decision of a matter of law in the courts, should the judge or court before whom the matter is brought be of opinion that, in any particular instance, this is the right course to adopt. The principle applicable where a specific question of law has been submitted to the decision of arbitration is well expressed by Channell, J., in *Re King and Duveen* (8). [His Lordship read the passage cited by the Lord Chancellor.] *Landauer* v. *Asser* (10) was referred to in the argument before your Lordships. It is not easy to understand the exact nature of this decision, but if the case purports to decide that, where a matter of law has been specifically referred to arbitration,

A it is competent for a court to set aside the decision of the arbitrator, on the ground that his decision is wrong, it cannot, I think, be regarded as a valid authority.

In the present appeal it was argued by the counsel on behalf of the appellants that the question of the construction of the deed had not been specifically referred to the arbitrator, although the construction of the deed was absolutely necessary for the determination of the disputes which had been referred to him. In my B opinion, this contention is not maintainable. Whether, however, a question of law has been specifically submitted to arbitration, falls in each case to be determined on the terms of the particular submission. If the court, before which it is sought to impeach the award, comes to the conclusion that the alleged error in law, even if it can be maintained, arises in the decision of a question of law directly submitted to the arbitrator for his decision, then the principle stated by CHANNELL, J., C in *Re King and Duveen* (8) applies, and the parties having chosen their tribunal, and not having applied successfully to the court under either s. 4 or s. 19 of the Arbitration Act, 1889, are not in a position to question the award, or to maintain a claim to set it aside. I agree, however, with the Court of Appeal that it is not necessary to decide this issue in the present appeal, and that whether the question of the construction of the deed has, or has not, been specifically submitted to D arbitration, the statements set out by the arbitrator on the face of his award do not disclose any error in law such as would justify a court in setting aside the award.

It is not necessary to set out at length the statements made by the arbitrator in his award, on which the appellants rely, as disclosing error of law. The arbitrator says that he makes these statements, having been pressed to state his views on the E points of law raised in the proceedings. In the argument before your Lordships the award was impeached under two heads—(i) that, in construing the deed of cancellation, the arbitrator had wrongly implied terms; (ii) that he had wrongly admitted evidence of "the circumstances attending the preliminary negotiations and the conclusion of the agreement." It will be convenient to consider first the question of evidence. Counsel for the appellants asked your Lordships to draw F the inference that the arbitrator had taken into account, not the circumstances attending the preliminary negotiations and the conclusion of the agreement, but the preliminary negotiations themselves. I can find no warrant for this argument. It is not only placing a strained construction on the language used in the award, but, further, as pointed out in the Court of Appeal, the point is not raised in the affidavit which states the grounds on which it is sought to impeach the award. G The evidence objected to is evidence which the arbitrator was not only entitled to, but bound to admit. A second objection taken was that the evidence admitted had been improperly applied in that such evidence, if admissible in the construction of the express covenants in the deed, was not admissible in the consideration whether any terms should be implied. In my opinion, this distinction has no sound foundation, and would lead to the result that evidence, admissible in the H construction of separate express terms in a contract, would not be admissible on the consideration of the construction of the contract taken as a whole.

The principle of law applied by the arbitrator in making implications is derived from the two well-known cases of *Hamlyn & Co.* v. *Wood & Co.* (1) and *The Moorcock* (2). The latter case was criticised by counsel for the appellants on the ground that the decision was given in the case of a parol, and not of a written, I agreement. The often quoted passage from the judgment of BOWEN, L.J., is, in terms, expressed to be applicable to all cases. When once the terms of an agreement have been ascertained, and the question is raised whether, in order to carry out the intention of both parties, some further terms should be implied, there is no ground for applying a different test in making implications, whether the agreement is in writing or by parol. After considering the evidence the arbitrator holds that to attempt to construe the deed without taking into account the evidence which he has admitted must lead to a construction which involves a failure of consideration and cannot have been within the contemplation of either party, and

would simply rob the transaction of such efficacy as both parties must have intended that, in all events, it should have. Using the evidence, as he was entitled to do, the arbitrator came to the conclusion that certain provisions should be implied as to the direction and terminus of the road, and that the railway should be constructed within the time limited for the completion of the road, and should be so constructed as to admit of the construction of the said road having the aforesaid terminus. The evidence on which the arbitrator acted is not before your Lordships. Unless, therefore, it can be shown that no evidence could render the implied terms admissible, it cannot be said that there is an error in law on the face of the award. I see no way in which such an error in law could be established, irrespective of the evidence which is not before your Lordships, unless the implied terms are such that they are inconsistent with the express terms of the deed. I agree with the Court of Appeal that this position cannot be established, and think it unnecessary to repeat the arguments of the Master of the Rolls, with which I entirely concur. Counsel for the appellants called your Lordships' attention to a considerable number of cases which raise the question whether and how far implications could be made in the construction of a written document, but each of these cases depends on its particular facts, and the construction of a contract in one case affords little or no assistance in the construction of a different contract in another case.

In my opinion, the appeal fails and should be dismissed with costs. I desire to add that, in my opinion, the preliminary objection was one which the House should not have entertained on the hearing of the appeal, and the appellants were entitled to ask for the decision of the House on their appeal.

LORD TREVETHIN.—The only question before the House upon this appeal is whether the award is bad for error in law appearing on the face of the award. If your Lordships should be of opinion that the award is bad in law upon its face, it should be set aside, for this is not, in my view, a submission to arbitration of such a nature that, although the law is bad upon the face of the award, the decision cannot be questioned. That happens only when the submission is of a specific question of law and is such that it can be fairly construed to show that the parties intended to give up their rights to resort to the King's courts and in lieu thereof to submit that question to the decision of a tribunal of their own. This deed contains a general submission under which disputes as well of fact as of law might be raised; it raises no specific question of law, and it reserves the supervision and control of the courts of law by incorporating the Arbitration Act, 1889.

The question, then, is: Is this award bad upon the face of it? It is suggested that the arbitrator has improperly applied certain evidence, which was tendered merely to show that it was a case in which the company had sustained damage, by using it for the construction of the deed of cancellation itself, although, when it was tendered, that purpose was expressly disclaimed. It is said that the passage in the award in which he refers to "the circumstances attending the preliminary negotiations and the conclusion of the agreement" shows that he did this, and so went wrong in the construction of the deed of cancellation, both as to the making of the road and the construction of the railway. I agree with the Master of the Rolls in thinking that this passage in the award and the expression as to "failure of consideration" is not attractively worded, but I see no ground for imputing to the arbitrator a violation of the well-known principle that you cannot vary or add to a deed by parol evidence. Counsel for the appellants called your Lordships' attention to a number of cases illustrating and applying this principle, but they did not show that the arbitrator had violated it. I am not aware to what evidence they refer when they say that he did. It appears to me that the award duly construes the deed of cancellation, and that the arbitrator was entitled to take into consideration all the surrounding circumstances of the contract for the purpose of ascertaining the meaning of the language contained therein.

Under that deed the company were surrendering their rights and privileges over a very large area of land containing some hundreds of thousands of acres. They

were to receive in return a sum of money and the right to select and hold in perpetuity at a rent 50,000 acres in blocks of not less than 2,000 acres each, which blocks were to "conform" as to shape and frontage upon road, river, or railway and otherwise to "the reasonable requirements of the government." This selection, therefore, required the concurrence of both parties to the deed. It was to be made within twelve calendar months after the government should have delivered to the company a plan showing the line of route of a railway intended to be made by the government through the concession or part thereof. This plan was to be delivered as soon as the general line of route had been settled, the government reserving the right to make deviations. The company were by the deed under terms limiting the time for the cultivation of the blocks (cl. 4). It would appear that, at the date of the deed, it was in contemplation that the route of the railway would run north and south, more or less, in the centre of the concession and on the west of the river which bounded the concession on the east (see deed, cl. 8). The plan provided for by cl. 4 of the deed was not in fact delivered until Oct. 31, 1918. It showed a railway route which traversed the concession from west to east, crossed the river above-mentioned, and passed northwards on the east of the river and outside the concession. During this long delay of more than six years, the selection of the blocks of land above mentioned was made by the parties. Three areas were agreed: one on the south of the concession, one on the west of the concession, and one near the centre of the concession; these were all to be traversed by the railway as finally determined, but the main batch of blocks containing 17,000 acres had been selected to the north of Kuala Tui with a frontage on the river. The railway on this part of its route is to proceed northward upon the east of the river and outside the concession. These 17,000 acres north of Kuala Tui are evidently an important part of the company's estates, for by the deed the government grants to the company certain lands then occupied at Kuala Tui, including the site of its sawmills and other lands nearby between the two rivers Galas and Lebir. The shape, too, of this block of 17,000 acres suggests that it has been the subject of careful selection. When one turns to cl. 18, under which the government undertook within four years to make a cart road within the concession from a point up-stream of Kuala Tui, that is, to the south of Kuala Tui, "to the railway referred to in cl. 4," it necessarily undertook to make this cart road to the northward of Kuala Tui, because the deed provided that "for the purposes of such road" the company were to surrender a strip of land one chain wide free from any right, title, or interest under the deed or any grant, lease or licence made thereunder. Inasmuch as the company's selected land only extended to just south of Kuala Tui, where the road was to commence, they could only surrender the strip for the road thence to the northward of Kuala Tui. When, therefore, the government engineers decided to make the railway hereabout to the east of the river bounding the concession, they must have contemplated some such loop into the concession as is suggested by the dotted line on the north of the plan No. 1, in order to comply with the provisions of cl. 18, for you cannot make a road "within the concession," with a terminus to a railway which does not exist.

I think, therefore, that the findings of the learned arbitrator are well founded upon the terms of the deed of cancellation itself. They are a necessary implication from the acts of the parties done in pursuance of the deed and the language of the express covenant contained in cl. 18.

Appeal dismissed.

Solicitors: *Burchells*; *Drake, Sons & Parton.*

[*Reported by* W. C. Sandford, Esq., *Barrister-at-Law.*]

A

SMITH *v.* SMITH

[Court of Appeal (Lord Sterndale, M.R., Warrington and Scrutton, L.JJ.), May 7, 8, July 2, 1923]

[Reported [1923] P. 191; 92 L.J.P. 132; 130 L.T. 8; 39 T.L.R. 632; 67 Sol. Jo. 749] B

Divorce—Maintenance of wife—Deduction of income tax—No specific proportion of husband's income ordered to be paid—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sched. D, Case III, r.* 1 (*a*), *All Schedules Rules, r.* 19.

By an order of the Divorce Court a divorced husband was ordered to pay to the wife £2 per week during the joint lives of the parties. In fixing the C sum payable the registrar, in view of the uncertain nature of the husband's income, did not order the payment of a certain proportion of it after the deduction of tax, and did not consider the question of tax, but prescribed what he thought was a fair sum in the circumstances.

Held (by Lord Sterndale, M.R., and Warrington, L.J., Scrutton, L.J., dissentiente): the payment to the wife, being a payment which might con- D tinue for more than a year, was an "annual payment" within the Income Tax Act, 1918, Sched. D, Case III, r. 1 (a), and All Schedules Rules, r. 19; it did not lose that character because it was inalienable and was imposed and liable to revision by the court; and, therefore, in paying it the husband was entitled to deduct income tax.

Notes. Applied: *Clack* v. *Clack*, [1935] All E.R.Rep. 228; *I.R.Comrs.* v. *Whitworth Park Coal Co.*, *I.R.Comrs.* v. *Ramshaw Coal Co.*, *I.R. Comrs.* v. *Brancepeth Coal Co.*, [1958] 2 All E.R. 91. Referred to: *Shearn* v. *Shearn*, [1930] All E.R.Rep. 310; *I.R.Comrs.* v. *Barnato*, [1936] 2 All E.R. 1176; *Taylor* v. *Taylor*, [1937] 3 All E.R. 571; *Watkins* v. *I.R.Comrs.*, [1939] 3 All E.R. 165; *Wallis* v. *Wallis*, [1941] 2 All E.R. 291; *Cunard's Trustees* v. *I.R.Comrs.*, *McPheeters* v. *I.R.Comrs.*, [1946] 1 All E.R. 159. E F

As to permanent maintenance and income tax thereon, see 12 Halsbury's Laws (3rd Edn.) 430–440, 446–451; and for cases see 27 Digest (Repl.) 611 et seq. and 28 Digest (Repl.) 177–180. For Income Tax Act, 1952, see 31 Halsbury's Statutes (2nd Edn.)

Cases referred to: G

(1) *Burroughes* v. *Abbott*, [1922] 1 Ch. 86; 91 L.J.Ch. 157; 126 L.T. 354; 38 T.L.R. 167; 66 Sol. Jo. 141; 28 Digest (Repl.) 178, *718*.

(2) *Re Cooper*, *Cooper* v. *Cooper* (1917), 88 L.J.Ch. 105; 119 L.T. 303; 62 Sol. Jo. 230; 28 Digest (Repl.) 169, *680*.

(3) *Re Janes' Settlement*, *Wasmuth* v. *Janes*, [1918] 2 Ch. 54; 87 L.J.Ch. 454; 119 L.T. 114; 62 Sol. Jo. 520; 28 Digest (Repl.) 169, *681*. H

(4) *Watkins* v. *Watkins*, [1896] P. 222; 65 L.J.P. 75; 74 L.T. 636; 44 W.R. 677; 12 T.L.R. 456, C.A.; 27 Digest (Repl.) 630, *5906*.

(5) *Re Robinson* (1884), 27 Ch.D. 160; 53 L.J.Ch. 986; 51 L.T. 737; 33 W.R. 17, C.A.; 27 Digest (Repl.) 106, *784*.

(6) *Dayrell-Steyning* v. *Dayrell-Steyning*, [1922] P. 280; 91 L.J.P. 210; 127 L.T. 846; 38 T.L.R. 898; 28 Digest (Repl.) 177, *713*.

(7) *Re Shaw*, *Smith* v. *Shaw*, [1918] P. 47; 87 L.J.P. 49; 118 L.T. 334, C.A.; I 28 Digest (Repl.) 197, *821*.

(8) *Blount* v. *Blount*, [1916] 1 K.B. 230; 85 L.J.K.B. 230; 114 L.T. 176; 28 Digest (Repl.) 178, *716*.

(9) *Frankfort de Montmorency* v. *Frankfort de Montmorency* (1845), 4 Notes of Cases, 280; 28 Digest (Repl.) 177, *712*.

(10) *Re Barry's Trusts*, *Barry* v. *Smart*, [1906] 2 Ch. 358; 75 L.J.Ch. 676; 95 L.T. 165; 54 W.R. 621; 50 Sol. Jo. 615, C.A.; 28 Digest (Repl.) 179, *727*.

(11) *Campbell* v. *Campbell*, [1922] P. 187; 91 L.J.P. 126; 127 L.T. 29; 38 T.L.R. 320; 27 Digest (Repl.) 636, *5988*.

(12) *Earl Howe* v. *I.R.Comrs.*, [1919] 2 K.B. 336; 88 L.J.K.B. 821; 121 L.T. 161; 35 T.L.R. 461; 63 Sol. Jo. 516; 7 Tax Cas. 289, C.A.; 28 Digest (Repl.) 351, *1549*.

(13) *Herbert* v. *McQuade*, [1902] 2 K.B. 631; 71 L.J.K.B. 884; 87 L.T. 349; 66 J.P. 692; 18 T.L.R. 728; 4 Tax Cas. 489, C.A.; 28 Digest (Repl.) 325, *973*.

Also referred to in argument:

Pemberton v. *Pemberton* (1842), 2 Notes of Cases, 17; 28 Digest (Repl.) 177, *710*.

Appeal by the wife from an order made by HILL, J., on a summons taken out by the wife for leave to proceed to execution on an order for secured maintenance previously made in her favour.

The facts are stated in the judgments.

Acton-Pile for the wife.

Bayford, *K.C.*, and *Cotes-Preedy* for the husband.

By the Income Tax Act, 1918, Sched. D, Case III, r. 1:

"The tax shall extend to—(a) any interest of money, whether yearly or otherwise, or any annuity, or other annual payment, whether such payment is payable within or out of the United Kingdom either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract, or whether the same is received and payable half-yearly or at any shorter or more distant periods. . . ." [See now Income Tax Act, 1952, s. 123 (1), Case III.]

By the All Schedules Rules:

"Rule 19. (1) Where any yearly interest of money, annuity, or any other annual payment (whether payable within or out of the United Kingdom, either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract, or whether payable half-yearly or at any shorter or more distant periods), is payable wholly out of profits or gains brought into charge to tax, no assessment shall be made upon the person entitled to such interest, annuity, or annual payment, but the whole of those profits or gains shall be assessed and charged with tax on the person liable to the interest, annuity, or annual payment, without distinguishing the same, and the person liable to make such payment, whether out of the profits or gains charged with tax or out of any annual payment liable to deduction, or from which a deduction has been made, shall be entitled, on making such payment, to deduct and retain thereout a sum representing the amount of the tax thereon at the rate or rates of tax in force during the period through which the said payment was accruing due. The person to whom such payment is made shall allow such deduction upon receipt of the residue of the same, and the person making such deduction shall be acquitted and discharged of so much money as is represented by the deduction as if the sum had been actually paid." [See now Income Tax Act, 1952, s. 169, s. 170.]

Cur. adv. vult.

July 2. The following judgments were read.

LORD STERNDALE, M.R.—The question on this appeal arises out of an order for permanent maintenance made by the Probate, Divorce, and Admiralty Division after a divorce. The order is as follows (I read it as far as necessary): that

"The respondent [husband] do secure to the petitioner [wife] as from Oct. 25, 1920, for her life £3 per week and further do pay to the petitioner £2 per week during the joint lives of the petitioner and respondent."

The husband has secured the £3 a week to the satisfaction of the court. I need not read the deed by which the security is given. It is enough to say that he is entitled to the income of the securities so long as he continues to pay the £3 a week to the wife. He is, however, under a personal liability to pay the £3 a week by agreement, or by order of the court, or otherwise, and if he fails to pay that sum the wife can resort to and enforce the security and that is her only right. The £2 a week is payable under the order of the court. In paying the two sums of £3 and £2 the husband claims to deduct and has deducted income tax. The wife objected to these deductions and applied to the Probate, Divorce, and Admiralty Division for leave to issue execution on the order. This was refused by the registrar and his decision was affirmed by HILL, J.

As to the £3 the order seems to me to be obviously right apart from any question of the Revenue Acts. There was no order on the husband to pay any sum and no order upon which execution could issue and the husband has done all that he was required to do in respect of that payment by securing it as ordered. If the wife has not been duly paid her remedy is to enforce the security.

The question as to the £2 is different and more difficult and does require a consideration of the Revenue Acts, the question being, as it seems to me, whether the payment is taxable income of the appellant under Case III, r. 1 (a) of Sched. D. of the Income Tax Act, 1918, and whether the husband, as the person paying that sum, is entitled to deduct the tax under r. 19 of the General Rules relating to all schedules. The question is important, although the amount at stake in this appeal is small, but its importance is lessened by the fact that it is competent to the court in ordering payments in respect of permanent maintenance to make them payable free of income tax when that is the intention: see *Burroughes* v. *Abbott* (1).

The first question is whether the payment is an annual payment within Case III, r. 1 (a), of Sched. D. I can see no reason why it is not. It is no doubt payable weekly, but that fact does not prevent it from being an annual payment if the weekly payments may extend beyond a year: see *Re Cooper*, *Cooper* v. *Cooper* (2) and *Re Janes' Settlement*, *Wasmuth* v. *Janes* (3), decisions with which I agree. It was, however, argued that, although it might be an annual payment, it was not taxable as profit against the wife under Sched. D. No doubt, the words "profits and gains" are not the most suitable words to describe such a payment, but it is clear that annuities and annual payments are for some purposes profits and gains within the meaning of the schedule, though probably in ordinary language those words would not be used to describe them. Unless, therefore, there is something in the nature of this particular payment which leads to an opposite conclusion, it seems to me clearly within the schedule. It is a personal allowance made by the husband to his wife under the order of the court: see *Watkins* v. *Watkins* (4); it is inalienable: see same case and *Re Robinson* (5); and it is liable to alteration or termination by order of the court. It is true that voluntary allowances are not in practice taxable, though I do not know of any case which lays down the principle on which they are exempted; it may be because, as suggested by WARRINGTON, L.J., in his judgment to be delivered directly, such allowances are considered as a series of gifts and not annual payments at all. At any rate, this is not a voluntary allowance, and, therefore, does not come within the principle, whatever it is. The fact that it is inalienable does not seem to me to be important; many inalienable payments are taxable, for example, inalienable pensions, and I do not see that the fact that it can be increased, reduced, or terminated by the court makes it less a taxable annual payment so long as it continues. Lastly, the words in Case III, r. 1 (a), from "whether such payment" down to "contract" do not seem to me to exclude from taxable annual payments all payments that cannot be brought within those particular words. I think, therefore, that this is a taxable annual payment within Case III, and the only question is whether the respondent is entitled to deduct the tax under r. 19.

It seems to be established that if the maintenance be ordered as a part of the husband's income after all tax has been deducted he cannot then himself deduct

tax from the payment, and the learned president in *Dayrell-Steyning* v. *Dayrell-Steyning* (6) seems to decide that such is the proper way of fixing the payment. We thought it right, therefore, to ask the learned registrar who made the order on what basis he had fixed the payment, and he told us that in consequence of the uncertain nature of the husband's income he did not order payment of a proportion of it and did not consider the question of income tax, but fixed what he thought was a fair sum in the circumstances. There is, therefore, in my opinion, nothing to prevent the husband from deducting the tax in accordance with what I understand to be the general practice in the Probate, Divorce, and Admiralty Division, and the appeal must be dismissed.

WARRINGTON, L.J.—By an order of the Probate, Divorce, and Admiralty Division dated Nov. 8, 1920, and made on the wife's application for permanent maintenance it was ordered that the divorced husband do secure to the wife as from Oct. 25, 1920, for her life £3 per week and further do pay to her £2 per week during the joint lives of the parties. The £3 per week was duly secured according to terms agreed upon. As to this it is to be observed that the husband has thus completely performed the obligation imposed upon him by the order. He is not either by force of the order or by the terms of the agreement for security under any personal liability to pay this weekly sum. The wife, in default of payment by him, can resort to the security, but that is her only remedy. The husband, in paying both weekly sums, claims to be entitled to deduct income tax. The wife, desiring to dispute his claim, sought to raise the question by a summons for leave to proceed to execution in respect of the sums so deducted. Hill, J., has dismissed the summons, being of opinion that the deductions were rightly made. The wife appeals. With regard to the £3 a week the order of the learned judge by which he dismissed the application was clearly right. In the first place the summons was altogether misconceived inasmuch as the order of Nov. 8, 1920, had been fully complied with so far as the £3 per week was concerned and there was nothing for which execution could issue. Besides this technical reason, on the merits the order was right because, the payments depending only on the terms of the order for security, they are subject to the provisions of the Income Tax Act, 1918, and under r. 19 of the All Schedules Rules the husband paying the weekly sum is entitled to deduct the tax, and under r. 23 the wife is bound under penalty to allow the deduction, and any agreement to the contrary is void: see *Re Shaw, Smith* v. *Shaw* (7); and *Blount* v. *Blount* (8).

As to the £2 per week in respect of which the obligation to pay depends upon the order and is a personal obligation and binding on the husband the question is not so easy. In the first place it is said that the order must be construed as being an order to pay the £2 free of income tax, it being the practice of the court to arrive at the proportion payable for maintenance of the husband's income after deducting income tax, and such income tax ought not to be deducted twice over as it would be if it were deducted from the sum allowed for maintenance: see *Dayrell-Steyning* v. *Dayrell-Steyning* (6); and *Frankfort de Montmorency* v. *Frankfort de Montmorency* (9). The answer to that contention seems to me to be afforded by the answer given by the registrar to the inquiries we made, by which it appears that for reasons which to him appeared satisfactory the £2 per week was not fixed as a certain proportion of the husband's income after deducting tax, and the foundation for the argument therefore disappears. But then it is said that a payment of this description is not subject to income tax at all. This argument is founded on the nature of permanent maintenance as described by authority. In *Re Robinson* (5), dealing with permanent alimony awarded after a decree for judicial separation, Cotton, L.J., says (27 Ch.D. at p. 164):

> "The very nature of alimony is inconsistent with its being capable of assignment. We are familiar with instances of allowances which are not alienable in the case of men, such as the half-pay of the officers in the army and navy, which are given them in order that they may maintain themselves

in a sufficient position in life to enable them to be called out for future service if required. Although alimony is not the same thing, it is governed by the same principle. Alimony is an allowance which, having regard to the means of the husband and wife, the court thinks right to be paid for her maintenance from time to time, and the court may alter it or take it away whenever it pleases. It is not in the nature of property, but only money paid by the order of the court from time to time to provide for the maintenance of the wife. Therefore it was not assignable by the wife."

In the same case LINDLEY, L.J., in coming to the same conclusion, said that alimony is only an allowance made by the court and is revocable by the same court. In *Watkins* v. *Watkins* (4) this court decided that a sum ordered to be paid for the permanent maintenance of a divorced wife is also a purely personal allowance and so long as the order subsists can neither be alienated nor released. LINDLEY, L.J., in the course of his judgment thus described the payment with which he was dealing ([1896] P. at p. 226):

"The payments to be made to the divorced wife are to be for her maintenance and support. This language points to a purely personal allowance. Such allowances are by no means unknown to the law. Alimony is one instance. An officer's full or half-pay is another. It is true that in a case like this the court has no power to increase the allowance once made, and there is good reason for this; for, the marriage bond being at an end, there is no reason why the woman's allowance should increase with her late husband's means. On the other hand, if he cannot pay the allowance fixed by the court, the court can reduce it or suspend its payment, or even discharge the order for maintenance, and so release the husband altogether."

The only point actually decided in these cases was that the allowance is inalienable, but at the same time it is laid down, correctly as I understand, that the court has power to reduce it, suspend its payment, or even discharge the order altogether. The question we have to determine is a different one, viz., is a periodical payment of such a nature an "annual payment" within the meaning of Case III, r. 1 (a), of Sched. D. of the Income Tax Act, 1918? There is no authority directly in point. It has, however, I think, been assumed hitherto that an allowance for permanent maintenance would be liable to income tax unless the order in express terms, or, on its true construction on the principles referred to above, directed that it should be free from income tax: see particularly the judgment of the President in *Dayrell-Steyning* v. *Dayrell-Steyning* (6). Still the assumption may be ill founded, and, being challenged, it has to be considered. The fact that the obligation to pay is imposed by an order of the court, and does not arise by virtue of a contract, does not, in my opinion, exclude the payment from the operation of the Income Tax Act. The words in Case III, r. 1 (a), "whether such payment" and so forth, do not, in my opinion, limit the annual payments to those there mentioned, but merely provide that they at all events shall be included. Again, the fact that the payment is to be made weekly does not prevent it from being annual, provided the weekly payments may continue beyond the year. The words of the Case seem to me to make this clear and the point has been twice decided by a judge of first instance—by SARGANT, J., in *Re Cooper*, *Cooper* v. *Cooper* (2), and by ASTBURY, J., in *Re Janes' Settlement*, *Wasmuth* v. *Janes* (3). I see no reason to differ from these decisions. Then is it other than an annual payment within the Act because it is inalienable? I can see nothing in the Act to justify this view. On the contrary, I think it is quite clear that the inalienable nature of an annuity does not exempt it from tax. Under Sched. E. every annuity, pension, or stipend payable by the Crown is subject to tax, and it is well known that many of such pensions at all events are inalienable: see per LINDLEY, L.J., in *Watkins* v. *Watkins* (4) and per COTTON, L.J., in *Re Robinson* (5). Lastly, is it free of tax because it is liable to be reduced, suspended, or released by the court? With all respect to those who take the opposite view I cannot

think so. So long as the order stands, the £2 per week is payable during the joint lives of husband and wife, and it is not a voluntary payment or allowance. It is true it cannot be recovered by ordinary execution without leave of the court, but with such leave it can be so recovered. It is true that in Sched. D. the subject of taxation is described in general terms by the expression "profits and gains," an expression hardly appropriate to such a payment as that in question, but when the subject of taxation is more specifically described under the several cases it is found that it includes annual payment in the widest sense. A merely voluntary payment is, in my opinion, on a different footing. Although described as so much a year it really consists of a succession of gifts, the making of each one of which is dependent on the will of the donor. For these reasons I think the order appealed from was right, and the appeal should be dismissed.

SCRUTTON, L.J.—I regret that with part of the judgment which has been delivered I am unable to agree. This case raises the old question of deduction of income tax from sums due for alimony or maintenance in the Divorce Court.

The husband was ordered (i) to secure to the wife by way of maintenance after divorce £3 per week for her life, and (ii) to pay her £2 a week during their joint lives. He complied with the first order by executing an assignment and deed of covenant under which certain shares were assigned to two trustees to hold them absolutely for the husband so long as he paid £3 a week to the wife, and if he failed to make such payment to apply the income or capital for that purpose. There was, however, no order on the husband to pay £3 a week—only to secure it—and no personal covenant by him to pay. The husband in fact deducted income tax from both the £3 and the £2 whereupon the wife took out a summons for leave to proceed to execution for arrears of maintenance, which was dismissed by the registrar and the judge. It was apparently overlooked that there was no order on the husband to pay £3 on which execution could be issued. This would be in itself a reason for dismissing the appeal against HILL, J.'s order, though on other grounds than these on which that order proceeded. But if there were a covenant by the husband or the trustee, we should be bound by *Re Barry's Trusts*, *Barry* v. *Smart* (10) to hold that the covenantor could deduct income tax from his payments under the deed, even if that deed were expressed "free of income tax." This is the result which followed in *Blount* v. *Blount* (8), in which case, however, there was an order of the Divorce Court to pay, under which, as appears from the judgment in *Re Shaw*, *Smith* v. *Shaw* (7), the amount was collected free of income tax. In this case there is no such order to pay, and the decisions in *Re Barry's Trusts*, *Barry* v. *Smart* (10), and *Blount* v. *Blount* (8), would support the order of HILL, J., on the assumption made as to the £3.

We consulted the registrar who made the order on whether in fixing the amount he had considered the husband's income as net after he had paid income tax, or gross before paying income tax. In the former alternative SIR H. JENNER FUST'S decision in *Frankfort de Montmorency* v. *Frankfort de Montmorency* (9) would appear to show that the husband could not deduct income tax from payments of maintenance or alimony. But the registrar informed us that he had not taken income tax into consideration at all, or, indeed, taken any proportion of the husband's income in the peculiar circumstances of the case. This faces the court with the simple question: When the Divorce Court orders a husband to pay permanent alimony after a judicial separation, or maintenance after a divorce, can the husband deduct income tax from such payments? Alimony or maintenance, as stated by COTTON, L.J., in *Re Robinson* (5) (27 Ch.D. at p. 164), by LINDLEY, L.J., in *Watkins* v. *Watkins* (4) ([1896] P. at p. 226), and SIR HENRY DUKE, P., in *Campbell* v. *Campbell* (11) ([1922] P. at p. 192), is a personal allowance to be paid by the husband for the maintenance and support of the wife. It is neither the property of the wife nor a debt due from the husband. The wife cannot alienate it, nor can she issue execution for it without the leave of the court. The court never loses control of it, and can alter it or take it away at any time. Is

such a purely personal allowance, entirely depending on the control of the court, "annual profits or gains" of the wife chargeable under Sched. D., from which the husband paying can deduct income tax under either r. 19 or r. 21 of the General Rules in the Income Tax Act, 1918? The sections which rr. 19 and 21 replace were considered by this court in *Earl Howe* v. *I.R.Comrs.* (12), where it was pointed out that not all annual payments were liable to deduction, but only those which were part of the taxable income of the recipient. Now not all receipts are part of the taxable income of the recipient; for instance, voluntary allowances are always assessed and taxed in the hands of the payer, not in those of the recipient. I know of no case deciding this, but I know that this is the practice of the Inland Revenue. The only cases that I am aware of where voluntary gifts are treated as taxable income are those where the gifts are received by virtue of an office under Sched. E.: see *Herbert* v. *McQuade* (13) and the cases cited therein. In my view, the personal allowance to a wife, which is not her property or a debt due to her, or legally alienable or recoverable by her without the leave of the court, is not her profit for income tax purposes, and, therefore, not an annual payment from which the payer can deduct income tax. She is, of course, liable to pay income tax on the sum as part of her income, as the husband would be on sums spent on the maintenance of the wife living with him.

In my view, therefore, the appeal should be allowed as to the £2 a week, and for the reasons stated disallowed as to the £3 a week. The question whether any relief can be obtained on the lines pursued in *Burroughes* v. *Abbott* (1) is not before us. Under the rules of practice laid down by Sir Henry Duke in *Dayrell-Steyning* v. *Dayrell-Steyning* (6), the propriety of which is also not before us, the question will apparently not arise in future. It certainly seems odd that where a fixed sum is allowed by the court for the maintenance of the wife, a lesser sum should be paid because of government taxation, even if that sum deducted can be recovered later from the revenue authorities, for the sum named in the order will not be paid as and when ordered.

Appeal dismissed.

Solicitors: *Percy Haseldine & Co.* for *W. E. Price*, Leicester; *H. W. Clarkson* for *Herbert Simpson & Bennett*, Leicester.

[*Reported by* J. L. Denison, Esq., *Barrister-at-Law.*]

BRIGHTON AND HOVE GENERAL GAS CO. *v.* HOVE BUNGALOWS, LTD.

[Chancery Division (Romer, J.), July 12, 13, 16, 17, 18, 19, October 25, 1923]

[Reported [1924] 1 Ch. 372; 93 L.J.Ch. 197; 130 L.T. 248; 88 J.P. 61; 68 Sol. Jo. 165; 21 L.G.R. 758]

Foreshore—Accretion of dry land—Recession of sea—Addition to land of adjoining owner—Accretion brought about by erection of groynes—No intention to produce accretion.

The general law of accretion, as laid down in Blackstone's Commentaries, vol. 2, p. 262, and now settled by numerous authorities, that land gained from the sea either by alluvion or by dereliction by small and imperceptible degrees, belongs to the owner of the land adjoining, is applicable when the accretion is brought about or assisted by artificial means for the purpose of preventing erosion, e.g., by the erection of groynes. But, aliter, where the accretion is due to operations which were not only calculated, but intended, to produce an accretion, the owner of the adjoining land in such a case not being entitled to any accretion arising from those operations.

Observations of Sir William Maule in *Doe d. Seebkristo* v. *East India Co.* (1) (1856), 10 Moo.P.C.C. at p. 158, and of Lord Chelmsford in *A.-G.* v. *Chambers* (2) (1859), 4 De G. & J. at pp. 68, 69, applied.

A.-G. of Southern Nigeria v. *John Holt & Co. (Liverpool), Ltd.* (3), [1915] A.C. 599, distinguished.

Per **Curiam**: The general law of accretion, as stated above, applies where the land gradually left dry by the retreat of the sea abutted on land the boundary of which was well known and ascertainable, e.g., a sea wall.

Observations of Lord Chelmsford in *A.-G.* v. *Chambers* (2) (1859), 4 De G. & J. at pp. 69, 70, 71, not applied.

Gifford v. *Lord Yarborough* (4) (1828), 5 Bing. 163, and *A.-G.* v. *McCarthy* (5), [1911] 2 I.R. 260, applied.

Notes. Referred to: *Secretary of State for India in Council* v. *Fourcar & Co.* (1934), 50 T.L.R. 241.

As to accretion to the foreshore, see 3 Halsbury's Laws (3rd Edn.) 363, 364, and ibid. (2nd Edn.), vol. 33, pp. 522–525. For cases see 44 Digest 67–70.

Cases referred to:

(1) *Doe d. Seebkristo* v. *East India Co.* (1856), 10 Moo.P.C.C. 140; 6 Moo. Ind. App. 267; 14 E.R. 445, P.C.; 44 Digest 69, *499*.

(2) *A.-G.* v. *Chambers*, *A.-G.* v. *Rees* (1859), 4 De G. & J. 55; 45 E.R. 22; sub nom. *A.-G.* v. *Chambers*, *A.-G.* v. *Lewis*, *A.-G.* v. *Rees*, 33 L.T.O.S. 189; 23 J.P. 308; 5 Jur.N.S. 745; 7 W.R. 404, L.C.; 44 Digest 68, *495*.

(3) *A.-G. of Southern Nigeria* v. *John Holt & Co. (Liverpool), Ltd.*, [1915] A.C. 599; 84 L.J.P.C. 98; 112 L.T. 955, P.C.; 44 Digest 68, *491*.

(4) *R.* v. *Lord Yarborough* (1824), 3 B. & C. 91; 4 Dow. & Ry.K.B. 790; 2 L.J.O.S.K.B. 196; 107 E.R. 668; affirmed sub nom. *Gifford* v. *Lord Yarborough* (1828), 5 Bing. 163; 130 E.R. 1023; sub nom. *R.* v. *Lord Yarborough*, 2 Bli.N.S. 147; 1 Dow. & Cl. 178, H.L.; 44 Digest 67, *477* and *485*.

(5) *A.-G.* v. *M'Carthy*, [1911] 2 I.R. 260; 44 Digest 67, *476 i.*

(6) *Smart* v. *Dundee Magistrates* (1797), 8 Bro. Parl. Cas. 119; 3 E.R. 481, H.L.; 44 Digest 67, *484*.

(7) *Re Hull and Selby Rail. Co.* (1839), 5 M. & W. 327; 8 L.J.Ex. 260; 44 Digest 68, *492*.

(8) *Godfrey* v. *Littel* (1831), 2 Russ. & M. 630; 39 E.R. 534, L.C.; 7 Digest 273, *67*.

Also referred to in argument: A

A.-G. v. *Tomline* (1880), 14 Ch.D. 58; 49 L.J.Ch. 377; 42 L.T. 880; 44 J.P. 617; 28 W.R. 870, C.A.; 44 Digest 79, *606*.

Witness Action in which the plaintiffs claimed damages for trespass and for the removal of shingle from land which they alleged was theirs, and an injunction.

By an indenture dated Dec. 20, 1905, there was conveyed to the plaintiffs, the B Brighton and Hove General Gas Co., a piece of land in the parish of Aldrington in the county of Sussex which was described as being bounded on the north by part of the canal or eastern arm of New Shoreham Harbour and on the south by land belonging to the Crown to high-water mark. The land conveyed formed part of a bank of shingle and boulders running east and west which separated the eastern arm of New Shoreham Harbour on the north from the sea on the south. The C management, control, and protection of New Shoreham Harbour was entrusted to a statutory body known as the Shoreham Harbour Trustees, and the land in question, and the foreshore to the south of it, were admittedly within the limits of the harbour as defined by the New Shoreham Harbour Act, 1876. On the lands within these limits the trustees were empowered to make and effect such works as should be necessary for improving and preserving the navigation of the harbour D and the use thereof by the persons trading thereto. Erosion by the sea of that part of the coast was due to a natural phenomenon known as the easterly drift. Owing to the prevalence of south-westerly and westerly winds in the English Channel and to the fact that under normal conditions the flood tide swept up channel with greater force than that exerted down channel by the ebb tide, there was a more or less constant procession of shingle and sand along the south coast of E England from west to east. In some places the shingle got arrested by natural causes; at other places the easterly drift had a seriously eroding effect. In times gone by shingle was accumulated at Shoreham in such quantities as to cause the sea gradually to recede from Old Shoreham and to produce that bank of shingle that lies between the eastern arm of Shoreham Harbour and the sea, of which bank the plaintiffs' land formed part. It was established by the evidence that, unless F prevented by artificial means, the easterly drift would inevitably have an eroding effect upon this bank of shingle. Before the year 1870 the sea was gradually and imperceptibly encroaching at this particular part of the coast. To such an extent did this take place that at a date which was not accurately fixed, but was not later than 1870, the Shoreham Harbour Trustees caused two groynes (referred to at the trial groyne no. 1 and groyne no. 2) to be erected upon the land subsequently G conveyed to the plaintiffs and on the foreshore adjoining it. The erection of the two groynes in question would, no doubt, have had the effect of diminishing the erosion, but whether the erosion was only diminished or whether for the time being it was held completely in check, or whether the effect of the groynes was to bring about a temporary gradual accretion to the beach, the learned judge said that he was unable on the evidence to determine. The only reliable evidence as to the H position of high-water mark—i.e., the high-water mark on an ordinary tide—in former days, he said, was afforded by the ordnance maps of 1898 and 1912, the latter indicating the state of affairs in the year 1910. A comparison of these two maps showed that by 1910 the high-water mark had advanced slightly seaward as compared with the year 1898. By the year 1913 groyne no. 2 had fallen into a very bad state of repair, and had that state of things been allowed to continue, serious I erosion of the beach would have ensued, causing damage to the plaintiffs' land, and eventually endangering the harbour of New Shoreham. In those circumstances the plaintiffs, with the consent and under the authority and on behalf of the Shoreham Harbour Trustees, undertook the re-building of groyne no. 2, and in 1913 the re-building was effected. In the course of such re-building the height of the groyne was raised to the extent of 18 in. The re-building and raising of groyne no. 2 had the desired effect of preventing further erosion, and from the year 1913 onwards there had been a gradual accretion of shingle and boulders washed up by the sea,

with the result that not only was erosion stopped, but there was a gradual and imperceptible advance seawards of the high-water mark. In the latter part of the year 1920 the defendants, claiming to have an interest in the foreshore adjoining the plaintiffs' land, put forward the contention that the southern boundary of the plaintiffs' land was the line of high-water mark as it existed in 1913 before the renovation of groyne no. 2, and they proceeded to erect certain lines of light railway on the land from which the sea had receded, i.e., between the 1910 high-water mark and that existing in 1920. The erection of the light railways was objected to by the plaintiffs, who claimed that their southern boundary was the high-water mark from time to time, and on Feb. 7, 1921, the writ in this action was issued. In the meantime the defendants had removed the two top planks of a portion of groyne no. 2 below high-water mark, reducing the groyne to its original height. The defendants' reason for doing this was that they considered the raising by the plaintiffs of groyne no. 2 to be a trespass so far as that groyne was on the foreshore. They were not at that time aware of the fact that the plaintiffs, in renovating and raising the groyne, were acting under the authority and on behalf of the Shoreham Harbour trustees, who had statutory power to carry out that work, and it was not until towards the end of the trial that counsel for the defendants abandoned the contention that the raising of the groyne was illegal. But at the time of the issue of the writ and in the defence, although the plaintiffs had restored the removed planks to groyne no. 2, the defendants were maintaining the right to interfere as they pleased with the part of groyne no. 2 that was erected on the foreshore. Indeed, after action brought, they further interfered with a portion of groyne no. 1 on the grounds that it constituted a trespass upon the foreshore.

C. E. E. Jenkins, K.C., and *Stuart Moore* for the plaintiffs.

J. W. Manning, K.C., *Russell Gilbert*, and *Eric Neve* for the defendants.

Cur. adv. vult.

Oct. 25. **ROMER, J.,** read the following judgment.—The plaintiffs contend that inasmuch as the southern boundary of the land conveyed to them by the indenture of Dec. 20, 1905, was the high-water mark, their southern boundary at the present time must, in accordance with the general law as to gradual and imperceptible accretion of land adjoining the foreshore of the sea, be the high-water mark at the present time. This general law has been stated by BLACKSTONE in these words (vol. 2, p. 262):

> "As to lands gained from the sea either by alluvion, by the washing up of sand and earth, so as in time to make terra firma, or by dereliction, as when the sea sinks back below the usual water-mark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For de minimis non curat lex; and, besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is, therefore, a reciprocal consideration for such possible charge or loss; but if the alluvion or dereliction be sudden and considerable, in this case it belongs to the King."

The reason given by BLACKSTONE for this rule of law is not generally accepted as being the true one, but the rule itself is settled beyond all question by numerous authorities of which it is sufficient to mention *R.* v. *Lord Yarborough* (4) and *A.-G.* v. *Chambers* (2), where LORD CHELMSFORD refers to it as the well-known rule of law as to the right of land gained from the sea. The defendants, however, deny that this general rule has any application to the present case, and base their denial upon two grounds. They say, in the first place, that the accretion to the land, although gradual and imperceptible, has not been brought about by natural causes only, but has been artificially brought about by the action of the plaintiffs in erecting groynes. They also contended at one time that the accretion has been brought about by the action of the plaintiffs in depositing refuse upon their land. This latter contention, however, was unsupported by the evidence given at the

trial, and after the admissions made by Dr. Owens, one of the defendants' witnesses, it was in effect abandoned by the defendants' counsel. The defendants say in the second place that the position of the high-water mark, as it existed in the year 1910, can be ascertained from the ordnance survey of 1912, and that no accretion since that date, however gradual and imperceptible from day to day, and even though brought about by natural causes, can have the effect of advancing the plaintiffs' southern boundary beyond the line indicated on that ordnance survey. In other words, they contend that the general law of accretion does not apply where the alteration of the high-water mark has been brought about by artificial means, or where it has taken place at any time, however distant, after its position has once been clearly ascertained. I will deal with these contentions in the order in which I have stated them.

The first reported authority in which a distinction was sought to be drawn between the gradual and imperceptible accretions brought about by natural causes and those brought about by artificial means, is *Doe d. Seebkristo* v. *East India Co.* (1). There was, it is true, an earlier case relied upon by counsel for the defendants as an authority in his favour. That was *Smart* v. *Dundee Magistrates* (6). The facts of this case are very obscure, and it is not easy to ascertain what exactly was decided. It is, however, apparent that the point upon which it was cited as an authority was never in issue. The appellant concluded his printed case by the following statement (8 Bro.P.C. at p. 137).

> "The appellant purchased a piece of ground in the town of Dundee bounded by the sea flood, the value of which situation considerably enhanced its price. He then proceeded to embank a part of the seashore when he was interrupted by the magistrates, who, in the face of repeated protests, embanked the remainder of the beach and seized upon that portion of it which had been taken in by the appellant. The point at issue between the parties is shortly this, whether or not a proprietor of land bounded by the sea flood is entitled to any accession to his property from that quarter that may arise either from the operation of nature or the works of human industry."

It would seem from that that the accretion was not a gradual and imperceptible one, but one brought about suddenly by the erection of an embankment made by the appellant on the foreshore and subsequently added to by the respondents. It is not surprising that the appeal failed. In point of fact the respondents did not contend that there was any distinction between accretion by natural means and accretion by artificial means. In their reasons (ibid. at p. 141) they stated that they had no occasion to dispute the general doctrine that where a person's property reaches to the sea or to a river he has a right to the soil that may be acquired from the sea or river by their receding naturally or by his own industry in embanking. To this, however, they added the qualification: "Where no other person can show a title to that soil." So qualified, the general rule, whether in relation to natural or to artificial accretion, becomes a mere platitude. Without the qualification, the rule, as stated by the appellant and admitted by the respondents, is inconsistent with the submission of counsel for the defendants. I can get no assistance from that case.

I must now examine *Doe d. Seebkristo* v. *East India Co.* (1). In that case the plaintiffs were entitled to certain land bounded on the west of the river Hooghly, a navigable tidal river. On part of this land, where it adjoined the river, the defendants had constructed a road and an embankment, but this road and embankment, as was subsequently found by the court, extended beyond the western boundary of the plaintiffs' land and was, therefore, in part constructed upon the foreshore. Subsequently, by gradual accretion, a strip of land at the foot of the embankment became dry land, and the question to be decided was whether this strip was the property of the plaintiffs or of the defendants. The plaintiffs claimed the strip on the footing that before the accretion took place they were the owners of the land on which the road and embankment had been placed up to the line of

high-water mark, and in reliance upon the general rule of law to which I have referred. The defendants resisted this claim on the ground that before the accretion took place the ownership in the soil adjoining the high-water mark was in them and that, therefore, any accretion to that soil was their property. But they contended also that the accretion was not due to natural causes but was due in whole or in part to human agency. As the court decided in the defendants' favour on the first ground the alternative ground did not really arise for decision, but, in delivering the judgment of the Privy Council, SIR WILLIAM MAULE expressed himself as follows (10 Moo.P.C.C. at p. 158):

> "The land claimed has become land by gradual accretion. A question of law was raised, whether, supposing the accretion (granting it to be gradual) was one which had been contributed to, or even purposely contributed to, by the act of the defendants, that would not take the matter out of the ordinary law with respect to the accretion. The court below thought, and we think rightly, that that made no difference. If there were a gradual accretion, which was not denied, it was one which would be dependent upon ordinary law."

In *A.-G.* v. *Chambers* (2) the question had again to be considered. In that case an embankment and other works had been erected upon land adjoining the foreshore of the harbour of Llanelly. The effect of these works was to cause a silting up of parts of the harbour which lay adjacent to them on either side, with the result that portions of the foreshore which were formerly covered by the sea at ordinary high tide had become dry land. The Crown, as owners of the foreshore, claimed to be entitled to this alluvial land so formed by or gained from the sea on the ground that it had been formed by artificial means and

> "had not been added to the adjoining mainland by the gradual and imperceptible projection of soil or silt arising from the operation of natural causes."

The defendants contended that the right of the Crown did not

> "extend to or embrace any alluvium the same being of gradual formation, whether the same shall have been produced by natural or unknown causes, or by cuttings or embankments lawfully made, or other lawful artificial means."

LORD CHELMSFORD was not satisfied with the evidence before him, and, therefore, without coming to any final conclusion upon the questions involved in the action, he directed certain issues to be tried. He did, however, express his opinion upon some of the questions raised in the argument, including the question of law that I have now to determine. As to this he observed that there was very little authority to guide him upon the question which, so far as he could discover, was then raised for the first time. *Doe d. Seebkristo* v. *East India Co.* (1) had not, however, been cited in argument. After referring to some of the authorities upon the general rule as to accretion, he added (4 De G. & J. at p. 67):

> "There is nothing, however, in any of the cases or in the few text writers upon the subject, which hints at the distinction now sought by the Crown to be established between effects produced by natural and by artificial causes. In order to determine whether there is any ground for this distinction it is essential to discover, if possible, the principle upon which the right to maritima crementa depends."

He then cited the passage from BLACKSTONE, to which I have already referred, and proceeded as follows (ibid. at pp. 68, 69):

> "I am not quite satisfied that the principle de minimis non curat lex is the correct explanation of the rule on this subject; because, although the additions may be small and insignificant in their progress, yet, after a lapse of time, by little and little, a very large increase may have taken place which it would not be beneath the law to notice, and of which the party who has the right to it can clearly show that it formerly belonged to him, he ought not to be deprived.

I am rather disposed to adopt the reason assigned for the rule by Baron Alderson, in *Re Hull and Selby Rail. Co.* (7), viz., 'That which cannot be perceived in its progress is taken to be as if it never had existed at all.' And as Lord Abinger said in the same case, 'The principle [as to gradual accretion] is founded on the necessity which exists for some such rule of law for the permanent protection and adjustment of property.' It must always be borne in mind that the owner of lands does not derive benefit alone, but may suffer loss from the operation of this rule; for if the sea gradually steals upon the land, he loses so much of his property, which is thus silently transferred by the law to the proprietor of the seashore. If this be the true ground of the rule, it seems difficult to understand why similar effects, produced by a party's lawful use of his own land, should be subject to a different law, and still more so if these effects are the result of operations upon neighbouring lands of another proprietor. Whatever may be the nature and character of these operations, they ought not to affect a rule which applies to a result and not to the manner of its production. Of course an exception must always be made of cases where the operations upon the party's own land are not only calculated, but can be shown to have been intended, to produce this gradual acquisition of the seashore, however difficult such proof of intention may be. If, then, it had been clearly proved or admitted in this case, that the additions to the seashore in the parishes of Llanelly and Pembrey were of gradual and imperceptible progress, so as to compel me to express an opinion upon the distinction taken by the Crown between accretions produced by nature and by artificial causes, I should have been prepared to repudiate the distinction, and to refuse any further inquiry to ascertain the original medium line of high water, as I consider this proceeding as closely analogous to a bill to ascertain boundaries in which it is necessary for the plaintiff to establish, by the admission of the defendant or by evidence, a clear legal title to some land in the possession of the defendant; *Godfrey* v. *Littel* (8). But in this case, although the allegation in the information, 'that the alluvial land has not been added to the adjoining mainland by the gradual and imperceptible projection of soil and silt upon the seashore arising from the operation of natural causes' is ambiguous and may either amount to a denial of the gradual and imperceptible nature of the accretions or of the cause by which they were produced, yet the witnesses for the Crown say that the alluvial land has not been added to the mainland gradually and imperceptibly, but rapidly.''

In consequence of this uncertainty as to the facts one of the issues that he directed to be tried was for the purpose of ascertaining whether the variation in the line of high water had been slow, gradual, and imperceptible or otherwise. I am told that the case was never brought before the court again, so that the question was never finally decided. But the opinion of Lord Chelmsford is expressed in no uncertain terms, and that opinion is adverse to the contention of the defendants in the present case. It was, however, contended by counsel for the defendants that the decision of the Privy Council in *A.-G. of Southern Nigeria* v. *John Holt & Co. (Liverpool), Ltd.* (3), is opposed to this opinion of Lord Chelmsford and to the opinion of Sir William Maule. Both *A.-G.* v. *Chambers* (2) and *Doe d. Seebkristo* v. *East India Co.* (1) were cited in argument of that case, but Lord Shaw, in delivering the judgment of their Lordships, did not even refer to, much less did he comment upon, either of these opinions so far, at any rate, as they dealt with the particular point now in question. It is in these circumstances highly improbable, to say the least of it, that the Privy Council intended to differ from the opinions of those eminent judges, and, therefore, it becomes necessary to examine the facts and the judgment in that case somewhat closely. The respondents to the appeal or their predecessors in title having obtained grants of land in the island of Lagos, bounded on one side by the foreshore, had carried out certain works upon their land and also upon the foreshore, including the erection

A of a retaining wall. They had also from time to time driven stakes into the foreshore to protect their land from erosion. Subsequent to the execution of these works a strip of shore which had previously been below high-water mark had become dry land. The respondents claimed to be the owners of this strip of shore on the ground that it had become dry land by "natural accretion." The Crown, on the other hand, alleged that the change was due to "artificial reclamation."

B LORD SHAW in delivering the judgment of the board, said ([1915] A.C. at p. 613):

> "Although various points were brought before their Lordships in the direction of questioning the law of accretion, their Lordships, for the reasons stated, do not doubt its general applicability to lands like those of the respondents' abutting on the foreshore. Nor do they, however, doubt the one condition of the operation of the rule. That is that the accretion should be natural, and should be slow and gradual—so slow and gradual as to be in a practical sense imperceptible in its course and progress as it occurs."

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After referring to several of the authorities which deal with the general law of accretion, he added this (ibid. at p. 615):

> "It was strongly contended before the Board that the facts of this case showed it to be substantially one of natural accretion. The argument was this. In accordance with the policy generally approved, stakes were set out between high and low water mark, and the silting up took place within those stakes and between them and the actual shore, and, secondly, any artificial erections were merely for the purpose of levelling the ground so as to make it suitable for the landing of cargoes, and avoiding the erosive action of the sea. The view thus presented certainly does receive no inconsiderable justification from language employed in the judgments of the court below. More than one reference is made to 'the question of the reclaimed or silted-up land,' and no distinction appears to be clearly drawn between the one and the other. Artificial reclamation and natural silting-up are, however, extremely different in their legal results; the latter, if gradual and imperceptible in the sense already described, becomes an addition to the property of the adjoining land; the former has not this result, and the property of the original foreshore thus suddenly altered by reclamatory work upon it remains as before, i.e., in cases like the present with the Crown. The history of the foreshore adjoining these lands and of the operations thereon, produces one of the main difficulties of the present case. Their Lordships have come to the conclusion that they are confronted with substantially concurrent judgments of the courts below upon this question of fact. Upon the appeals, GRIFFITHS, C.J., after referring to the finding of the trial judge, said:

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> 'I have no reasonable doubt that the great bulk of the land between the Crown grant land and the lagoon is the result of artificial reclamation on the part of the defendants and their predecessors.'

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OSBORNE, C.J., who had been the trial judge, puts his judgment upon this point thus:

> 'The evidence seems clearly to show that actual reclamation contributed more than alluvion to the extension of the lands in the occupation of the defendants and their predecessors in title, and as to actual gain, by alluvion, uninfluenced by the defendants' and their predecessors' reclaiming operations, there is no direct evidence.'

I

The finding is thus not very specific, although WINKFIELD, J., goes the length of saying 'It is not established that any part of the land neutral tint on the plan (i.e., the land in question) was the result of natural accretion or alluvion.' In this state of the judgment their Lordships are not in a position to hold themselves free to decline to accept the finding. Nor do they say that they would have come to a different conclusion. The case accordingly must be

dealt with as substantially one of an addition to adjoining lands being caused artificially by the execution of reclamatory work."

Now, as I read this judgment, the Privy Council would have been prepared to apply the general law of accretion in favour of the respondents had they been able to arrive at the conclusion that the silting up was due to stakes and other erections provided by the respondents and their predecessors in title for the mere purpose of preventing erosion by the sea. It was because they were confronted by a concurrent finding of fact in the courts below that the addition to the respondents' lands had been caused by the execution of "reclamatory works" that they decided in favour of the Crown upon this point. It appears to me after a careful study of the judgment that the real distinction that was being drawn by the Privy Council was one between an accretion brought about by works erected for the purposes of reclaiming land from the sea and a gradual accretion not brought about by works of that nature. I cannot think that the expressions "artificial reclamation," "reclamatory work" or "reclaiming operations" were intended to apply to a gradual and imperceptible accretion brought about unintentionally by groynes erected for the purpose of protecting the land from erosion. I think that they were intended merely to cover those cases of which LORD CHELMSFORD had said an exception must always be made—where the operations upon the party's own land are not only calculated, but can be shown to have been intended, to produce a gradual acquisition of the seashore. In my opinion, a gradual and imperceptible accretion brought about by the operations of nature is a natural accretion within the meaning of the rule as enunciated by LORD SHAW, even though it has been assisted by or would never have taken place but for the erection of groynes provided for the purpose of preventing erosion. To hold otherwise would be to deprive both the owners of the land and the owners of the foreshore on the coasts of Sussex and Kent, where groyning is almost universal of that general convenience and security which LORD SHAW says lie at the root of the entire doctrine of accretion and in which is to be found the very reason of the rule. In my opinion, the first reason put forward by the defendants for rejecting the plaintiffs' claim is unsound.

Their second reason is really based upon an observation made by LORD CHELMSFORD in *A.-G.* v. *Chambers* (2). After referring to the fact that the witnesses for the Crown in that case had alleged that the alluvial land had not been added to the mainland gradually and imperceptibly, but rapidly, he says (4 De G. & J. at pp. 69, 70 and 71):

"Now, if by the word 'rapidly' the witnesses mean 'perceptibly,' then the Crown, and not the defendant, would be entitled to these accretions. But if the witnesses merely mean, that at the expiration of some period of time they could perceive the changes which had taken place, although they could not discern them in their progress, then, I think, another important question may arise, and may call for determination, as to whether circumstances may not exist in which, though the changes were gradual, yet the original limits of the Crown's right, and of that of the owner of the adjoining land, are now capable of being distinctly ascertained. If there is no clear line of demarcation between the mainland and the seashore by the gradual encroachment or recession of the tide, all trace of the distinction between them will be completely obliterated, and there will be full scope for the rule of alluvion to operate. But suppose that the separation between the mainland and the seashore is distinct; as suppose the landowner puts up a wall to prevent the encroachment of the sea upon him, and the effect of the wall is to produce a gradual and insensible accretion, which cannot be perceived from day to day but at the end of some long period is distinctly to be seen, ought this to become the property of the landowner? LORD TENTERDEN, in *R.* v. *Lord Yarborough* (4), seems to think that it ought, for he says,

'An accretion extremely minute, so minute as to be imperceptible even by known antecedent marks or limits at the end of four or five years, may

A become, by gradual increase, perceptible by such marks or limits at the end of a century, or even of forty or fifty years. For it is to be remembered, that if the limit on one side be land or something growing or placed thereon, as a tree, a house or a bank, the limit on the other side will be the sea, which rises to a height varying almost at every tide, and of which the variations do not depend merely upon the ordinary course of nature at fixed B and ascertained periods, but in part also upon the strength and direction of the winds, which are different almost from day to day. And (he adds), considering the word "imperceptible" in this issue as connected with the words "slow and gradual," we think it must be understood as expressive only of the manner of the accretion, as the other words undoubtedly are, and as meaning imperceptible in its progress, not imperceptible after a long C lapse of time.'

This, however, is not in accordance with the great authority upon this subject, LORD HALE in HARGRAVE'S LAW TRACTS, p. 28. He says:

'This jus alluvionis is de jure communi, by the law of England, the King's, viz.: if by any marks or measures it can be known what is so gained, for if D the gain be so insensible and undiscernible by any limits or marks that it cannot be known, idem est non esse et non apparere.'

LORD HALE here clearly limits the law of gradual accretions to the cases where the boundaries of the seashore and adjoining land are so indistinguishable that it is impossible to discover the slow and gradual changes which are from time to time accruing, and when at the end of a long period it is evident that there E has been a considerable gain from the shore, yet the exact amount of it, from the want of some mark of the original boundary line, cannot be determined. But where the limits are clear and defined, and the exact space between these limits and the new high-water line can be clearly shown, although from day to day or even from week to week the progress of the accretion is not discernible, why should a rule be applied which is grounded upon a reason which has no F existence in the particular case."

But the attention of LORD CHELMSFORD had not been called to the fact that *R.* v. *Lord Yarborough* (4) had been taken to the House of Lords under the name of *Gifford* v. *Lord Yarborough* (4) and had there been affirmed. In that case the land gradually left dry by the action of the sea abutted upon land of which the former boundary was well known and readily ascertainable, for that boundary was a sea G wall. It was, nevertheless, held that the general law of accretion applied. The observations of LORD TENTERDEN, therefore, were not merely dicta, but went to the root of his decision, and, that decision having been affirmed in the House of Lords, I am, I apprehend, bound by the statement of law enunciated by him and am not at liberty to give effect to the views expressed by LORD CHELMSFORD in the passage that I have read, even if those views commended themselves to my mind.

H The whole question, however, was most carefully considered by the King's Bench Division in Ireland in *A.-G.* v. *M'Carthy* (5). In that case the court treated the question as having been concluded by the decision of the House of Lords in *Gifford* v. *Yarborough* (4), but PALLES, C.B., further gave his reasons for considering that, apart altogether from that decision, the dictum of LORD CHELMSFORD was inconsistent with principle and with authority. With those reasons I respectfully I agree. I come, therefore, to the conclusion that the southern boundary of the plaintiffs' land is the present high-water mark, and I will so declare. The plaintiffs being willing to accept the £50 paid into court in satisfaction of the damages occasioned by the acts of the defendants which, in the view that I have taken, were trespasses upon the plaintiffs' land, that £50 will be paid out to the plaintiffs, and I will give them liberty to apply for an injunction should that course subsequently become necessary.

It only remains for me to deal with the plaintiffs' claim in respect of the removal by the defendants of shingle and other materials from below the high-water mark.

As to this it will suffice for me to say, after considering all the evidence, that the plaintiffs have, in my judgment, failed to prove that this removal of this material has in any way endangered, or, if permitted to continue to substantially the same extent as at present, is likely to endanger the plaintiffs' land. The plaintiffs' action, therefore, must fail so far as it seeks relief under this head. But, as already pointed out, the defendants down to nearly the end of the trial were maintaining their claim to be entitled to interfere with, and, if they so thought fit, entirely remove, groynes nos. 1 and 2 so far as such groynes extended below high-water mark. If these groynes were removed or substantially interfered with to this extent, the whole of the plaintiffs' land would be seriously endangered, and any removal by the defendants of shingle or other material below high-water mark would appreciate and accelerate this danger. Down to the time when the defendants' claim in respect of these groynes was abandoned, the plaintiffs were, accordingly, entitled to some modified form of relief in respect of the removal of material. On the other hand, a considerable body of evidence on both sides was directed to the issue whether the removal of material had damaged or would damage the plaintiffs in the conditions at present existing of the groynes being in position. On this issue the plaintiffs have failed. In the circumstances, I think that I shall be doing justice by ordering the defendants to pay two-thirds of the plaintiffs' costs of action.

Solicitors: *Clarke, Calkin & Son*, for *Howlett & Clarke*, Brighton; *Hicks, Arnold & Bender*, for *J. C. Buckwell*, Brighton.

[*Reported by* G. P. Langworthy, Esq., *Barrister-at-Law.*]

SHAPIRO *v.* LA MORTA

[Court of Appeal (Bankes, Scrutton and Atkin, L.JJ.), December 7, 10, 20, 1923]

[Reported 130 L.T. 622; 40 T.L.R. 201; 68 Sol. Jo. 552]

Defamation—Malicious falsehood—Statements not defamatory of plaintiff's reputation, but affecting property or business—Need to prove damage and malice —Measure of damages recoverable—Proof of malice.

An action for malicious falsehood affecting, not the plaintiff's reputation, but his property or business, differ from actions for statements defamatory of reputation in that (i) only damages in respect of actual damage resulting from the untruths can be recovered; (ii) the plaintiff must prove (a) damage and (b) malice, neither of which will be presumed. **Semble:** a statement made by one who knows that it is likely to injure and that it is false, or has no belief whether it is true or false and makes it recklessly, not caring whether it is true or false, is made maliciously.

Notes. As to malicious falsehood, see 24 Halsbury's Laws (3rd Edn.) 128–132; and for cases see 32 Digest 203 et seq.

Cases referred to:

(1) *R.* v. *Pembliton* (1874), L.R. 2 C.C.R. 119; 43 L.J.M.C. 91; 30 L.T. 405; 38 J.P. 454; 22 W.R. 553; 12 Cox, C.C. 607, C.C.R.; 14 Digest (Repl.) 503, *4852*.

(2) *Ratcliffe* v. *Evans*, [1892] 2 Q.B. 524; 61 L.J.Q.B. 535; 66 L.T. 794; 56 J.P. 837; 40 W.R. 578; 8 T.L.R. 597; 36 Sol. Jo. 539, C.A.; 32 Digest 170, *2086*.

A (3) *Royal Baking Powder Co.* v. *Wright, Crossley & Co.* (1900), 18 R.P.C. 95, H.L.; 32 Digest 205, *2551.*
(4) *Pitt* v. *Donovan* (1813), 1 M. & S. 639; 105 E.R. 238; 32 Digest 206, *2574.*
(5) *Pater* v. *Baker* (1847), 3 C.B. 831; 16 L.J.C.P. 124; 8 L.T.O.S. 449; 11 Jur. 370; 136 E.R. 333; 32 Digest 206, *2576.*

B Also referred to in argument:

Brook v. *Rawl* (1849), 4 Exch. 521; 19 L.J.Ex. 114; 14 L.T.O.S. 205; 154 E.R. 1320; 32 Digest 207, *2577.*
Wilkinson v. *Downton*, [1897] 2 Q.B. 57; 66 L.J.Q.B. 493; 76 L.T. 493; 45 W.R. 525; 13 T.L.R. 388; 41 Sol. Jo. 493; 35 Digest 36, *294.*
Miller v. *David* (1874), L.R. 9 C.P. 118; 43 L.J.C.P. 84; 30 L.T. 58; 32 W.R.
C 332; 32 Digest 29, *188.*
Kelly v. *Partington* (1834), 5 B. & Ad. 645; 2 Nev. & M.K.B. 460; 3 Nev. & M.K.B. 116; 3 L.J.K.B. 104; 110 E.R. 929; 32 Digest 29, *200.*

Appeal against an order of LUSH, J., made in an action tried by him and a common jury.

The plaintiff, Mrs. Sadie Shapiro, a professional pianist, claimed against the
D defendants damages for injurious falsehood, or, alternatively, for libel.

On further consideration of the action LUSH, J., in giving judgment, said that the statements complained of were neither defamatory nor disparaging. They were not in themselves calculated to injure. To succeed in such an action the plaintiff must prove, not only that the statements were untrue to the defendants' knowledge and were intentionally published, but that they were published with
E the actual intention of injuring the plaintiff. One could not infer an intention to injure as one could in the case of a libel or a slander of title because the statements were not in themselves calculated to do harm as a libel or a slander of title was. In the present case not only was there no evidence of an intention to injure, but the jury expressly negatived it. The action also failed on the ground that the damage alleged was too remote. His Lordship gave judgment for the defendants,
F and the plaintiff appealed. The facts appear in the judgments.

Gilbert Beyfus for the plaintiff.
Harold L. Murphy for the defendants.

BANKES, L.J.—The plaintiff's claim in this action was for damages for the defendants having maliciously published a false statement in reference to her
G professional engagements, which caused her damage. Had the facts in reference to the damage suffered by the plaintiff been somewhat different from what they were, it would have been necessary to consider carefully whether any evidence was given at the trial of what the law regards as malice. In the circumstances it is not, in my opinion, necessary to discuss that question. The plaintiff's complaint was that the defendants had published placards, leaflets, and programmes announc-
H ing that she would, during the week commencing Jan. 8, 1923, assist one of the performers at the London Music Hall, High Street, Shoreditch, as his accompanist, whereas the fact was that the plaintiff had refused to accept the engagement which the performer had offered her, and as a result of the announcement she had lost an engagement which she would have otherwise obtained. It was not disputed that in order to succeed the plaintiff must prove that the publication by
I the defendants was malicious, and that she had in consequence suffered damage. The evidence given at the trial showed that the performer in question had endeavoured to engage the plaintiff to accompany his performance, and that he had led the defendants' manager to believe that he had actually engaged her. The plaintiff had, in fact, refused the engagement, but the manager was not informed of this until midday on Jan. 8. In order to supply proof of malice, evidence was given which was intended to show, and did, in fact, to some extent show, that after the manager had been made aware of the fact that the plaintiff's name ought not to have appeared in the week's announcements, sufficient steps were not taken

to correct the mistake. The plaintiff did, in my opinion, give satisfactory proof that the announcement had caused her damage, but only to the extent of the loss of an engagement for Jan. 9, which would have been offered her in the week previous to that commencing Jan. 8 but for the announcement complained of. LUSH, J., left three questions to the jury in reference to the conduct of the defendants' manager in publishing the announcement complained of, to which the jury replied—(i) that in publishing the statements he did not intend to injure the plaintiff, but (ii) that he ought to have known that they were likely to do so, and (iii) that he acted mala fide in publishing them. When asked what they meant by acting mala fide the foreman, on behalf of the jury, said that the interpretation which they put upon the manager's conduct was that the bills and posters were kept up and the programmes circulated after the manager knew the facts, and that in doing so he was considering the defendants' interest and disregarding those of the plaintiff. Had it been material to consider whether this finding amounted to a finding of malice, and whether there was any evidence to justify such a finding, it would have been necessary to look closely into the facts and the authorities. In my opinion, it is not necessary to do this, for the simple reason that the only damage proved did not flow from the alleged malicious acts, but resulted from the incorrect announcements appearing in the week preceding that commencing Jan. 8, at which time the statements, which were incorrect and in that sense false, were made perfectly bona fide by the defendants' manager under the mistaken but justifiable belief that they were true. For this reason I think that the appeal fails, and must be dismissed with costs.

SCRUTTON, L.J.—This appeal raises some matters of general interest. The plaintiff was a skilled accompanist who had on five previous occasions appeared as accompanist to one La Morta, alias Bernard, a vocalist, at the Shoreditch Theatre, owned by the defendant company. On four of those occasions she had been engaged by La Morta himself, on the fifth by a direct contract with the company. La Morta was going to appear again at the defendants' theatre in the week beginning Jan. 8, 1923. For a fortnight beforehand the defendant company circulated handbills stating that La Morta was going to appear during the week in question, with the plaintiff as his accompanist. The company's manager said that this was done because La Morta told him that it was the fact. In truth, however, La Morta had offered the plaintiff a smaller salary, and she had refused to take it. The defendant company put out posters and a programme for the week in question, announcing the plaintiff as engaged. On the Monday La Morta told them that the plaintiff was not going to appear. The defendant company altered the printed programme on the Tuesday, though one at least of the old programmes was distributed on the Wednesday. They also altered the poster at the theatre, but did not alter the other posters about the locality. Thereupon the plaintiff brought an action similar to that of slander of title, alleging false statements about her in her profession or business, issued maliciously and causing damage. The damage alleged was that "she thereby lost the remuneration which she otherwise would have earned," and the "particulars of special damage alleged" were loss of an engagement with one Endelston for one night by which she lost £6. At the trial, besides proving this specific loss, she said that she generally had one, two, or three engagements a week and had none for the week in question. The judge asked three questions of the jury to which they answered: "Did Mr. Freeman when he published this statement intend to injure the plaintiff?"—(A.) "No." "Ought he to have known that it was likely to do so?"—(A.) "Yes." "Did he act mala fide towards the plaintiff in publishing it?"—(A.) "Yes." He then asked what they meant by "mala fide," to which they replied: "The interpretation which we put on it was that the bills and posters were kept up and the programmes were circulated after they knew. That is the interpretation we put upon mala fide." Thereupon the learned judge put this question: "When you say that he acted mala fide towards the plaintiff, you mean, I gather, that he was considering his

own interests and disregarding those of the plaintiff?" The foreman of the jury: "Yes, my Lord." I take this answer to mean that the jury thought that the mala fides was in not altering the posters after the defendants knew them to be untrue, which refers to Monday, Jan. 8, and that till that time they believed the announcement to be true. The answers with the addendum appear to amount to a statement that, though the defendants did not intend to injure the plaintiff, they ought, when, on Monday, Jan. 8, they heard that the statements were untrue, to have known that the plaintiff might be injured thereby, and, therefore, from that date they acted mala fide in not stopping them. The jury were then asked as to damage, being directed that the only actual damage claimed was £6, whereupon they gave £20. I think they were of opinion that the plaintiff, who had in fact no engagements, might, by reason of the statements, have lost other engagements of which she did not know. The judge then, after argument, entered judgment for the defendants. He held that the statements were not in themselves calculated to cause or capable of causing the plaintiff any damage. I do not understand this. To say of any professional person that he is fully engaged for a week, and to say it untruly, must be capable of damaging him in his profession, by causing others to abstain from engaging a man already stated to be fully engaged. The judge further, as I understand, held that it was necessary that the statements should be published with the intention of actually injuring the plaintiff, and that the first answer of the jury negatived this, while their second answer to a leading question from the judge showed that they thought that the defendants ought to have disregarded their own interests and attended to those of the plaintiff, which was an erroneous view. Again I do not understand this. Leaving the posters unaltered after the defendants knew of their falsity had nothing to do with any interests of the defendants, and this was what the jury apparently complained of. But the difficulty seems to be that the loss of the £6 engagement was due to the handbills which were circulated when the defendants did not know of their falsity, and not to the failure to correct the posters, which was after the defendants' manager knew them to be untrue. Further, there was really no satisfactory evidence that the plaintiff, who had usually "one, two, or three engagements a week," and proved the actual loss of one for the week in question, had actually lost any more through the posters uncorrected after Monday, Jan. 8.

Actions for slander of title and similar malicious falsehoods, affecting, not reputation, but property or business, differ from actions for statements defamatory of reputation in that (i) only damages in respect of actual damage resulting from the untruths can be recovered, and the plaintiff must prove it; and (ii) the plaintiff must prove "malice," instead of its being presumed. The terms "malice" and "malicious" have caused more confusion in English law than any judge can hope to dispel. Malice is sometimes said to be "where any person wilfully does an act injurious to another without lawful excuse": per BLACKBURN, J., in *R.* v. *Pembliton* (1). This is applied to cases similar to slander of title by BOWEN, L.J., in *Ratcliffe* v. *Evans* (2) as a statement of "damage wilfully and intentionally done without just cause or excuse," in which definition it is not clear what "wilfully" adds to "intentionally," or what is a "just cause or excuse." LORD DAVEY in *Royal Baking Powder Co.* v. *Wright, Crossley & Co.* (3) again defines "maliciously" simply as "without just cause or excuse." In neither of these cases was it necessary to define "malice," and neither definition explains what is a just cause or excuse. On the other hand, cases like *Pitt* v. *Donovan* (4) and *Pater* v. *Baker* (5) suggest that if the defendant is speaking in furtherance of his own business or interest and honestly believes what he says to be true, as contrasted with deliberate intention to injure the plaintiff, either with knowledge that the statement is untrue or recklessly indifferent whether it is true or false, then either there is no cause of action or the defendant has a "just cause or excuse." In the present case it appears to me that as to the period before Jan. 8, on which day the defendants knew the statement to be untrue, there is no evidence on which the jury could find malice. The defendants were entitled to advertise their forthcoming per-

formances, and they made a statement, which they honestly believed to be true, without intending to injure the plaintiff. As to the period after Monday, Jan. 8, while I think there was evidence on which the jury might find malice, the plaintiff fails to prove any damage resulting from the continued exhibition of the posters. For these reasons, which are not exactly those of the judge below, I think the plaintiff fails in her action, and the appeal should be dismissed, with costs.

ATKIN, L.J.—The plaintiff complains of continuing representations made by the defendants from Dec. 26 onwards which she says were false and malicious and caused her damage to the extent of £6. I need not re-state the facts. I think the plaintiff fails in consequence of being unable to prove that the damage suffered was caused by a representation which was malicious. I assume, after the judge's summing-up, that the judge and the jury understood the question as to the defendants' acting mala fide as covering the whole question of malice except in so far as an actual intention to injure was concerned. I also think that it is right to assume that in answering the third question the jury meant to cover the whole period of publication complained of. There is no trace of any distinction between one date and another in the summing-up, and as in the absence of any ruling by the judge as to absence of evidence the jury clearly ought to have been asked as to the whole period, it is right to assume that the proper question was put and answered. For myself I should pay no regard to the answer given by the foreman of the jury to the judge after the verdict. Members of juries are not accustomed, and often not qualified, to return complete and accurate answers stating reasons for their decisions even though there may be excellent reasons to give. One difficulty is that though juries must be unanimous in their final decision, they are no more required to agree for the same reasons than judges are; and to collect the reasons of the twelve members of the jury and express them completely and accurately may well be too great a task for a foreman. I strongly deprecate subjecting a jury to any further inquisition upon their verdict other than may be necessary to clear up an inconsistency or an ambiguity in the answers given. Assuming, however, that the jury's verdict referred to the whole period, I agree with the other members of the court that there is no evidence of malice before Jan. 8. For this purpose it is not necessary to decide the point, but I shall assume that a statement made by a man who knows that it is likely to injure and knows that it is false is made maliciously and I shall make the same assumption if he knows that it is likely to injure and has no belief whether it is true or false and makes it recklessly, not caring whether it is true or false. The onus is on the plaintiff to establish malice, and in the present case before midday on Jan. 8 the evidence is at least as consistent with the absence as with the existence of malice so defined. Indeed, in view of the previous contractual relations of the parties, I think myself that it is much more probable that the defendants' manager genuinely believed in the truth of the statement, even though he may have been careless in forming such belief. I cannot think that his conduct after Jan. 8, which, as I have said, I assume to have been malicious, would justify a jury in finding malice before the date at which he discovered the truth. If this is so, the only special damage claimed and proved was admittedly caused by a representation at a time when it was not malicious, and the action must fail. The more general damages found by the jury in excess of £6 are not covered by the pleadings and not supported by evidence. They may equally be referable to the non-malicious period. I agree that the appeal should be dismissed, with costs.

Appeal dismissed.

Solicitors : *S. A. Bailey*; *Stephenson, Harwood & Tatham.*

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

A

REYNOLDS v. SHIPPING FEDERATION, LTD.

[Chancery Division (Sargant, J.), July 26, 1923]

[Reported [1924] 1 Ch. 28; 93 L.J.Ch. 70; 130 L.T. 341;
B 39 T.L.R. 710; 68 Sol. Jo. 61]

Conspiracy—Unlawful combination—Agreement between trade union and employers that only union members should be employed—No combination against individual—No malicious desire to damage individual or class.

The plaintiff was a seaman. The defendants were an association of shipping
C employers and representatives of a seaman's trade union who had agreed that the members of the federation should employ in their ships only members of the union. The plaintiff was eligible for membership of the union, but he refused to become a member when given an opportunity to join it. On the sole ground that he was not a member he was refused employment in a ship belonging to a member of the federation. In an action by the plaintiff for a
D declaration that he was entitled to employment in the case of a vacancy in any ship without being a member of the union and that the agreement between the federation and the union relative to the employment of seamen was void as being against public policy he alleged that the conduct of the defendants constituted a wrongful conspiracy to prevent him obtaining employment in any ship under the control of the federation.

E **Held:** the agreement or combination by the defendants was not against a particular individual, but merely operated to exclude such individuals as might not from time to time satisfy a qualification which was within the reach of any who desired employment; the motive of this exclusion of a class was not a malicious desire to inflict loss on any individual or class of individuals, but a desire to advance the business interests of employers and employed alike by
F securing or maintaining those advantages of collective bargaining and control which had been experienced; and, therefore, the defendants' agreement was not unlawful, and the action must fail.

Quinn v. *Leatham* (1), [1901] A.C. 495, and *Temperton* v. *Russell* (2), [1893] 1 Q.B. 715, distinguished.

Mogul Steamship Co. v. *McGregor, Gow & Co.* (3), [1892] A.C. 25, applied.

G **Notes.** Referred to: *Sorrell* v. *Smith*, [1925] All E.R.Rep. 1; *Crofter Hand Woven Harris Tweed Co.* v. *Veitch*, [1942] 1 All E.R. 142.

As to a trade combination to injure another person, see 32 Halsbury's Laws (2nd Edn.) 522–524; and for cases see 43 Digest 112 et seq.

Cases referred to:

H (1) *Quinn* v. *Leatham*, [1901] A.C. 495; 70 L.J.P.C. 76; 85 L.T. 289; 65 J.P. 708; 50 W.R. 139; 17 T.L.R. 749, H.L.; 43 Digest 112, *1179*.

(2) *Temperton* v. *Russell*, [1893] 1 Q.B. 715; 62 L.J.Q.B. 412; 69 L.T. 78; 57 J.P. 676; 41 W.R. 565; 9 T.L.R. 393; 37 Sol. Jo. 423; 4 R. 376, C.A.; 43 Digest 114, *1185*.

(3) *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, [1892] A.C. 25; 61 L.J.Q.B.
I 295; 66 L.T. 1; 56 J.P. 101; 40 W.R. 337; 8 T.L.R. 182; 7 Asp.M.L.C. 120, H.L.; 43 Digest 10, *51*.

Also referred to in argument:

Allen v. *Flood*, [1898] A.C. 1; 67 L.J.Q.B. 119; 77 L.T. 717; 62 J.P. 595; 46 W.R. 258; 14 T.L.R. 125; 42 Sol. Jo. 149, H.L.; 43 Digest 111, *1164*.

Witness Action for declarations and an injunction.

The plaintiff was at all material times a member of the Amalgamated Marine Workers' Union (hereafter referred to as the Amalgamated Union), which was a

union for seafaring men registered under the Trade Union Acts, 1871 to 1917. The plaintiff's occupation was that of a greaser in a ship's engine-room. He had previously been a member of the National Sailors and Firemen's Union (hereafter referred to as the National Union), but had ceased to contribute to it and joined the Amalgamated Union. The defendants were the Shipping Federation, Ltd. (which was an association of practically all the shipowners in the country except those belonging to the Port of Liverpool), the National Union and their president, Havelock Wilson, and one Clark, who was a representative of the National Union acting as a port consultant in the Port of London. On Feb. 20, 1923, the plaintiff applied to one Jamieson, the second engineer of the steamship *Demosthenes*, then lying in the Port of London, for employment as a greaser on the then impending voyage of the vessel to Australia. Jamieson, who had had previous experience of the plaintiff and knew him as a reliable man, told him to come to the vessel next day for the purpose of passing the doctor and signing on. The plaintiff attended and went with other men into the third-class saloon, where there were present Jamieson, the defendant Clark, Captain Bissett, a representative of the Shipping Federation, and another representative of the National Union. When the plaintiff's name was called he came forward and Jamieson was prepared to accept him subject to an examination by the ship's doctor, but Clark raised the objection that the plaintiff had not a "P.C. 5 card" which was issued under an arrangement for joint supply of crews made between the Shipping Federation and the National Union. During the war of 1914–18 a body called the National Maritime Board was constituted, and after the war reconstituted with the object (inter alia) of establishing "a single source of supply of sailors and firemen jointly controlled by employers and employed." On the board the shipowners were represented by the Shipping Federation, the sailors and firemen by the National Union, and the men of the catering department by the National Union of Ships' Stewards, Cooks, Butchers and Bakers (hereinafter called the Stewards' Union). The masters, officers, and engineers were also represented on the board. In 1921 the Stewards' Union withdrew from the board, and at the beginning of 1922 amalgamated with a small sailors' and firemen's union at Southampton as the Amalgamated Union. This union did not belong to the National Maritime Board and refused to accept its decisions, and in these circumstances the Shipping Federation and National Union entered into an arrangement for the issue of "P.C. 5 cards" to members of the latter union, and the shipowners belonging to the Shipping Federation instructed their officers not to employ sailors or firemen who did not possess this card. In reply to Clark's objection the plaintiff admitted that he had not a "P.C. 5 card" and said that he was a member of the Amalgamated Union and not of the National Union, and, though offered an opportunity of rejoining the National Union on paying his arrears, and of thereby obtaining the necessary card, he refused to do so. Jamieson, therefore, took no further steps to engage him. The plaintiff brought this action alleging that the acts and conduct of the defendants constituted a wrongful conspiracy to prevent him from obtaining employment in any ship under the control of the Shipping Federation. He further alleged by his statement of claim that the defendants unlawfully watched and beset him at the place where he happened to be—namely, the steamship *Demosthenes*—in order to prevent him from obtaining employment there in breach of the Conspiracy and Protection of Property Act, 1875, and thereby prevented him from obtaining employment. The plaintiff, therefore, claimed (inter alia) (i) a declaration that he was entitled to employment as a merchant seaman in the case of a vacancy in any ship, or with any shipmaster or owner, without being a member of the National Union and/or being in possession of a "P.C. 5 card"; and (ii) a declaration that the agreement between the Shipping Federation and the National Union relative to the employment of merchant seamen and the issue of the "P.C. 5 card" in relation thereto was void as being against public policy.

He further claimed an injunction to prevent the defendants from interfering with his obtaining employment as a merchant seaman and damages.

Alexander Grant, K.C., and *D. White* for the plaintiff.
Greene, K.C., and *H. C. Bischoff* for the Shipping Federation.

Cur. adv. vult.

July 26. **SARGANT, J.,** read the following judgment.—The main object of this action is to obtain a declaration that an agreement or arrangement that has been made between the defendants, or some of them, for the supply of merchant seamen to vessels controlled by the Shipping Federation infringes the rights of the plaintiff, and is contrary to public policy and void. The arrangement is one under which, in effect, the crews of vessels controlled by the Shipping Federation are to be supplied exclusively by the defendants, the National Union, and under which it is, in effect, a condition of employment in any such vessels that the employee shall be a member of that union. The plaintiff is a member of the Amalgamated Union, which is apparently a union of much more recent origin and much smaller membership than the National Union, and is in competition with it. The defendants, the Shipping Federation, are an association of shipowners who include all, or practically all, the owners of ships in this country except Liverpool shipowners belonging to a somewhat similar Liverpool Association. The defendant Havelock Wilson is the president of the National Union, and the defendant James Clark is a delegate or officer of the National Union employed at the Port of London in the capacity of a port consultant for the purpose of seeing to the carrying out of the arrangement.

To understand the meaning and object of the arrangement that is now being attacked, it is essential to be acquainted with the history of the matter during the last six or seven years. The evidence as to this of Mr. Brett, the secretary of the Shipping Federation, was very clear, and has not been questioned. It appears that in or about the year 1917 the Ministry of Shipping set up an organisation known as the National Maritime Board for the purpose of enabling shipowners to obtain crews without difficulty, of removing causes of friction, and of enabling any questions between employers and employed to be dealt with promptly and effectively. On this board the shipowners were represented by the Shipping Federation, the masters by three societies, the marine engineers by two societies, the navigating officers by three societies, the sailors and firemen by the National Union, and the catering department by a union of their own—namely, the National Union of Ships' Stewards, Cooks, Butchers, and Bakers (hereinafter called the Stewards' Union), of which a Mr. Cotter was the president. There was an independent chairman of the board, namely, the Parliamentary Secretary of the Ministry of Shipping. The board as so constituted succeeded in settling questions in dispute, and also in effecting agreements or arrangements for regulating the conditions of employment and wages and standardising rates of pay at the different ports. Until that time there had been no collective bargaining of the kind, but merely the formation of individual contracts as the result of separate bargains. Some time after the termination of the war—in 1919—the Ministry of Shipping announced that they would have to sever their connection with the National Maritime Board. But, in view of the advantages that had resulted from the activities of the board, both the Ministry of Reconstruction and the Ministry of Labour urged the shipowners to keep the board going, and in fact on or about Jan. 1, 1920, the National Maritime Board was reconstituted. It is important to notice that one of the objects of the board, as stated in its Constitution, is as follows:

> "(c) The establishment of a single source of supply of sailors and firemen jointly controlled by employers and employed in accordance with the following general principles:—(i) The shipowner shall have the right to select his own crew at any time through a jointly controlled supply office, already established or to be established on a basis to be mutually agreed. Special arrangements to be made by the National Maritime Board to meet special cases such as coasting trade and shipping of substitutes. (ii) Equal rights of registration and employment must be secured for all seamen. Raw recruits to be registered as such. (iii) The seamen shall have the right to select their ship."

The representatives on the board on the employers' side were to be elected by the Shipping Federation and the Employers' Association of the Port of Liverpool; the representatives of the various employees were to be elected by their unions as specified in the constitution, the sailors' and firemen's panel being elected by the defendants, the National Union, and the catering department panel being elected by the Stewards' Union. Co-operation in the securing of crews for ships at the various ports, in the prevention of delays, and in the adjustment of local differences was secured by the appointment of port consultants representing the employers and the employees respectively. There was power to amend or add to the constitution as the board might from time to time determine.

The board appears to have worked smoothly and successfully, generally speaking, down to the present time, but in the year 1921 events occurred which caused a slight change in its constitution. In that year there was a demand on the part of the shipowners for a reduction of wages; and after a long negotiation terms were agreed to in the month of May by all the associations and unions represented on the National Maritime Board with the exception of the Stewards' Union. The members of that union struck, but in the result were unsuccessful; and about the month of August, 1921, shortly after the termination of the strike, the Stewards' Union withdrew from the National Maritime Board, and ceased to have any connection with it. At the beginning of the year 1922 a new union, the Amalgamated Union, was formed by the amalgamation of the Stewards' Union with a small sailors' and firemen's union at Southampton called the British Seafarers' Union. The Amalgamated Union, as its name implies, consists of sailors and firemen as well as stewards and cooks, and after its formation it proceeded to open offices at the various ports with a view to embracing all classes of seafarers except officers, and to enlarging its membership as much as possible. The Amalgamated Union and its president, Mr. Cotter, have, to say the least of it, come into keen competition and rivalry with the National Union and its president, Mr. Havelock Wilson. But it has never become a member of the National Maritime Board, and has never recognised that board or accepted its decisions officially or as a body, though its individual members may often in fact have had no alternative but to do so. Indeed, it appears from the outset to have been opposed to the policy of co-operation and joint supply represented by the National Maritime Board, and to have aimed at upsetting the board. At any rate, that was the view held, and I think reasonably held, by Mr. Brett and the representatives of the shipowners. In these circumstances the Shipping Federation recognised or apprehended that, if any considerable proportion of the men employed on their ships were members of the Amalgamated Union, and outside the National Union, they would not be bound by any decision of the National Maritime Board as being unrepresented on it, and there would be a virtual end of the system of collective bargaining, and strikes would almost certainly result. Accordingly, the federation made an arrangement with the National Union that the existing arrangements for the joint supply of men should be varied so that the supply should take place through the National Union, and that for this purpose every man before he was engaged should produce a card which should be stamped by the National Union and afterwards stamped by the Shipping Federation. It was not actually stated that every man engaged shall belong to the National Union, but it was assumed that only men would be sent who would be bound through their representatives on the National Maritime Board. The card in question was called a "P.C." or a "P.C. 5" card, the letters "P.C." being derived from the initials of the port consultants provided for in the constitution of the National Board. The whole arrangement is very clearly set out in a printed circular dated April 12, 1922, and issued by the Shipping Federation, and it is made plain by another circular dated May 16, 1922, of the federation that any engagement of a man by an officer should be provisional only, and subject to the man's "P.C. card" being stamped both by the National Union and by the federation.

I must next state the particular facts in relation to the plaintiff which constitute

his individual claim to relief. His ordinary employment is in the engine-room as a greaser. He had at one time been a member of the National Union, but had ceased to contribute to it some time back, and had at the beginning of this year become, as he still is, a member of the Amalgamated Union. On Feb. 20 last he applied to one Stanley Jamieson, the second engineer of the steamship *Demosthenes*, then lying in the Port of London, for employment as a greaser on the then impending voyage of the vessel to Australia. Jamieson, who had had previous experience of the plaintiff and knew him as a reliable man, told him to come to the vessel next day for the purpose of passing the doctor and signing on. The plaintiff attended accordingly, and went with other men into the third-class saloon, where there were present Jamieson, the defendant Thomas Clark, a representative of the National Union, a Captain Bissett, as representative of the Shipping Federation (these two being, as I understand the facts, the two port consultants under the National Maritime Board scheme), and another representative or delegate of the National Union. When the plaintiff's name was called by Jamieson he came forward, and Jamieson was prepared, so far as he was concerned, to accept him, subject to an examination by the ship's doctor, but before anything definite was done an objection was raised by Clark that the plaintiff had not a "P.C. card." The plaintiff admitted that he had not such a card, and said that he was a member of the Amalgamated Union, and not of the National Union, and, though offered an opportunity of joining the National Union, or rejoining on paying up his arrears, and thereby obtaining a "P.C. card," refused to do so. Jamieson thereupon declined to take any further steps to engage him, and the plaintiff failed to obtain the employment he was seeking. There can be no doubt that Jamieson's refusal was due solely to the plaintiff not having a "P.C. card," and that had the plaintiff produced such a card, either originally or after he had been required to do so, he would have been passed to the doctor for examination, and, subject to that examination proving satisfactory, would have been engaged. It is clear, therefore, that the plaintiff has suffered some damage by the requirement that he should produce a "P.C. card," and the question is whether he has also suffered a legal injury, that is, in short, whether the arrangement between the Shipping Federation and the National Union is such an invasion of the plaintiff's primâ facie right to seek and obtain the employment constituting his livelihood as to amount to a legal wrong.

Counsel for the plaintiff relied on *Temperton* v. *Russell* (2) and *Quinn* v. *Leatham* (1), and, while admitting that neither of these cases completely covered the ground, argued that they established principles sufficient to entitle the plaintiff to succeed here. But, in my judgment, the present case differs in at least two vital respects from either of those cases. In the first place, the agreement or combination here was not against a particular individual, but merely operated to exclude such individuals as might not from time to time satisfy a qualification which was within the reach of anyone who desired employment. The exclusion, that is, was against a class, and that a class to which anyone at any time might cease to belong. In the second place, the motive of the exclusion was not a malicious desire to inflict loss on any individual or class of individuals, but a desire to advance the business interests of employers and employed alike by securing or maintaining those advantages of collective bargaining and control which had been experienced since the institution of the National Maritime Board. In both these respects the present case markedly resembles the *Mogul Steamship Case* (3), and, in my opinion, the principles laid down in the judgments there are entirely applicable here, and are fatal to the plaintiff's claim. Indeed, a decision in favour of the plaintiff would lead to a strange anomaly. For many years past no one has questioned the right of a trade union to insist, if they are strong enough to do so, under penalty of a strike, that an employer or a group of employers shall employ none but members of the trade union. The result of any such effective combination of workmen has, of course, been to impose on the other workmen in the trade the necessity of joining the union as a condition of obtaining employment. Here, the employers, instead of being forced against their wills into employing union men only, have recognised

that advantages may arise from adopting such a course voluntarily, and have, accordingly, made an agreement with the trade union to that effect. The incidental result to the other workmen in the trade is the same as if the employers had yielded against their wills instead of agreeing voluntarily. But I fail to see that workmen who are unwilling to join the union have any greater reason to complain of a violation of their legal rights in the second case than in the first. Counsel for the Shipping Federation, indeed, invited me to go much further, and to say that any body of employers, even the whole body of employers in a trade, had an absolute and unqualified legal right to agree together not to employ an individual or a class of individuals, and that completely irrespective of motive. I am certainly not prepared to go so far, and apprehend that such an agreement, if made maliciously or capriciously, might well amount to a boycott within the reasoning of LORD LINDLEY in *Quinn* v. *Leatham* (1). But the facts here render it quite unnecessary for me to adopt any such extreme position as suggested. In the result, therefore, the plaintiff fails as regards his principal claim in this action. A subsidiary complaint by him that the defendants have watched and beset him contrary to s. 7 of the Conspiracy and Protection of Property Act, 1875, is entirely unfounded, and ought never to have been made. Indeed, at the hearing no attempt was made to support it. The action must be dismissed with costs, but words will be inserted in the judgment to prevent the dismissal prejudicing the rights, if any, of the plaintiff in respect of the alleged breach by the Federation of the contract suggested to have been constituted by the terms of the registration certificate or any renewal thereof.

Solicitors: *White & Co.*; *Botterell & Roche*; *Frank Daphne*, for *Alexander Smith*, West India Dock Road.

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law.*]

SUTTON *v.* BEGLEY AND ANOTHER

[COURT OF APPEAL (Bankes, Scrutton, and Atkin, L.JJ.), May 2, 1923]

[Reported [1923] 2 K.B. 694; 92 L.J.K.B. 1086; 129 L.T. 773; 68 Sol. Jo. 82; 21 L.G.R. 679]

Rent Restriction—Apportionment—Rooms let in comprising dwelling-house—No structural conversion into separate flat—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12 (1), (3).

Where rooms in a comprising dwelling-house were let in 1921 without their being any structural alteration converting them into a separate flat,

Held: the rooms were not "first let" within s. 12 (1) of the Increase of Rent &c. (Restrictions) Act, 1920, when they were first separately let, and to determine their standard rent or rateable value it was necessary, under s. 12 (3) of the Act, to apportion the rent or rateable value of the property in which they were comprised, and the county court had jurisdiction to do so.

Notes. Section 12 (1) of the Act of 1920 [see 13 HALSBURY'S STATUTES (2nd Edn.) 981] was repealed as to England and Wales by s. 26 (3) of and Part 1 of Sched. 8 to the Rent Act, 1957 [see ibid., vol. 37, p. 550], by which also the references to standard rent in s. 12 (3) were removed.

Considered: *Joy* v. *Eppner*, [1925] 1 K.B. 362; *Upsons, Ltd.* v. *Herne*, [1946] 2 All E.R. 309. Referred: *Phillips* v. *Potter* (1925), 94 L.J.K.B. 819; *Barrett* v. *Hardy Bros. (Alnwick), Ltd.*, [1925] All E.R.Rep. 139; *Lloyd* v. *Cook*, *Goudge* v. *Broughton*, *Simson* v. *Miatt*, *Bartram* v. *Brown*, *Barker* v. *Hutson*, [1928]

All E.R.Rep. 201; *Cole* v. *Harris*, [1945] 2 All E.R. 146; *Capital and Provincial Property Trust, Ltd.* v. *Rice*, *Rice* v. *Capital and Provincial Property Trust, Ltd.*, [1950] 2 All E.R. 174; *Capital and Provincial Property Trust, Ltd.* v. *Rice*, [1951] 2 All E.R. 600; *Paisner* v. *Goodrich*, [1955] 2 All E.R. 330.

As to the ascertainment of rateable value, see 23 HALSBURY'S LAWS (3rd Edn.) 723–726; and for cases see 31 DIGEST (Repl.) 685–688.

Cases referred to:

(1) *Sinclair* v. *Powell*, [1922] 1 K.B. 393; 91 L.J.K.B. 220; 126 L.T. 210; 38 T.L.R. 239; 66 Sol. Jo. 235; 20 L.G.R. 73, C.A.; 31 Digest (Repl.) 673, *7691.*

(2) *Woodward* v. *Samuels* (1920), 89 L.J.K.B. 689; 122 L.T. 681; 84 J.P. 105, D.C.; 31 Digest (Repl.) 673, *7690.*

(3) *Marchbank* v. *Campbell*, [1923] 1 K.B. 245; 92 L.J.K.B. 137; 128 L.T. 283; 39 T.L.R. 120; 67 Sol. Jo. 184; 21 L.G.R. 90, D.C.; 31 Digest (Repl.) 686, *7782.*

(4) *R.* v. *Marylebone County Court Judge*, [1923] 1 K.B. 365; 92 L.J.K.B. 367; sub nom. *R.* v. *Scully, Ex parte Boon*, 128 L.T. 364; 39 T.L.R. 169; 67 Sol. Jo. 299; 21 L.G.R. 139, D.C.; 31 Digest (Repl.) 685, *7771.*

Appeal from an order of the Divisional Court (AVORY and GREER, JJ.) affirming the decision of the county court judge upon an application by a tenant for the apportionment of his rent under s. 12 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

By a lease executed in March, 1921, premises in Leamington known as York House were let to the defendants, Julia Ann Begley and Ettie Clarke Stephen, for a term of five years at a yearly rental of £100. The lessees covenanted to pay rates and taxes, and do the internal repairs. The house comprised nineteen rooms, two lavatories, a bathroom, and a large basement with a garden in front and rear. On Aug. 3, 1914, the gross rateable value of the premises was £60 and the net rateable value £48. When the lessees took the house over, it was in a very dilapidated condition and considerable expense had to be incurred to make it habitable. By an agreement dated June 11, 1921, and made between the defendants and Charles George Sutton, the plaintiff, the plaintiff became tenant for three years of four rooms on the ground floor, together with the use jointly and in common with the landlords and other tenants of other parts of York House, of the entrance hall leading to the premises, etc., at a yearly rent of £80. On June 16, 1922, the plaintiff made an application under s. 12 (3) of the Act of 1920 to the Warwick County Court for the apportionment of the rent on Aug. 3, 1914, of York House, comprising the four rooms and appurtenances aforesaid, with a view to determining the standard rent of the same, for the purposes of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The county court judge held, following *Sinclair* v. *Powell* (1), that the plaintiff (the then applicant) was entitled to have the rent of his rooms and appurtenances reduced to a proportion of the standard rent of the whole house and he fixed it at £60 per annum from May 24, 1921. The Divisional Court having affirmed his decision, the defendants appealed.

The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provides:

Section 12 (1). "For the purposes of this Act, except where the context otherwise requires: (a) The expression 'standard rent' means the rent at which the dwelling-house was let on Aug. 3, 1914, or, where the dwelling-house was not let on that date, the rent at which it was last let before that date, or, in the case of a dwelling-house which was first let after the said Aug. 3, the rent at which it was first let. . . . (3) Where, for the purpose of determining the standard rent or rateable value of any dwelling-house to which this Act applies, it is necessary to apportion the rent at the date in relation to which the standard rent is to be fixed, or the rateable value of the property in which that dwelling-house is comprised, the county court may . . .

make such apportionment as seems just . . . (8) Any rooms in a dwelling-house subject to a separate letting wholly or partly as a dwelling shall, for the purposes of this Act, be treated as a part of a dwelling-house let as a separate dwelling."

P. E. Sandlands and *A. A. Dickey* for the defendants.

T. N. Winning for the plaintiff.

BANKES, L.J.—This is an appeal from a decision of the Divisional Court in which a gallant but unsuccessful attempt has been made to persuade this court that it took an entirely wrong view of s. 12 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, when it gave the decision in *Sinclair* v. *Powell* (1). There are no merits in this application, which is one which renders the construction that counsel for the defendants contends for very desirable in this particular case, if the Act allowed it and the construction could be limited to this case. But, in my opinion, the contention, if acceded to, would not only very largely defeat the object of the Rent Restriction Acts, but would in many cases deprive intending tenants of the protection which the Acts were expressly passed to give them.

In March, 1921, the defendants, two spinster ladies, took a large house in Leamington known as York House. It contained nineteen rooms, two lavatories, a bathroom, a large basement, and a garden front and back. At the time they took it the house was in a bad state of repair, and the learned county court judge said that they had expended a certain amount of money in putting the premises into a proper state of repair. Having done that, they were desirous of letting off portions of the premises, and they let off one portion of the premises to the present plaintiff, who is a solicitor and himself drew the agreement for a lease for three years which he now seeks to repudiate, under which he agreed to take

"All those your rooms on the ground floor of the messuage known as York House, Leamington Spa aforesaid, with the fixtures and fittings now being in the said premises, together with the use jointly and in common with the landlords and other tenants of other parts of York House, of the entrance hall leading to the said premises, and together also with the use of the water-closet on the ground floor of York House and together also with the right to use the basement, kitchen and scullery in common with all persons to whom the landlords may have granted or may hereafter grant the like right, and together also with the right in common as aforesaid to use the bathroom on the second floor of York House at all reasonable times, and together also with the use of the garden in front of the said premises, to hold the same for the term of three years."

Having agreed to pay a yearly rental of £80 he now seeks to repudiate that bargain and to obtain from the county court judge an order for the apportionment of what he says is the standard rent of the whole house, the effect of which would be to allow him to occupy the parts of the house which are included in his agreement at a very much less rent than the one which he contracted to pay to the ladies.

The whole of the argument of counsel for the defendants depends upon the contention that the effect of s. 12 (8) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, is to put the part of these premises which are included in the agreement of letting in exactly the same position as if they were a self-contained flat or tenement into which these premises had been converted. As I have already said, the effect of that would be entirely to destroy, as I think, the main objects of the statute in many cases, and, in my view, it is not necessary to give that construction to this subsection, nor, indeed, possible to do so. The subsection was first introduced in the Act of 1919, and it was introduced, as I understand it, at any rate for the first time as sub-s. (4) to s. 5 of the Act of 1919, the side-note to which is: "Minor amendments of the principal Act" [the Act of 1915]. I think I have already had occasion to call attention to that side-note and

to point out that the amendments or at any rate some of them, were in no sense minor amendments. That section, among other things, requires the landlord under a penalty to furnish the tenant with a statement of the standard rent which he is under an obligation to pay. The subsection in question provided that

> "Any rooms in a dwelling-house the subject of a separate letting as a dwelling shall, for the purposes of the principal Act and this Act, be treated as a part of a house let as a separate dwelling."

Subsection (1) of s. 5 is introduced into the Act of 1920 as s. 11; and sub-s. (4) of s. 5 of the Act of 1919 now appears as sub-s. (8) of s. 12. The application to the county court judge was made under sub-s. (3) of s. 12, which provides:

> "Where, for the purpose of determining the standard rent or rateable value of any dwelling-house to which this Act applies, it is necessary to apportion the rent at the date in relation to which the standard rent is to be fixed, or the rateable value of the property in which that dwelling-house is comprised, the county court may, on application by either party, make such apportionment as seems just . . ."

That subsection, or the corresponding subsection in the previous Acts, has been before the courts on previous occasions, the first being in *Woodward* v. *Samuels* (2). In that case the dwelling-house had been let in separate lettings, but without any structural alteration of the premises so as to convert the premises into what might be called separate self-contained flats or tenements, and the Divisional Court held that in those circumstances nothing had occurred to change the identity of what I may call the original dwelling, and the case was one in which the county court judge had jurisdiction and should proceed to apportion the standard rent of the original dwelling. That case came under consideration by this court in *Sinclair* v. *Powell* (1), and there ATKIN, L.J., and myself both said that we concurred with the view expressed by the Divisional Court in *Woodward* v. *Samuels* (2), but we thought that the facts distinguished *Sinclair* v. *Powell* (1) from *Woodward* v. *Samuels* (2) in that there had been such a change of the original dwelling-house into separate tenements or flats that the original dwelling-house had lost its identity and that the separate tenements or flats, therefore, had their own standard rent, so that no case arose for apportioning the rent of the original dwelling-house. *Sinclair* v. *Powell* (1) came under consideration in the Divisional Court again when it was applied by SALTER, J., in *Marchbank* v. *Campbell* (3), as I think perfectly correctly. I entirely agree with SALTER, J., when he says, in reference to the question which he had to decide, and which we have to decide in this case:

> "The question in this case is: What are the considerations which should guide a judge in deciding (to take the present case) whether this flat was first let in December, 1920, or was let on Aug. 3, 1914? In my opinion this is a question of fact and depends on the nature and extent of the structural alteration. It is not, I think, to be inferred from the terms of s. 12 (9) that apportionment must always be made unless the structural alteration amounts to complete reconstruction within that subsection. Subsections (2) and (3), read together, seem to imply that, to ascertain the actual rent of a dwelling-house such as this flat, it will be sometimes necessary and sometimes unnecessary to resort to apportionment. It is a question of the physical identity of the applicant's dwelling-house. To justify a judge in finding that the part was first let when it was first let separately, there must be, in his opinion, not merely a new and separate dwelling-house in law by virtue of a new and separate letting, but a new and separate dwelling-house in fact by virtue of substantial structural alteration."

In that passage SALTER, J., in terms negatives the contention which has been put forward on behalf of the defendants in the present case, and, in my opinion, he was quite right. The reason which he gives is one with which I entirely agree and it is in accordance with the decision of this court in *Sinclair* v. *Powell* (1).

In my opinion, when one finds, as here, nothing in the nature of a structural alteration which can be said to have changed the identity of the original dwelling-house it is quite immaterial that for some purposes of the statute the rooms in the dwelling-house may have been let separately—"separate letting wholly or partly as a dwelling-house" [see s. 12 (8) of the Act of 1920]. So long as the original house maintains its identity and there has been no structural alteration or reconstruction of it the result is that it has not lost its identity, and the jurisdiction of the county court remains to apportion the standard rent of what I may call the original dwelling-house. For these reasons, in my opinion, the decision of the Divisional Court was quite right, and there is no reason to question either the wisdom or the correctness of it because in this particular case it enables a person to take, what I cannot help calling, a mean advantage of his position. With regard to other points, all I need say is that I think that the decision of *R.* v. *Marylebone County Court Judge* (4) was quite right, and for the reasons given by the learned judge. In my opinion, the appeal fails and must be dismissed with costs.

SCRUTTON, L.J.—I am of the same opinion. In my view this case turns really on the meaning to be attached to s. 12 (1) (a) of the Act of 1920. The expression "standard rent" means the rent at which the dwelling-house was let on Aug. 3, 1914, or in the case of a dwelling-house which was first let after the third day of August, the rent at which it was first let. What is to happen when a house of so many rooms was let at a rent on Aug. 3, 1914, without any apportionment of the rent of the rooms, and some of these rooms were subsequently for the first time separately let after Aug. 3, 1914? They are the rooms separately let after Aug. 3, 1914. Were they also let in August, 1914, in company with other rooms, or can the word "dwelling-house" in that section apply to rooms ultimately separately let and be held to mean that these rooms have never been separately let before, and, therefore, they were not let in August, 1914, although they were occupied under one contract of tenancy?

In my view, a dwelling of separate rooms in a house is not first let when it is first separately let if it has previously been let as part of the larger tenement. That is involved in the decision in *Sinclair* v. *Powell* (1). In that case the house had been altered by being converted into flats after 1914, and in a case of that sort the identity has been destroyed within the meaning of sub-s. (9) of s. 12 of the Act of 1920. *Woodward* v. *Samuels* (2) has no application to that sort of case, and in the view of s. 12 (8) which this court took in *Sinclair* v. *Powell* (1), it has no application to a case where such structural alterations were made in the rooms if they constituted a new tenancy. *Woodward* v. *Samuels* (2) does not apply to either of these cases. It does not apply to cases where the reconstruction is after 1919, because of sub-s. (9), and it does not apply to cases where there was reconstruction before 1919 because of the decision in *Sinclair* v. *Powell* (1), that there are then new tenements, and the new tenements had not been taken in August, 1914. We are left with a case, which is the present one, where there has been no reconstruction or alteration. The rooms first separately let in 1921 were let in the same condition as they were in 1914, but as part of the larger house. It appears to me that to say in a case like that one does not look at the whole rent at which the whole house was let in 1914, but only at the rent at which the room or rooms were first let separately, and which is subject to no restriction except the agreement between the parties, would be entirely to defeat the operation of the Act. The Act was intended to protect small tenants without much regard to landlord's interests. If a landlord who had let a house, say, at £10 a year, was allowed immediately to let each separate room at £10, and say he was not prevented from doing so because he was letting a room for the first time, would be to entirely defeat the operation of the Act. Therefore, it appears to me that to adopt the meaning of s. 12 (1) (a) as being that the dwelling-house was limited to the exact room subsequently let separately would be entirely to defeat the object with which

A the Act was passed. I think, therefore, that *Woodward* v. *Samuels* (2), or so much of it as is left after *Sinclair* v. *Powell* (1), and after sub-s. (9), was rightly decided and its effect was correctly stated by SALTER, J., both in *Marchbank* v. *Campbell* (3) and in *R.* v. *Marylebone County Court Judge* (4), where he also used the same language.

In the present case the rooms were separately let after the house had become B subject to the Rent Restrictions Act. It is not, therefore, necessary for me to repeat or re-consider the view I took in *Sinclair* v. *Powell* (1), where the rooms were let when the house was not subject to any Rent Restriction Acts. So far as I have re-considered the matter, I remain of the same opinion. For these reasons, applying myself to the question of law and leaving the question of morality to the conscience of the plaintiff, I think this appeal must fail.

C

ATKIN, L.J.—I agree. I think that in substance all I need to say is that I think that *Sinclair* v. *Powell* (1) determines this matter. I adhere to everything I said in that case, and I do not think I need repeat it. In reference to the two particular points that were urged before us, I may say that as to s. 12 (8), that subsection has very little value in this particular case. I think the sole effect of D it is merely to define what is meant in the Act when it speaks of part of a house let as a separate dwelling, and to make sure that it may apply to the case of rooms let which are not part, what one might call a continuous part, of a dwelling, and also now under the Act of 1920, where such rooms have been subject to separate letting although they are not to be used exclusively as a dwelling, but may be used as a workshop. Then, with reference to s. 12 (3), counsel for the E defendants contends that the decision, so far as it has been based upon the suggestion that sub-s. (3) can only have an application to cases of this kind, is based upon too narrow a ground. I am inclined to think he is right in that view if by that is meant that sub-s. (3) only applies to the case where you re-consider the apportionment of rooms in a dwelling-house, because I agree that it may apply to the case of a whole dwelling-house let as part of the original larger property. F But at the same time I think it is very difficult to apply that subsection at all or to account for the need of it unless in reference to premises which have been let for the first time after Aug. 3, 1914, because, unless it is in reference to premises such as that, it seems to me impossible to consider a case in which apportionment would be necessary at all. I have stated in *Sinclair* v. *Powell* (1) what I think is meant by that, namely, that, where premises have been let as part of a larger G tenement, they were in fact let in August, 1914, though they may have been let separately for the first time after that date. For these reasons, I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Rawle, Johnstone & Co.*, for *Wright, Hassell & Co.*, Leamington; *C. G. Sutton.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

A

CRADDOCK BROS., LTD. *v.* HUNT

[Court of Appeal (Lord Sterndale, M.R., Warrington and Younger, L.JJ.), January 19, 22, 23, 24, March 26, 1923]

[Reported [1923] 2 Ch. 136; 92 L.J.Ch. 378; 129 L.T. 228; 67 Sol. Jo. 593]

B

Contract—Sale of land—Rectification—Mistake—Proof of mutual mistake by parol evidence—Agreement carried out by conveyance—Contract required to be in writing—Specific performance of contract as rectified.

Trust—Constructive trust—Acquirement of property with notice of another's better claim—Order to convey to that other person.

C

Rectification can be granted of a written agreement on parol evidence of mutual mistake, although that agreement is complete in itself and has been carried out by a more formal document based on it, e.g., a conveyance in the case of a contract for the sale of land. After rectification the written agreement does not continue to exist with a parol variation. It is to be read as if it had been originally drawn in its rectified form, and it is of that document alone of which specific performance can be decreed. This is so in the case of a contract for the sale of land although, under s. 40 of the Law of Property Act, 1925 (formerly s. 4 of the Statute of Frauds), no action can be brought on such a contract unless the agreement, or some memorandum or note thereof, is in writing and signed by the party to be charged, because, when the memorandum has been rectified, the necessary signature must be taken as affixed to that document, save where the document, when rectified, does not satisfy the statute.

D

E

A person who acquires a legal estate with notice that another has a better claim thereto cannot, in a court of equity, be allowed to insist on his position at law, but will be treated as a trustee for the person rightfully entitled, and, if necessary, ordered to convey the estate to him.

F

Principle in *Leuty* v. *Hillas* (1) (1858), 2 De G. & J. 110, applied.

So **held** by Lord Sterndale, M.R., and Warrington, L.J., Younger, L.J., dissentient.

Decision of P. O. Lawrence, J., [1922] 2 Ch. 809, affirmed.

Per Warrington, L.J.: The jurisdiction of courts of equity in respect of the rectification of documents is to bring the written document executed in pursuance of an antecedent agreement into conformity with that agreement. The conditions of its exercise are that there must be an antecedent contract and the common intention of embodying or giving effect to the whole of that contract by the writing, and there must be clear evidence that the document by common mistake failed to embody such contract and either contained provisions not agreed on, or omitted something which was agreed on, or otherwise departed from its terms. If these conditions are fulfilled, on principle the instrument so rectified should have the same force as if the mistake had not been made, in which case the Statute of Frauds would be no defence to an action founded on it.

G

H

Per Younger, L.J.: The evidence by which it is sought to show that words taken down in writing are contrary to the concurrent intention of all parties to the instrument must be of the highest nature—it must be "irrefragable". This dates from the time of Lord Thurlow.

I

Notes. Section 4 of the Statute of Frauds, 1677, has been practically wholly replaced or repealed. It provided that no action should be brought on the following contracts unless the agreement on which the action was brought or some memorandum or note thereof should be in writing and signed by the party to be charged: (i) a promise by an executor or administrator to answer damages out of his own estate, (ii) a guarantee, (iii) an agreement made in consideration of

marriage, (iv) a contract for the sale of land, (v) a contract not to be performed within a year. The section was repealed as to (i), (iii) and (v) by the Law Reform (Enforcement of Contracts) Act, 1954, s. 1, and as to (iv) it was replaced by s. 40 of the Law of Property Act, 1925.

Approved: *United States of America* v. *Motor Trucks, Ltd.*, [1924] A.C. 196.

As to the rectification of a contract on the ground of mutual mistake, see 26 HALSBURY'S LAWS (3rd Edn.) 907–909, 914–921; as to rectification of a conveyance see 29 HALSBURY'S LAWS (2nd Edn.) 463, 464; as to specific performance of a rectified contract, see ibid., vol. 31, pp. 381, 382; and as to constructive trusts, see ibid., vol. 33, p. 138 et seq. For cases see 35 DIGEST 127 et seq., 137–141; 40 DIGEST (Repl.) 383–386; 42 DIGEST 562–564; 43 DIGEST 631–642.

Cases referred to:

(1) *Leuty* v. *Hillas* (1858), 2 De G. & J. 110; 27 L.J.Ch. 534; 22 J.P. 96; 4 Jur.N.S. 1166; 6 W.R. 217; 44 E.R. 929; sub nom. *Lenty* v. *Hillas*, 30 L.T.O.S. 299, L.C.; 40 Digest (Repl.) 152, *1164.*

(2) *Woollam* v. *Hearn* (1802), 7 Ves. 211; 32 E.R. 86; 42 Digest 562, *1285.*

(3) *Davies* v. *Fitton* (1842), 4 1 Eq.R. 612; 2 Dr. & War. 225; 35 Digest 139, *g.*

(4) *May* v. *Platt*, [1900] 1 Ch. 616; 69 L.J.Ch. 357; 83 L.T. 123; 48 W.R. 617; 40 Digest (Repl.) 308, *2551.*

(5) *Thomas* v. *Davis* (1757), 1 Dick. 301; 21 E.R. 284; 40 Digest (Repl.) 384, *3074.*

(6) *Olley* v. *Fisher* (1886), 34 Ch.D. 367; 56 L.J.Ch. 208; 55 L.T. 807; 35 W.R. 301; 40 Digest (Repl.) 45, *273.*

(7) *Shrewsbury and Talbot Cab and Noiseless Tyre Co., Ltd.* v. *Shaw* (1890), 89 L.T.Jo. 274; 35 Digest 133, *327.*

(8) *Thompson* v. *Hickman*, [1907] 1 Ch. 550; 76 L.J.Ch. 254; 96 L.T. 454; 23 T.L.R. 311; 40 Digest (Repl.) 385, *3090.*

(9) *Johnson* v. *Bragge*, [1901] 1 Ch. 28; 70 L.J.Ch. 41; 83 L.T. 621; 49 W.R. 198; 35 Digest 139, *376.*

(10) *Hanley* v. *Pearson* (1879), 13 Ch.D. 545; 41 L.T. 673; 40 Digest (Repl.) 586, *900.*

(11) *Cowen* v. *Truefitt, Ltd.*, [1899] 2 Ch. 309; 68 L.J.Ch. 563; 81 L.T. 104; 47 W.R. 661; 43 Sol. Jo. 622, C.A.; 35 Digest 100, *83.*

(12) *Marquis of Townshend* v. *Stangroom* (1801), 6 Ves. 328; 31 E.R. 1076, L.C.; 40 Digest (Repl.) 303, *2516.*

(13) *Mortimer* v. *Shortall* (1842), 2 Dr. & War. 363; 1 Con. & Law. 417; 35 Digest 124, *257 i.*

(14) *Cass* v. *Waterhouse* (1691), Prec. Ch. 29; 24 E.R. 15; 40 Digest (Repl.) 21, *82.*

(15) *Glass* v. *Hulbert* (1869), 102 Mass. 24.

Appeal from an order of P. O. LAWRENCE, J.

By a conveyance dated Mar. 20, 1877, a plot of land (hereinafter referred to as plot 1), consisting of 432 square yards, was conveyed to Benjamin Davis Rollings, and on part of it he erected a house known as 44, Powlett Street, Wolverhampton. The part of this plot not built upon is hereinafter referred to as the land in dispute. By a conveyance made on Dec. 23, 1885, another plot of land immediately adjoining plot 1 at the rear and the side and hereinafter referred to as plot 2, consisting of 332 square yards, was conveyed to Rollings who used it, together with the land in dispute, as a yard in connection with his business. About the year 1910 Rollings leased the whole of the yard to George Greenstone. In the year 1920, Rollings having died, his legal personal representatives put up the house, together with the yard adjoining, for sale in one lot, and the particulars of sale described the yard as adjoining the house at the side and rear and as being then in the occupation of Greenstone. The lot was not sold. Thereupon, on the same day, the house was put up for sale and, it not being purchased, the yard was put up for sale and purchased by the plaintiffs for £230. This took place while the defendant's agent, Percy John Thomas, was present, and the yard was sold with his knowledge

to the plaintiffs. It was held on the evidence that the vendors, the plaintiffs, the defendant's agent, P. J. Thomas, and the defendant all understood that the whole of the yard in the occupation of Greenstone, including the land in dispute, was sold to the plaintiffs. The contract or agreement for sale subsequently prepared, however, set out as the plot of land purchased by the plaintiffs at the auction the plot 2 conveyed to Rollings in 1885, which did not include the land in dispute, but the contract described the land as "now in the occupation of Greenstone." A similar error was made in the agreement for sale of the house to the defendant who had purchased it shortly after the day of the auction for £500; the land and house sold to him was plot 1 conveyed to Rollings in 1877, thus including the land in dispute which formed part of the yard. The deeds by which the house and the yard were conveyed to the defendant and the plaintiffs (dated Sept. 3 and Sept. 2, 1920, respectively) conveyed to the defendant plot 1 and to the plaintiffs plot 2, following the error made in the agreements for sale though the conveyance to the plaintiffs did not contain the words "now in the occupation of Greenstone." After the conveyance to the plaintiffs Greenstone paid the weekly rent of the whole yard to them and the defendant never made any claim to the land in dispute. In April, 1921, the plaintiffs, having occasion to refer to their conveyance, for the first time discovered that the land in dispute had not been conveyed to them and informed the vendors and the defendant who then for the first time claimed the land in dispute. The plaintiffs now claimed a declaration that they were entitled to have the land in dispute conveyed to them by the defendant, and, if necessary, rectification of the conveyance to them. P. O. Lawrence, J., held that the true construction of the contract for sale to the plaintiffs passed the land in dispute, as the leading description was that the land was in the occupation of Greenstone, and the inaccurate statement as to the measurement should be rejected as a falsa demonstratio; therefore, the case was completely covered by *Leuty* v. *Hillas* (1) and the defendant was merely a trustee of the land in dispute for the plaintiffs; but, assuming that that construction of the contract was wrong, the court had jurisdiction to rectify the plaintiff's conveyance, and the defendant must execute a conveyance to the plaintiffs of the land in dispute. The defendant appealed.

A B C D E F

Ward Coldridge, *K.C.*, and *L. Mossop* for the defendant.
Jenkins, *K.C.*, and *Archer*, *K.C.*, for the plaintiffs.

Cur. adv. vult.

Mar. 26. The following judgments were read.

G

LORD STERNDALE, M.R.—This appeal from P. O. Lawrence, J., arises out of the sale and purchase of some property in Powlett Street, Wolverhampton, and raises some difficult questions both of fact and law.

The property had belonged to B. D. Rollings and had been bought and treated by him in the following way. In 1877 he bought in fee simple a plot of land fronting on Powlett Street, 24 ft. in width, 160 ft. in length, and containing, according to the conveyance, 432 square yards. It will be convenient to call the plot of land, as Lawrence, J., has done, plot 1, and to describe it as containing the land coloured blue and brown on the plan in the statement of claim. Mr. Rollings built a dwelling-house on the front part of the land adjoining Powlett Street, which he occupied. In 1885 he bought another strip of land adjoining plot 1, 18 ft. in width, approximately the same length as plot 1, and containing 332 square yards. This I call plot 2. For some years he occupied the house and the land for the purposes of his business as a builder and, so far as appears, there was at that time no fence or other division between any part of the two plots. In or about 1905 he fenced off plot 2, which is coloured pink on the map above mentioned, and a part of plot 1, coloured brown, from the remainder of plot 1, which is coloured blue. He still continued to occupy the whole of the two plots for the purposes of his business and there were probably gates leading from the blue into the brown and also into the pink. There were some buildings used for

H I

A the purposes of the business upon some parts of the brown. A few years after he had made this division he left the premises and then let the yard to a Mr. Greenstone at a rent of 6s. a week. The yard so let to Greenstone was the whole yard consisting of both the pink and the brown land, and Rollings at the time he let it blocked up the gates leading from the blue land and left no access from it either to the brown or to the pink. The house with the blue land was let from time B to time to different tenants, and at the time of the sale with which this case is concerned was vacant. None of those tenants had the occupation of any part of the pink or brown land and both continued in the occupation of Greenstone until his death and afterwards in that of his son who was in occupation at the time of the sale.

In 1913 Rollings died, leaving as his personal representatives his daughter, C Mrs. Hinckes, and her husband, Mr. Hinckes, who in 1920 decided to sell the property. For this purpose they instructed a firm of auctioneers, Messrs. Boswell & Tomlins, and a firm of solicitors, Messrs. Stirk & Co. Mr. Boswell, a member of the firm of auctioneers, inspected the property and drew particulars and posters advertising the sale for July 27, 1920. On the poster the property, which was lot 9, was thus described,

D

> "Powlett Street, lot 9. The very excellently situated freehold property, comprising a dwelling-house known as 'Powlett House,' No. 44, Powlett Street, Wolverhampton, together with the yard immediately adjoining. Vacant possession of 'Powlett House' will be given upon completion. Solicitors, Messrs. Stirk & Co., Lichfield Street, Wolverhampton."

E This description, though correct, was not full, and it was supplemented by that contained in the particulars, i.e.,

> "Lot 9. The very excellently situated freehold property, comprising a dwelling-house known as 'Powlett House,' No. 44, Powlett Street, Wolverhampton, together with the yard immediately adjoining. Vacant possession of 'Powlett House' will be given upon completion. The yard is at present let F to Mr. Greenstone, glass merchant, at an inclusive rental payable quarterly. The dwelling-house is two-storey brick and slate built with forecourt and covered cartway entrance at side. The accommodation includes tiled hall entrance, two sitting-rooms, glazed verandah, pantry, kitchen, with range and cupboards; scullery, with sink, boiler and grate; four bedrooms, bathroom and cellar. Outside there is a part paved yard, brick built workshop or store- G room and w.c. The yard immediately adjoins at the side and rear, and the wood-shedding and erections thereon belonging to the vendor will be included in the sale."

There are two matters of importance contained in this description, one, that vacant possession would be given of the house on completion, but that the yard H was let to Greenstone on a quarterly tenancy, and the other that the yard so let adjoined the house both at the side and rear. The position therefore was that the yard, which was, as stated before, physically divided from the house, consisted of the pink and the brown land which were held under different titles, the pink under the conveyance of 1885 and the brown under that of 1877, and no one who inspected the land or read the particulars could have any doubt that the yard I extended behind the house and occupied part of the land behind it.

The vendors sent a letter of instructions to the auctioneer which he received on July 27, 1920, in these terms:

> "With reference to the sale of Powlett House and yard this evening I do not know whether you have been informed that the yard is still at the old 1914 rental of 6s. per week and subject to the increase of rates since and also to present allowed increase just passed. If the reserve price is not reached, I think they had better be offered separately, house (reserve £700) and yard £200. I trust you will be very successful."

There can, in my opinion, be no doubt that the yard which the auctioneer was instructed to put up separately, if necessary, at a reserve of £200, was the same yard as that to which the writer of the letter refers as let at 6s. a week, and it will be seen that the auctioneer acted on it in that sense. The instructions that Mr. Stirk got were as follows. On July 21, 1920, Mrs. Hinckes brought the deeds to him and this is what he says took place.

> "(Q) How did you come to think that that deed related to the whole yard or exclusively to the yard? (A) When Mrs. Hinckes brought me the deeds I undid the parcel while she was there and there were two separate conveyances of two plots side by side. I asked which the house was built on and whether they were separate. She showed me which the house was, and I think I marked with pencil which the house was. I think I marked one 'house' and the other 'yard.' It is two years ago and I cannot remember very much about it. (Q) On which deed do you think it is marked? (A) I think I put 'yard' on one and 'house' on the other. It would be on the deed with the plots upon it."

It will be noticed that he got no answer to the question whether they were separate, and asked no questions as to the extent of the yard or the nature of the property, but, as he was told one set of deeds referred to the house, jumped to the conclusion that the deeds relating to the house and those relating to the yard were entirely separate. He had the particulars of sale some days before the auction, and, as I have pointed out, they clearly stated that the yard was at the rear of the house as well as at the side. The intention was to sell the property in one lot if possible, but, if that could not be done, the auctioneer had instructions, as I have already mentioned, to sell the house and the yard in two lots, a separate reserve being put on each. The plaintiffs, who had a place of business in the neighbourhood and knew the premises well, were willing to buy the yard if it were put up separately, and the defendant had arranged with a Mr. Thomas that they would buy the house if it could be got for not more than £500. I shall have to discuss later the extent of their knowledge of the premises and its effect on the defendant.

Just before the auction Mr. Stephen Craddock, a director of the plaintiff company, which is a private company consisting of his brother and himself, happened to be in the auctioneer's office on other business, and, seeing Mr. Boswell, told him that if the yard were put up separately he would buy it at any price up to £230. Before leaving he gave Mr. Boswell instructions to bid for his firm up to that amount. There was considerable discussion as to the exact words used at this conversation, particularly whether the actual expression "Greenstone's yard" was used, but, whatever the words, in my opinion, the evidence establishes quite clearly that both Mr. Craddock and Mr. Boswell understood quite well that what the former intended to buy and the latter intended to sell was the yard as occupied by Greenstone. Mr. Craddock was not present at the auction, but Mr. Thomas and Mr. Stirk were both there. The property was at first put up in one lot and no bid was obtained. It was then withdrawn and the house put up separately. There is some controversy as to whether there was any bid, but at any rate it was not sold and the yard was then put up separately, and in the hearing of Mr. Thomas was knocked down to the plaintiffs for £230, the auctioneer bidding for them. Mr. Thomas then asked Mr. Stirk what was the reserve for the house and was told £700. He said he could give £500 and Mr. Stirk said he did not think it would be much use, but asked Mr. Thomas to leave a business card. He did so, and the next morning he got a telephone message asking him, if the offer was still open, to send round £10 deposit. On this Mr. Thomas put the matter into the hands of his solicitor, Mr. Hayward, and eventually bought the house for £500.

Great stress is laid by the defendant upon the fact that when the auctioneer put up the yard separately he did not mention the boundaries or the extent of it

A or describe it as the yard in Greenstone's occupation. I think the evidence shows that he did not, at any rate it does not show that he did. As events turned out probably some difficulties would have been avoided if he had mentioned these things, but I do not think anyone can blame him for not doing so. He had in the particulars, to which the poster referred intending purchasers, quite accurately described the yard and the house; the division between them was quite plain to B anyone who looked at the property and I do not think the auctioneer was bound to assume that such information must be given all over again, because neither those concerned with the sale nor intending purchasers had taken the trouble to acquaint themselves with circumstances of which the means of knowledge were so easily open to them. This was certainly the case with regard to Mr. Stirk, and the defendant and Thomas allege that they were in the same state of ignorance. C Whether that is the fact or not is a question which I shall have to decide later.

It appears from a copy of the conditions of sale produced on the hearing that Mr. Hinckes, no doubt on information from the auctioneer, signed a memorandum of contract in the following terms:

> "Memorandum that Kate Catherine Hinckes and John Hinckes, both of D Wolverhampton, are the vendors and Craddock Brothers, boot manufacturers, of Wolverhampton, are the purchasers and the highest bidders for and were declared the purchasers of the property described as lot 9 in the before-mentioned particulars at the price of £230, and on the terms of the foregoing special and general conditions so far as the same are applicable to a sale by private contract, and the said Craddock Brothers have paid a certain sum by way of deposit and agree to pay to the vendors or their Settled Land Act E trustees according to the foregoing conditions the balance of the purchase money, including the valuation money (if any), and the vendors and the purchasers hereby respectively agree to complete the said sale and purchase according to the said conditions."

This is dated July 27, 1920, but there is no evidence as to when it was actually F signed. It, however, entirely confirms the conclusion to which I have come upon the evidence of Mr. Stephen Craddock and Mr. Boswell that what the latter meant to buy for the former on his instructions and what he meant to sell for the vendors was the yard as let to Greenstone. It also shows that in doing so he was acting in accordance with the instructions of the vendors.

It is at this point that the difficulties begin. Mr. Stirk knowing that the yard G had been sold to the plaintiffs, and having sold the house to Mr. Hayward, acting for the defendant, made out contracts to carry out these bargains, and they are as follows: "An agreement made July 29, 1920," between the Hinckeses and Craddock Bros.:

> "The vendors agreed to sell and the purchasers agreed to purchase at the price of £230 all that plot of land situate in Powlett Street, Wolverhampton, H aforesaid, to which it has a frontage of 6 yards and containing in the whole 332 square yards or thereabouts and also such erections thereon as belong to the vendors, which premises are now in the occupation of Mr. Greenstone. The title shall commence with an indenture dated Dec. 23, 1885, and made between John Davis, of the one part, and Benjamin Davis Rollings, of the other part."

I The contract with the defendants is:

> "The vendors agree to sell and the purchaser agrees to purchase at the price of £500 all that plot of land situate in Powlett Street, Wolverhampton, having a frontage to the said street of 8 yards and containing in the whole 432 square yards, and also that messuage and outbuildings now standing and being on the said land and known as 44, Powlett Street aforesaid which said messuage is now void. The title shall commence with an indenture dated March 20, 1877, and made between the Honourable Edward Stanhope and Henry

Morgan Vane, of the first part, the Duke of Cleveland, of the second part, and Benjamin Davis Rollings, of the third part."

It will be noticed that the 332 square yards mentioned as the extent of land purchased by the plaintiffs and the 432 as that purchased by the defendant, if correct, give to the plaintiffs only the pink land and to the defendant the blue and the brown, so that the plaintiffs do not get the whole of the yard occupied by Greenstone and the defendant does get part of it. These measurements were taken by Mr. Stirk from the deeds which he had marked "house" and "yard" respectively some days before, as he jumped to the conclusion that the house and yard sold after and at the auction corresponded to the land which was described in those deeds. It is no part of my duty to criticise Mr. Stirk, but it seems from the undisputed facts to be clear that if he had asked for any information, however simple, when the deeds were brought to him, at the auction, or at the time of preparing the contracts, the difficulty would never have arisen. I do not know whether he saw the memorandum of contract signed by Mr. Hinckes, but he says that he must have read the particulars, and admits that, if he had read them correctly, he would have known that Greenstone's yard extended behind 44, Powlett Street. If he had known that he could not have drawn the contracts as he did.

The contract with the defendant went through in the ordinary course, and that with the plaintiffs was sent to them and signed by Mr. George Craddock, the brother of Mr. Stephen Craddock, who had instructed Mr. Boswell. Mr. George Craddock had known nothing about the matter before, but went down to Mr. Stirk's office, paid the deposit, and either then or at his own office signed the contract. He may have been satisfied with the words "which premises are now in the occupation of Mr. Greenstone" and taken no notice of the measurement, but if one director is going to make the bargain and another attend to the documents carrying it out, it would seem as if a little more communication between them than the evidence in this case shows would be wise. Some time later a tracing of the pink land was sent to the plaintiffs' solicitors in consequence of a requisition on title asking for a tracing of the plan referred to in the deed of 1885 appearing in the abstract. The conveyances followed the contracts in each case, though the conveyance in the plaintiffs' case makes it plainer than in the contract that the plaintiffs only get the pink land. This appears from the description of the boundaries.

The defendant went into possession of the house and the blue land very soon after the conveyance, but the plaintiffs could not get possession of the yard until after the termination of Mr. Greenstone's tenancy. This was terminated by notice, given by the plaintiffs, which expired on Dec. 25, 1920. The plaintiffs received the two quarters' rent due at Michaelmas and Christmas for the whole yard, and on the expiration of the notice they took possession of the whole yard. They had, on the completion of the purchase of the yard in accordance with the completion account rendered to them by Mr. Stirk, paid to the vendors the apportioned part of the whole rent of 6s. from the last quarter day down to the date of completion. During the whole of the time no claim to the possession of the brown land was ever made by the defendant, nor did he ever make any claim to any part of the rent paid by Greenstone. This, however, would have been a very small sum and not of very great importance. In the spring of 1921 the plaintiffs instructed their architect to erect some buildings upon the brown land, and on inspection of the deeds and plans the architect discovered that according to them the plaintiffs had no title whatever to that land. Negotiations thereupon took place between the vendors, the plaintiffs, the defendant and Thomas, the result of which was that the vendors, in consideration of an indemnity given to them by the plaintiffs, conveyed to them the brown land, but the defendant and Thomas declined to join in the conveyance and maintaned their title to that land. Of course, if the defendant had acquired a good title to the land in 1920 this conveyance could have no effect, and I think it is only of importance as showing

A that the vendors recognised that a mistake had been made and did not object to a rectification of the contract and conveyance to the plaintiffs so far as they were concerned. The question in these circumstances is whether the learned judge was right in ordering the defendant to execute a conveyance to the plaintiffs of the brown land, and what are the plaintiffs' rights as against the defendant.

The first question is whether the contract to the plaintiffs as drawn by Mr. Stirk B did include the brown land. The learned judge has held that it did, and that the statement that the measurement of the land as 332 yards was merely a falsa demonstratio. On that construction, and on the facts as found by him, he has held that within the principle of *Leuty* v. *Hillas* (1) the defendant must convey the brown land to the plaintiffs. If I agreed with the learned judge's construction of the agreement I should not differ from his conclusion. I regret, however, that C I cannot do so. I think the area of 332 yards which Mr. Stirk no doubt took from the 1885 deed was the governing description in the contract. There are no boundaries given, and the statement that the premises are now in the occupation of Mr. Greenstone is just as apt to part of the yard as to the whole. The stipulation as to the commencement of the title points in the same direction. On this point, therefore, I cannot agree with the learned judge.

D There is, however, another ground on which he has decided against the defendant. He has not in terms stated the ground, but I think it may be shortly stated as being that upon the true results in fact and law the brown land had been bought by the plaintiffs, that the defendant knew that fact from the beginning, that he knew he had not bought it and took the contract and conveyance that purported to give it to him with notice that it belonged to the plaintiffs. It is on these E grounds that I think LAWRENCE, J., has decided against the defendant. This latter point seems to me to raise serious questions of fact and law. First, are the plaintiffs entitled to say that they have bought the brown land and have a title to it as against the vendors? If the construction which I have put upon the contract is right, it is necessary as a first step to show that the plaintiffs, as against the vendors, are entitled to have the contract and conveyance rectified. I think there F is ample ground, in fact, for asking for such a rectification. I have already said that the vendors, if the yard were sold separately, instructed the auctioneer to sell the whole yard let to Greenstone for 6s. a week, that Stephen Craddock instructed the auctioneer to buy the whole yard, that the auctioneer understood those instructions, and that when it was knocked down the auctioneer intended to buy for the one party and sell for the other the whole yard. The memorandum G signed by one of the vendors shows that he so understood the transaction. The contract was wrongly drawn so as not to include the brown land by a careless blunder on the part of Mr. Stirk, and accepted by Mr. George Craddock as carrying out what he believed to be the bargain. It seems to me as clear a case of mutual mistake as could occur, and if there be no legal difficulty in the way I think the plaintiffs could claim rectification of the contract and conveyance in a suit against H the vendors. They, however, are not parties to this action, but I think that is not material because, as I have mentioned already, their execution of the conveyance of 1921 seems to me to be an assent to such a rectification. The defendant, however, contends that in law there cannot be such a rectification. He alleges, as, I understand, the grounds for this contention (i) that in no case can there be a rectification of a complete written agreement in accordance with a previous parol I agreement; and (ii) that even if that proposition cannot be maintained at large, it is correct where the subject-matter of the agreement is such that by reason of the Statute of Frauds an agreement to be binding must be in writing.

The first contention is mainly supported by the authority of *Woollam* v. *Hearn* (2), *Davies* v. *Fitton* (3), and *May* v. *Platt* (4). These cases are said to establish that where a conveyance has been executed in accordance with a previous written agreement, that agreement and the subsequent conveyance cannot be rectified, because to do so would be to grant specific performance of a written agreement with a parol variation, which cannot be done. These cases are not all cases of

rectification, but I think they do go to the extent for which the defendant contends, and if they stood alone and without criticism, I should not feel justified in differing from them. This, however, is not the case; the decisions have not received universal approval, and there are cases in which a different rule has been applied. Evidence for the purpose of such rectification has been held admissible in *Thomas* v. *Davis* (5), *Olley* v. *Fisher* (6), and *Shrewsbury and Talbot Cab and Noiseless Tyre Co., Ltd.* v. *Shaw* (7). The earlier cases, including *May* v. *Platt* (4), in which neither of the last two cases was cited, have been adversely criticised by NEVILLE, J., in *Thompson* v. *Hickman* (8). Opinions adverse to the rule established by these cases have also been expressed in FRY ON SPECIFIC PERFORMANCE (2nd Edn.), para. 799; (6th Edn.) pp. 379 to 382, §§ 815–819; and WILLIAMS, VENDOR AND PURCHASER (2nd Edn.), vol. 1, pp. 788–791. These cases are all discussed in these passages, which also show that the rule is contrary to opinions expressed by STORY, J., and KENT, C. In these circumstances I think I am at liberty, at any rate since the Judicature Act, to express my opinion that rectification can be granted of a written agreement on parol evidence of mutual mistake, although that agreement is complete in itself and has been carried out by a more formal document based upon it. I think the contrary view is based upon an insufficient consideration of the result of rectification. After rectification the written agreement does not continue to exist with a parol variation; it is to be read as if it had been originally drawn in its rectified form (*Johnson* v. *Bragge* (9)), and it is that written document and that alone of which specific performance is decreed.

The second argument is that though such rectification may take place in a case where the original contract need not be in writing, it is otherwise where the Statute of Frauds requires a memorandum in writing in order to constitute an enforceable contract [see now, in the case of a contract for the sale of land, s. 40 of the Law of Property Act, 1925]. I think in this case there is good ground for saying that the statute has no application because there was part performance by the plaintiffs through taking possession, but apart from that, I think the cases and passages from text writers to which I have referred show that the contention is not well founded: see *Johnson* v. *Bragge* (9). The ground of this is not stated so far as I know in any case, but I think it must be founded on this, that when the memorandum has been rectified the signature must be taken as affixed to that document. The apparent limitation put upon this by the last words of NORTH, J.'s judgment in *Olley* v. *Fisher* (6), in every case in which the Statute of Frauds does not create a bar (words taken from FRY ON SPECIFIC PERFORMANCE (2nd Edn.), p. 799), relate only, in my opinion, to a case where the document, when rectified, is not such as to satisfy the statute.

The result is that, in my opinion, the plaintiffs are entitled as against the vendors to rectification of both the contract and the conveyance, and have as against them a good title to the brown land. I have already explained why I do not think the vendors necessary parties to the action.

It now remains to consider the difficult question whether the plaintiffs have any and what rights as against the defendant. In order to decide this question it is necessary first to ascertain the facts as regards the defendant. It is clear, I think, that the contract between him and the vendors must be treated as subsisting. I do not think it necessary to discuss the question whether the vendors in a properly constituted action brought by them could or could not rectify that contract. I see considerable difficulties in the way of such an action, but I do not decide that they could not be overcome. This, however, is immaterial, for it is quite clear that the contract cannot be rectified in this action at the instance of the plaintiffs and in the absence of the vendors. Speaking generally, I agree with LAWRENCE, J., that the defendant and Thomas bought with a knowledge that the yard, as occupied by Greenstone, was bought by the plaintiffs and that they did not either of them think that they had bought the brown land, but I think it well to state my own reasons for so finding. They knew that the auctioneer was selling the house and yard as they in fact existed at that time and that the house and

A yard were in different occupations. They must, therefore, be taken to know that, when the auctioneer, after putting up the two in one lot, put them up separately, what was put up was the house as it then existed and the yard as it then existed. But they knew more than that. Thomas, when he went to the property, saw that the back-yard of the house ended in a series of sheds. It is true that he says he thought that they were not the end of the property, but he had no reason to think B so, and I come to the conclusion that he must have known that was the boundary between the house and Greenstone's yard. He had no reason to think that the back-yard of the house went any further, though there was an attempt made at the trial to show that he thought so, because he thought all the houses in Powlett Street extended further back. Unfortunately, when he was asked if he knew how far those other houses in the street went back, his answer was No, instead C of the desired, and perhaps expected, answer, Yes. All he knew, therefore, was that he was buying the house with an unknown amount of ground at the back, and that so far as he could see the ground at the back was bounded by a row of sheds belonging to the builder who to his knowledge had the adjoining yard. The defendant himself says that he could see the end of the property, and that it ended in the wooden sheds about 4 ft. from one another and a bit of wood fencing D between, and that he thought the part beyond had been fenced off, as he says, for the hire system to let it to someone else. He also said that he knew Greenstone was the tenant of that bit as well as the bit at the side. It is true that he says that he thought he had bought that bit, but I think the evidence and his subsequent conduct show he thought nothing of the kind. In the absence of evidence to the contrary I must assume the truth of the statement that Thomas and the defendant E did not read the particulars, and considering the very careless way in which nearly every one concerned in the matter conducted themselves it may very likely be true, but Thomas at any rate had seen the poster on which it appeared in large letters that vacant possession of Powlett House would be given on completion, and he says that it was necessary that the defendant should have vacant possession of something. I think the defendant's evidence shows that he thought he ought to F have vacant possession of what he had bought, for he says that he thought it wrong that Greenstone should be in occupation of the brown land after he (the defendant) had completed his purchase. Yet, as I have already pointed out, he made no attempt to get possession. He never communicated with the vendors or with Greenstone or the plaintiffs, and allowed Greenstone to remain without even asking for any part of the rent he was paying for the yard. Indeed, he took G no steps to assert his right to this land till many months after he had gone into possession and some time after the plaintiffs had found out that there was a mistake. It is true that he says that he made some remark to his wife when he found that he had not got possession of the brown land. The learned judge did not believe that, nor do I. He says that he told her he was surprised to find the ground was fenced off in that position, whereas, as I have already pointed out, he admits that H he saw that very fencing before he bought. If he had, however, said anything to his wife it would not, in my opinion, at all lessen the effect of his conduct in saying nothing to the vendors or Greenstone or the plaintiffs. Such conduct is, in my opinion, entirely inconsistent with any belief that he had bought the brown land, and, for the reasons I have given, I consider the position to be as follows. The defendant and Thomas knew that the auctioneer was selling the house and I the yard as they existed and as they were physically divided. Thomas, who was treated throughout the case as the defendant's agent, knew that the yard had been knocked down to the plaintiffs, though he did not know, for it was not the fact, that they had entered into any binding contract within the Statute of Frauds. With that knowledge he, on behalf of the defendant, made an offer for the house, and he and the defendant never thought that they had bought more than the house as it was and never thought they had bought any of the brown land, but when the plaintiffs discovered the mistake and the defendant discovered that he had a paper title to it he determined to keep it if he could. Thomas apparently was willing to

put the matter right if he could get the defendant's consent, but the latter refused. A

It seems to me that the question is whether upon these facts the defendant ought to be held in equity to be a trustee of the brown land for the plaintiffs. The learned judge must, I think, on this branch of the case as on the former have held that he ought, but he has not given his reasons for so holding. It does not seem to me that the case is brought within the direct authority of *Leuty* v. *Hillas* (1), where the facts were quite different, but I think it comes within the principle B which seems to me to underlie that case. I can see no conscience or honesty in the defendant's claim, and I think he should be declared a trustee for the plaintiffs of land to which he has by mistake got a title which he knew had been knocked down to them and which he never thought was intended to be sold to him or had been bought by him. The appeal must be dismissed with costs.

C

WARRINGTON, L.J.—This is an action of an unusual character. It arises out of a dispute between two purchasers from the same vendor of adjoining pieces of land. The parcel in dispute contains according to one description 189 square yards, according to another 165 square yards, but this discrepancy is not material, there being no question what the actual parcel of land is. The plaintiffs' case is that it was to the knowledge of all parties comprised in their purchase and paid for by D them and was neither bought nor paid for by the defendant, that it was by mistake omitted both from the plaintiffs' contract and from his conveyance and included in those of the defendant, that the defendant, on the mistake being pointed out to him, wrongfully refused to put the matter right insisting on retaining that to which he was not entitled, and, accordingly, that, although he has obtained a conveyance of the legal estate, he ought to be declared a trustee thereof E for the plaintiffs and ordered to execute a conveyance of the parcel of land to the plaintiffs. P. O. Lawrence, J., has accepted the plaintiffs' view and ordered the defendant to execute a conveyance of the land to them. The defendant appeals. The learned judge, indeed, has held that, according to the true construction of the plaintiffs' contract, the disputed parcel is included therein, though not in their conveyance, but he has said that, even if this were not the true construction, his F ultimate decision would have been the same. With all respect to him, I cannot take the same view of the construction of the contract. I think it is remarkably clear, especially having regard to the stipulation as to the commencement of title, that the description in the contract does not include the land in question, and my judgment proceeds on the footing that, both in the contracts and in the conveyances such land purports to be excluded from the plaintiffs' purchase and included G in the defendant's.

[His Lordship stated the facts and continued:] I am satisfied that the defendant entered into the contract, paid his purchase money, and took his conveyance, in the belief shared by the vendors that the land in question was not included in his purchase and with the knowledge, through his agent Thomas, that the yard, including that part of plot 1 which was coloured brown on the plan, had been H bought by the plaintiffs in the sense that all the land not put up with Powlett House, including, therefore, the piece in question, had been knocked down to them. In these circumstances I am of opinion that he would not be allowed in a court of equity to assert his legal title against the plaintiffs, and that the learned judge was right in so holding. In my opinion, the case comes within the principle in *Leuty* v. *Hillas* (1). It is true that in that case the mistake was in the conveyance, I and only in the conveyance, the two contracts accurately describing in each case the property actually bought. But this, in my view, is mere detail. It happened to be easier in that case to prove what each purchaser had actually intended to buy. Here the plaintiffs have, in my opinion, established this point by the clearest evidence, and that being so, the same principle applies. The defendant has accidentally got something which he has neither bought nor paid for, and he had notice that the vendor did not intend to sell to him, for he knew, as I have said, that so much of the property as was not included in what he intended to

A buy was knocked down to the plaintiffs. The principle applicable to *Leuty* v. *Hillas* (1), and to the present case is, in my opinion, that under which a man, acquiring a legal estate with notice that another had a better claim thereto, cannot, in a court of equity, be allowed to insist on his position at law, but will be treated as a trustee for the person rightfully entitled, and be, if necessary, ordered to convey the estate to him.

B Strictly speaking, I think there is no necessity for actual rectification of the plaintiffs' conveyance, but the point is not of very much importance inasmuch as it would require practically the same evidence to fix the defendant with a trust as to entitle the plaintiffs to rectification. Much time, however, was spent in discussing the extent of the equitable doctrine of rectification under which a written contract or other document which by a mistake common to both parties fails to C carry into effect their antecedent bargain may be rectified so as to conform thereto, and in particular whether the Statute of Frauds is an obstacle to such rectification where the subject-matter is the sale of land. The learned judge has expressed the view, contrary to the opinion of FARWELL, J., in *May* v. *Platt* (4), that the Statute of Frauds does not in such a case prevent the rectification of the contract on the conveyance, and, although in the view I take it is unnecessary to determine this D point, still, in deference to the arguments addressed to us, I think it right to say a few words upon it.

The jurisdiction of courts of equity in this respect is to bring the written document executed in pursuance of an antecedent agreement into conformity with that agreement. The conditions to its exercise are that there must be an antecedent contract and the common intention of embodying or giving effect to the whole of E that contract by the writings, and there must be clear evidence that the document by common mistake failed to embody such contract and either contained provisions not agreed upon, or omitted something that was agreed upon, or otherwise departed from its terms. If these conditions are fulfilled, then, it seems to me, on principle, that the instrument so rectified should have the same force as if the mistake had not been made, in which case the Statute of Frauds would be no defence to F an action founded upon it. The authorities on this point have been so fully stated and discussed that I think it is unnecessary for me to review them again. I would, however, add a reference to two cases in which a marriage settlement has been rectified on parol evidence of mistake, viz., *Johnson* v. *Bragge* (9) and *Hanley* v. *Pearson* (10), and to *Cowen* v. *Truefitt, Ltd.* (11), in which the same relief was obtained in respect of a lease. I would also refer with approval to MR. CYPRIAN G WILLIAMS' statement of the law in WILLIAMS ON VENDORS AND PURCHASERS (2nd Edn.), vol. 1, p. 783; see also the statement of the law on this subject in STORY'S EQUITY JURISPRUDENCE, ss. 155–159. *May* v. *Platt* (4) is not a very satisfactory authority. The point was dealt with on an application to admit evidence, the judge, therefore, did not have the opportunity of knowing in what precise particular there was a mutual mistake or how such mistake arose, nor was the question H thoroughly argued. Neither *Hanley* v. *Pearson* (10) nor *Cowen* v. *Truefitt, Ltd.* (11) nor *Olley* v. *Fisher* (6) was cited, nor was any reference made to the discussion of the question in FRY ON SPECIFIC PERFORMANCE (2nd Edn.). On the whole, on this point I agree with LAWRENCE, J., that, if such relief were necessary, the plaintiffs' conveyance could be rectified so as to bring it into conformity with the actual bargain in each case. It seems to me that, on principle, if an instrument I of whatever nature is rectified, it ought to be treated as if the necessary alteration had actually been made with the law and had been part of the document at the date of its completion. On the whole, I agree with the judgment of LAWRENCE, J., and am of the opinion that this appeal fails and should be dismissed.

YOUNGER, L.J.—The facts of this difficult case have been very fully and carefully stated. I will, accordingly, if I may, confine myself in any statement I make of them to certain aspects of these facts not referred to, which have a distinct bearing on a very fundamental problem in the case which was not, it

would seem, very fully explored in the court below—I mean the state of mind in relation to these two sales of the vendors themselves, not of one agent or of another, but of themselves. After all they were the parties to the agreements and conveyances. It is their state of mind which matters in this dispute. Yet they were neither of them called as witnesses. A possible explanation of the absence of both of them from the box may perhaps be gathered from the evidence of their solicitor, Mr. Stirk. Perhaps they were not prepared to support on this question of common mistake the case of the plaintiffs. But however this may be, they were not called, and their position in reference to this question must be ascertained as far as possible by their statements and actions as disclosed in the evidence that was adduced. It seemed to me, after the hearing, to be not unlikely that, if the relevant facts in the case were marshalled from that point of view, it would be found that the personal position of the vendors in this matter was at the very least left in a condition of complete uncertainty—as serious a result for the plaintiffs as if it were affirmatively established that in relation to the two formal contracts with the conveyances following thereon which they executed, the vendors were under no mistake at all. Accordingly, I have thought it right to inquire into their state of mind with reference to this important matter. That they laboured under some mistake is not in doubt, but I think it has been assumed rather than established that their mistake was the same as that of the plaintiffs, that is, that both vendors and plaintiffs laboured under a common mistake. I propose to examine the facts with the view of ascertaining whether this assumption is shown to be correct.

The vendors' testator, Benjamin Davis Rollings, purchased plot 1—the blue and brown land—in 1877; plot 2—the pink land—he acquired in December, 1885. These contiguous plots were two of a series, similar in size and laid out, it would seem, for building by the trustees of the Duke of Cleveland's settled estates to whom the land originally belonged. On plot 1 the testator, who was himself a builder, erected, apparently for his own occupation, the house No. 44, Powlett Street, the brown land being its garden ground, although that it has ever yet been so used is improbable. Plot 2—the pink—has never been built upon at all. The testator, before he acquired the pink in 1885, used the brown land as his building yard. After he had bought the pink he used both that land and the brown as his yard, but whether or not with the original boundary between the brown and the pink entirely removed, is not certain. In or about 1905, to meet the objections of his housekeeper, "who was complaining of the litter," he had the brown and the pink physically shut off from the blue back-yard of the house, but with access left both from the blue to the pink, and from the blue to the brown. A year or two later he removed to more commodious premises elsewhere, and he let the building yard, as he was himself then using it, to one George Greenstone, at a rent of 6s. a week, paid quarterly, but having first closed up the two accesses from the blue to which I have just referred, and in that state the premises remained until the date of the sale. Mrs. Hinckes, one of the vendors, is the testator's daughter; whether she ever lived at 44, Powlett Street with her father does not appear. It may, however, be not immaterial to observe that she never could have lived there when there was not a direct access from the blue to the brown. If she lived there prior only to 1905, the brown and the blue were not during her time even separated the one from the other. This physical division of the premises, adopted in the first instance solely for the business purposes of the owner of the entirety, was, it seems very obvious, highly disadvantageous to the house, as a dwelling, and to its amenity as such. We hardly need the evidence of Mr. Leighton, the defendant's surveyor, to make it reasonably clear that the house without the brown land in the rear was incomplete, and that it would be a condition of any proper division of the entire property into two lots for sale at public auction that the blue and the brown should be one of the lots, a lot composed of a house with its garden ground as in the original building scheme. Very possibly, because of its obvious disadvantages as then occupied, the house apparently remained, after the

A testator left it, for the greater part of the time unlet. It had been vacant for two years before, in 1909, it was taken on lease by Mr. Dean, a witness in the case. He gave up his tenancy in 1913. Whether it has been again let does not appear. It was certainly unlet and empty at the time of the sale.

I doubt whether the full significance of all the circumstances in this case—some of them in themselves quite trifling—can be fully appreciated unless the original B purpose of these two plots and their history while in the hands of the testator are borne in mind. They have a very material bearing upon any division of the premises likely to be directed, if a sale of them in lots was to be resolved upon, and in whole or in part—for though they were not equally well known to all concerned, they account to some extent for the extraordinary unanimity with which everybody in this case, whether acting for vendors or for purchasers, carried C out these two sales, by a conveyance accepted, of plot 1 to one purchaser and of plot 2 to the other. They are also of special significance in relation to one party to the case. The defendant Hunt knew the premises in the days of Mr. Rollings, when one entered the brown straight from the blue, and he knew that then the two were occupied together. I think that his evidence as to what he expected to get when he contemplated buying the house and his uncertainty as to his rights D after he actually entered on possession, indicated by his conversation with his wife, which, as a story, the learned judge did not believe, may, perhaps, be entitled to more serious consideration in view of these facts. I have read his evidence several times and it does not strike me as the evidence of a witness out to make points for himself or ready to deny every suggestion against his interest. This I think it due to him to say.

E Mr. Rollings died in April, 1913, and in the summer of 1920 his legal personal representatives—his daughter and her husband—decided to offer the whole property for sale by auction, and it was accordingly announced for sale by Messrs. Boswell and Tomlins for the evening of July 27, 1920. By the particulars as actually prepared and by the posters advertising the sale, the entirety was to be offered in one lot. There was no hint or indication given that the property might be divided F to suit bidders or otherwise. Plot 1 and plot 2 were held, as has been seen, under different titles. The deeds relating to both plots were brought by Mrs. Hinckes to Mr. Stirk on July 21 to enable him to prepare the conditions of sale. On undoing the parcel while she was there he found, as was the fact, that there were two separate conveyances—those of 1877 and 1885—of two plots side by side, and he asked which the house was built on and whether they were separate. She G showed him which the house was and he thinks he marked one "house" and the other "yard." On cross-examination Mr. Stirk said that it might have been the wrappers he marked in that way, and the learned judge has so found, and the statement is rather borne out by some expressions in the correspondence. But the real significance of the incident is the answer given by Mrs. Hinckes, whatever it was, that led Mr. Stirk to mark the deeds as he did. Many things become H clear, as will hereafter appear, if it was her impression, however erroneous, that the yard, by which I mean the building yard, was all of it comprised in the conveyance of 1885.

On the day of the auction, Mr. Hinckes sent to the auctioneers a letter directing a division of the property into two lots and fixing the reserve for each, should no bidder for the entirety up to the reserve already fixed for it present himself. I I pause here to observe that the auctioneer was bidding on behalf of the plaintiffs and by their instructions. He knew nothing of the deeds under which the property was held, but, having visited the property some time before the auction, he had seen the yard as then occupied by Mr. Greenstone, and he acted upon Mr. Hinckes' letter instructing him to offer the yard as one lot as applying to that yard as he had seen it. The yard was not publicly offered by metes and bounds or by reference to Greenstone by name, but the auctioneer, whatever he may have said, intended to offer that yard, and, on the plaintiffs' behalf, to bid for it. No contract was, however, then signed by the plaintiffs nor did the auctioneer describe the lot in

terms which conveyed to Mr. Stirk—to take him as representative of interested persons present—any intimation that the agreement, in fact prepared by him next day in the terms of the formal contract of July 29, was not a complete fulfilment of any offer made at the auction. I do not desire to minimise the effect, whatever it may be, of the fact that on this occasion the auctioneer, as agent of the plaintiffs, knew what he was being offered by himself as auctioneer. But when I remember that, as he said, for interested reasons, he made no reference to the area of land going with the house he was offering, and to the complete absence of particulars in relation to the yard, my own view would be that no other bidder than himself could, from anything that was said, expect to get more than was, in fact, included by Mr. Stirk in the contract of April 29. I cannot myself suppose, in any case, that any intelligent conclusion could be gathered by any person present that a yard of some dimensions rather than others was being offered for sale. The "house" was not then sold. Mr. Thomas and the defendant, who had inspected the residence some days before—at a time when no actual division for purposes of sale had been either made or publicly intimated, decided that they did not want the pink, but that, if the "house" were sold separately, they would go to £500 for the "house"—whatever that expression as I here use it must be taken to have meant to them.

It is important at this point to observe that there was never any negotiation between Mr. Thomas and the auctioneer. His negotiation was entirely with Mr. Stirk. Mr. Thomas asked what was the reserve for the "house." He was told £700. Mr. Thomas then said he had a maximum offer of £500. Mr. Stirk said, I now quote the learned judge,

> "that this would not be of much use, but he asked Thomas to leave his address, which he did. Early on the following morning, July 28, Mr. Stirk telephoned to Mr. Thomas to inquire whether his offer of £500 still held good and, on being informed that it did, asked Thomas to send round a deposit of £10."

Mr. Stirk must have received in the interval express authority from the vendors to accept Thomas's offer for the house in terms which enabled him, as he thought, to prepare for Thomas's signature a formal contract for the sale for £500 of plot 1 —that is to say the blue and the brown. There is, however, no evidence as to the terms of this authority or the time at which or the circumstances in which it was given. I have not myself seen either the original or a copy of either of the two contracts as signed for the vendors. In para. 9 of the statement of claim it is alleged that both were signed by themselves, in which case their actual terms would be brought directly to their notice. The learned judge, however, who doubtless saw these agreements, said that each of them was signed by Mr. Stirk on behalf of the vendors. The above comment is, accordingly, not open, but it may be truly made with reference to the conveyances dated respectively Sept. 2, 1920, and Sept. 3, 1920, by which the purchases were completed.

The trouble with regard to these two conveyances began eight months later—in May, 1921. The plaintiffs, who intended only to buy and who believed that they had bought and acquired Greenstone's yard, which, as occupied by him, comprised as they knew, not the pink only but the brown as well, ascertained that in the conveyance to them of Sept. 2, there was comprised only the pink. Their case, as accepted by the learned judge, would, on proof of their own mistake, have entitled them to rescind the sale on the ground that the parties to it were never ad idem. That remedy, it seems, they did not desire to pursue. Any other remedy, in the absence of willingness by the defendant to whom it had been conveyed, to give up the brown to them, was to try to compel him to do so by establishing as a first step a case, not of unilateral mistake on their own part, but of common mistake on the part of the vendors and themselves. But on approaching the vendors it was made plain that they admitted no common mistake, and that they would not assist in any way except on a complete indemnity against all claims—an indemnity ultimately executed by the plaintiffs on Sept. 30, 1921.

Upon the plaintiffs' agreeing upon that basis to negotiate from the vendors for what it was worth a conveyance of the brown land, Messrs. Stirk made it clear that even under that indemnity the vendors would admit no mistake on their part. The correspondence at this stage is very striking. In June, 1921, the plaintiffs' solicitors sent to Messrs. Stirk & Co. the first draft of a deed for conveying the "brown" to them, and containing, as is apparent from Messrs. Stirk's reply—the draft itself is, unfortunately, not forthcoming—recitals imputing mistake in common with the plaintiffs in connection with the original transaction. Messrs. Stirk's reply is uncompromising. On June 22 they write:

> "We do not agree with the recitals in your draft. This sale is governed by a written contract dated July 29, 1920, and the vendors have already conveyed to your clients all they contracted to convey. Apparently you now ask our clients to convey land which is not vested in them. This, of course, they are unable to do, and we cannot advise them to purport to do so."

On July 7 the plaintiffs' solicitors send a fresh draft conveyance with this letter:

> "Referring to our interview last week, we enclose a fresh conveyance in this matter. It is the same as the other except that we have set out in the recitals the history of the matter just as it happened. We shall be glad if you can approve this draft, it being understood that our clients are not seeking to establish a claim against your clients, but only to obtain a conveyance from Hunt and his mortgagee of the land that belongs to them. Counsel has advised that before issuing a writ against Hunt we should tender a conveyance for execution by him."

The draft so sent is in evidence. It became ultimately the conveyance of Sept. 30, 1921, executed (? after) the indemnity to which I have referred. It is returned approved in red by Mr. Stirk with, inter alia, these three marginal notes. The first introducing the recital is:

> "It must be understood that we do not admit or deny Messrs. Craddock's interpretation of the verbal arrangement. All we know is that we prepared a contract to carry out same as was understood then, and that we forwarded this contract to Messrs. Craddock by post, and they signed and returned same without comment, and the terms of the written contract have been carried out."

The second opposite the recital of the proceedings at the auction describing the yard as being one at the side and rear of the dwelling-house, and then let to Mr. Greenstone, glass merchant, is:

> "The sale to Messrs. Craddock was some days before the sale to Mr. Thomas and was of 332 square yards of land which has been conveyed to him."

The third note, towards the close of the recitals, is this:

> "Our perusal of this draft must not be construed as our confirmation of the statements in the recitals, as many of them are quite outside our knowledge."

On this question of common mistake, the only witness, so far as the vendors were concerned, was Mr. Stirk, called by the plaintiffs; his evidence may be summarised by his answer to this comprehensive question put to him by the learned judge: "The marginal notes on the draft represent your views then and now?" Answer: "Yes." The extreme reluctance on the part of the vendors to support the plaintiffs' contentions of fact in this case is indeed one of the striking features of the litigation. That reluctance, as I see it, is in no way due to any special tenderness for the defendant. Its explanation must be found in other directions, which may later in this judgment disclose themselves. As I read the correspondence and evidence, however, I am satisfied that the vendors only did so much as they did to save their estate—they are only executors—from attack by the plaintiffs. That secured, they have remained quite neutral since. Here, then, the evidence as to the common mistake of the vendors is left, with one addition, of course, a most important one—viz., the letter of instructions sent by Mr. Hinckes

to the auctioneer on June 27, 1921, and produced by him in his evidence. Undoubtedly the yard to which the writer there refers as being the yard to comprise one of the lots, is described as "still at the old rental of 6s. a week," i.e., the rent paid by Greenstone for both the brown and the pink. The learned judge on this, and on this alone, finds unhesitatingly that there was no sort of misapprehension in the minds, inter alios, of the vendors as to what was being sold to and purchased by the plaintiffs, or as to what property was on the next day sold to the defendant through Thomas. I do not know whether the learned judge might have modified that opinion, had there been present to his mind, in relation to this part of the case, any of the history and circumstances to which I have been referring. But that review, coupled with the action of the vendors at every subsequent stage leads me, at least, to infer that, while they too were under some misapprehension, their mistake was not the same as the mistake of the plaintiffs. For my own part, I feel reasonably satisfied on a review of all the facts that under the description of the yard for which they were receiving 6s. a week, Mr. Hinckes' intention was to include everything comprised in the deed of 1885—the deed the envelope of which Mr. Stirk had marked "yard" in Mrs. Hinckes' presence—and his belief being that that included the whole of the yard, for which they were receiving 6s. This was their mistake, and it is, because it was that and no other, as I am led to conclude, that the vendors, against whose honour no word has been said, have never at any time, directly or indirectly, suggested, so far as I can see, that the defendant received under his agreement and conveyance a yard more than at the time they intended him to have. The last thing they had it, then, in their minds to do—such is my inference from the whole of the circumstances so far as we have been permitted to know them—was without, be it noted, any advice or assistance to interfere in their "lotting" with the division of the property made by the deeds themselves.

The whole trouble has been due to the fact that the auctioneer, who knew nothing of the deeds, did know about the yard: the vendors knew of the deeds, but were either ignorant, confused, or forgetful as to the real relation in which the yard as then occupied stood to them. To my mind, no other explanation will square with or account for their conduct in this matter from first to last, or will account for their assertion, never, so far as I can see, withdrawn, that what the plaintiffs were to have was the 332 square yards, and that they have got. In these circumstances if the mistake of the plaintiffs is to be imputed to the vendors personally as a common mistake it was, as it seems to me, essential that the vendors, or at all events one of them, say Mr. Hinckes, should have been called to say so. If he had, the review of the facts here given will show how difficult it would have been for him, a fiduciary vendor too, to make that statement convincing. He would have to say, of course, that it had been his deliberate intention to sell the yard as it stood for £200. Now the brown is about a third of the whole. Its proportion of the £200 is therefore about £66. If he were then asked whether for the sake of that £66 he had without advice risked being left with a house on his hands valued at £700, and deprived permanently of any garden ground, or if he were asked whether he had not put a fantastic reserve of £700 on this house with only a backyard—the auctioneer thought so—while at the same time offering all the land for £200; or whether, for the sake of such a sum as £66—or, if you like, £100—for doubtless the sum would not have been worked out in his mind arithmetically—he had deliberately imposed this permanent handicap upon the house the value of which in his eyes was relatively so much higher than the land—what could he have said in answer? In my view, he could have said nothing intelligent. And there are many other questions of the same sort that come readily to the mind. Is it, then, remarkable that Mr. Hinckes did not, nor did Mrs. Hinckes, in fact, come forward to say that they ever had any such intention—surely not; and all the more when this also is remembered that although by their indemnity arrangements with the plaintiffs the vendors have been relieved of all pecuniary risk resulting from any claim upon them by the defendant.

A Nevertheless, neither their solicitor nor they would make or have made, either in the witness-box or out of it, that avowal of this common mistake which the learned judge has found that they shared with the plaintiffs.

But it is not necessary for the purpose of any conclusion on this part of the case that my own view as to the vendors' state of mind should even probably be correct. It is enough if it is reasonably possible. The evidence by which it is B sought to show that words taken down in writing are contrary to the concurrent intention of all parties to the instrument must be of the highest nature—it must be "irrefragable." This dates from the time of LORD THURLOW; and LORD ELDON, quoting him with approval in *Marquis of Townshend* v. *Stangroom* (12) (6 Ves. at p. 334), proceeds:

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> "He therefore seems to say that the proof must satisfy the court what was the concurrent intention of all parties; and it must never be forgot, to what extent the defendant, one of the parties, admits or denies the intention."

I need not multiply authorities on this point. The rule, I think, is not open to question, and applying it here I reach the conclusion that the plaintiffs have failed D in limine; they have not even begun to move in their action. They have only shown that their case was rescission or nothing. To avoid misunderstanding I desire to add here that, in considering the position of the vendors personally, I have passed the stage of any intention attributable to the auctioneer. We are considering now a case of rectification not of rescission. In such a case what must be established is that there has been a mistake in drawing up the formal document E common at its date to the parties to that instrument.

As I have said, the case of the plaintiffs, as I see it, was rescission or nothing. In saying so, however, I ought not to forget that the plaintiffs do contend that in fact they do not need to rely on mistake at all, for that the agreement for sale to them of July 29, 1920, includes on its true construction both the pink and the brown. The learned judge, although with some hesitation, has so held. I regret F that I cannot take that view of the agreement. It is, to my mind, an agreement for a sale of land measured by metes and bounds with a frontage of 6 yards and a total area of 332 square yards, or thereabouts. The title to the lands sold is expressed to commence with the indenture of Dec. 23, 1885, and a reference to that indenture shows the identical measurements previously mentioned. Moreover it, in fact, is quite true to say, as the agreement does say, that these premises G "are now in the occupation of Mr. Greenstone." It is, therefore, not, to my mind, open, on construction of this agreement, to say that because a further parcel of land of 189 square yards belonging to the vendors is also in the occupation of Mr. Greenstone, that that area is to be included under the words "or thereabouts," the more especially as the indenture of Dec. 23, 1885, has no connection with these 89 square yards, which, if they were included in the agreement, would therefore H be there under an open contract. In my judgment, the actual intention of the draftsman of this agreement has been as completely given effect to by the words used in it as it is given effect to in the conveyance which followed it. Under the agreement and the conveyance it is, to my mind, quite clear that the plaintiffs have a conveyance of the pink, and of the pink only; and I would here observe that the learned judge utilised the decision of *Leuty* v. *Hillas* (1) merely for the I purpose of assisting a decision in favour of the plaintiffs on the footing that the agreement of July 29 actually comprised the brown land. It was not supposed by the learned judge, nor was it contended before us, that that case assisted him on any other hypothesis. My own view is the same. But I will return this matter at a later stage. The plaintiffs' case before us failing, his case, on construction, was that, on the learned judge's findings of common mistake, he was entitled to have his conveyance rectified, and thereupon obtain an order against the defendant for a conveyance to the plaintiffs of the brown land, which, as against them, he was not, so it was contended, entitled to retain. Counsel for the plaintiffs was

quite express that until he had his contract and conveyance reformed he had no rights against the defendant. Here, too, I agree with him. A

Accordingly, I will assume that I am wrong in the views I have expressed on the question of mistake and I will proceed to inquire whether rectification of the plaintiffs' agreement and conveyance, even on the footing of mutual mistake is possible—and we are now confronted with questions of extreme difficulty. There can, I think, be little doubt—however the relief is phrased—that here we have in substance an attempt by the plaintiffs to obtain what in effect is specific performance of a written agreement with a parol variation. It is impossible to read LORD ST. LEONARD'S judgment in *Davies* v. *Fitton* (3) (2 Dr. & War. at p. 233) with his concluding statement that it is so clear the court can make no such decree "that it is really against first principles to discuss it" without feeling how great must be the responsibility of any tribunal if it determines that the court can now make such an order. LORD ST. LEONARD'S judgment is all the more emphatic when it is compared with his judgment in *Mortimer* v. *Shortall* (13), cited by the plaintiffs, but delivered only eight days afterwards, in which the Lord Chancellor did rectify because the prior agreement was not in writing. Then there is FARWELL, J.'s judgment in *May* v. *Platt* (4), in which he applied *Davies* v. *Fitton* (3) without doubt or hesitation. It is true that *Olley* v. *Fisher* (6) was not cited to FARWELL, J., but the retort is open that *Davies* v. *Fitton* (3), with all the authority of LORD ST. LEONARDS, was not then cited to NORTH, J. I am, of course, conscious of the criticisms which have been made upon this principle. I have little doubt that they originated in, if you will, the timidity of the Court of Chancery in the exercise of its jurisdiction either to rectify or specifically enforce contracts to run counter to any positive rule of law relating to written instruments. I am not sure that there is not good sense in that timidity, but, be that as it may, the principle is old and, apart from recent criticism, well established, and I think myself that the safer course to take with reference to it is that adopted by NEVILLE, J., in *Thompson* v. *Hickman* (8), and leave this vexed question for the final decision of the House of Lords. To my mind, this is one of those rules which, if they are binding at all, are as binding on the Court of Appeal as on the Chancery Division and it may perhaps more safely be left to the highest tribunal to release us, if to them it seems that the rule ought not to remain operative. I am the more inclined to suggest this course because the authorities, before the Judicature Act, being almost admittedly preponderant in favour of the rule I find it difficult even to understand how that Act can have made any difference with respect to this matter. For while the Judicature Act may enable you to do in one action what before the Act had to be done in two, I have difficulty in seeing how it enables you to do in one action something that before the Act you could not do at all. I do not doubt that I must be mistaken in this view, the contrary being so authoritatively asserted. But although I have searched I can find no explanation of the change the Act has effected which satisfies my mind. For myself, therefore, I would prefer to leave these cases to be dealt with by the House of Lords, I hope in some later action, and say that for that reason we should hold that rectification should not here be entertained. B C D E F G H

But I am prepared to come to the same conclusion, on what seems to me a more certain ground and that is that you can have no specific performance with a parol variation if thereby the Statute of Frauds would be infringed. In *Olley* v. *Fisher* (6), NORTH, J., following FRY ON SPECIFIC PERFORMANCE, while holding that the court could reform a contract and direct a specific performance of the reformed contract, could, he said, so do, in every case in which the Statute of Frauds does not create a bar. I know that a very limited construction has been placed upon that reservation. I doubt for many reasons why any such limitation is permissible, but mainly because on principle it seems to me to be necessary, if the statute is not pro tanto to be repealed altogether, that no defendant shall be required to convey land to a plaintiff under agreement unless there is a signed note or memorandum of that agreement forthcoming or unless the statute on the ground I

A of part performance or by reason of countervailing fraud or otherwise is inapplicable. And I am glad to find that the application of the statute was recognised in these cases as long ago as 1691 in *Cass* v. *Waterhouse* (14). In that case there was a question whether I. S. had or had not agreed to convey five houses in mortgage and not three only to A. Upon a bill brought by A. to have the houses conveyed . . .

B "though the court seemed satisfied that I. S. had covenanted to convey all five to A. and though she had so done, yet there being no agreement in writing as to the two houses not comprised in the conveyance the Statute of Frauds and Perjuries stood full in the way that they could not decree the conveyance of them."

C I have found also in the American Reports a most admirable discussion of the whole subject, and in the same sense in *Glass* v. *Hulbert* (15)—a case in which STORY'S editor says (EQUITY JURISPRUDENCE (11th Edn.), vol. 1, p. 162, n.):

"The authorities were extensively considered and it was held that equity would not reform a deed of land on oral evidence so as to make it embrace other land alleged to have been omitted by mistake unless by part performance
D or otherwise the defendant were estopped from setting up the statute."

I have read the case. It is full of learning; it bears out entirely what STORY says of it, discussing incidentally the doctrine of part performance with a fullness which is very useful also in the present case. I will cite only two passages from the judgment:

E "Rectification by making the contract include obligations or subject-matter to which the written terms will not apply, is as much in conflict with the Statute of Frauds as if there were no contract at all."

This proposition is supported by reference to American authorities. The judgment goes on:

F "Such rectification when the enlarged operation includes that which is within the Statute of Frauds must be accomplished if at all under the other head of equity jurisdiction, namely fraud."

For that a series of English authorities is cited. I cannot myself see the answer to these propositions, and I should desire also, if I may, to adopt as part of my judgment a most lucid statement of the position to the same effect contained in
G ASHBURNER'S PRINCIPLES OF EQUITY (1902), p. 382. I may add that I have found no case in which in England any order to the contrary of these statements has been made.

But then two answers are brought forward in the present case. The first, somewhat tentatively, is that the statute is not pleaded. To that the reply, I think, clearly is that no allegation is made in the statement of claim which would suggest
H the statute as a defence. I find that BACON, V.-C., in one of the cases which I have consulted for the purpose of this judgment, remarked that the Statute of Frauds had no more to do with the case before him than had Magna Charta. That strikes me as being the position of this statement of claim. Moreover, the question of the statute was discussed in the court below and is dealt with by the learned judge in his judgment. In these circumstances an amendment raising the plea
I of the statute would be a matter of course. The second answer, and this has been accepted by the learned judge, is that there has here been part performance sufficient to take the case out of the statute. But I suggest very respectfully that that is not so. It is said the plaintiffs have taken possession of the brown. But they have taken such possession against the defendant to whom it was conveyed on Sept. 3, 1920: they were not given it by the vendors. The case might have been different if, as the plaintiffs tried to prove, they had expended money on the brown or otherwise altered their position on the faith of the verbal agreement. But they failed to prove that case, and, in my view, as against the defendant here

no kind of part performance is shown on their part sufficient to take the case out of the statute. A

I am of opinion, therefore, that rectification of the plaintiffs' agreement and conveyance is impossible, even if mutual mistake be admitted. But if again I be wrong in this, then the question still remains whether that gives the plaintiffs any rights whatever as against the defendant. Here the first observation I desire to make is that there is, as I think, no case for rectification at the instance of B the vendors of the defendant's contract or conveyance. I do not, for this purpose, need to rely upon any view I may hold as to the vendor's intentions in relation to the defendant's contract. I will assume that they have not been given effect to. Even so there is no room for rectification. For that contract was not preceded by any agreement of any kind with reference to which, even if it were otherwise permissible, rectification could be directed. In other words, and apart from every C technicality, there is no case for rectification here at all. Nor, indeed, did counsel for the plaintiffs contest this point. He admitted it freely. The plaintiffs, he said, must obtain a conveyance from the defendant by the strength of their own right and not by any assistance from the vendors. But how, it may be asked? The learned judge has so decreed, but he has not given the answer. Neither, so far as I could appreciate their arguments did the plaintiffs. I begin by observing D that no kind of fraud is alleged against the defendant. Any such imputation was expressly disclaimed. I observe next that nothing that happened at the auction is alleged to give the plaintiffs any rights as against the defendant. It is not even alleged that Thomas, to say nothing of the defendant, was present at the auction. Where, then, is there any kind of right in the plaintiffs as against the defendant other than a right which, on rectification of their conveyance, they can set up as E in the shoes, so to speak, of the vendors? I can myself see none in the plaintiffs themselves, and the vendors, as I have shown, have none. If there is any at all it must be by some extension of the principle of *Leuty* v. *Hillas* (1). But is there any principle in that case that can be so far extended? I cannot find one. The principle of Lord Cranworth's judgment, if it is looked for, is really very simple. It will be noticed that the proceedings at the auction in that case, so much F discussed in the argument, are not once even mentioned in the judgment. The judgment is based exclusively on the terms of the actual contracts as executed by the plaintiff, purchaser of lot 5, and defendant, purchaser of lot 6. The whole pith of the judgment is, I think, clearly in these words (2 De G. & J. at p. 122):

> "Mr. Hillas then entered into a contract for the purchase of lot 6 not including the disputed parcel. He might think that his contract concluded it; but he had no right to think so, for the contract according to its fair construction extended to nothing but what was in the occupation of Mrs. Trulock. Having then by his assignment obtained more than what was included in his contract he became merely a trustee of the excess and the plaintiff is entitled to a decree against him." G

H

That is to say, the defendant had obtained an assignment capable of being rectified in accordance with the prior written contract. The benefit of that rectification had passed to the plaintiff, the purchaser of lot 5, by his contract with the vendor. The assignment, therefore, by the defendant was ordered to go to the plaintiff direct. There is no refined equity here—no application of the doctrine of notice or anything of that kind. The case ceases to be applicable to this case so soon I as it is ascertained that the defendant's contract and conveyance here are, as they are, unassailable, to say nothing of the fact that the plaintiffs' contract and conveyance are in all respects, as executed, consistent with the complete correctness of the defendant's. If there were any such refined equity involved in *Leuty* v. *Hillas* (1) it would, in my judgment, be quite inapplicable to any such proceedings as characterised the auction in this case. Compare the precision of the particulars there with the happy-go-lucky proceedings on the present occasion. I have already referred to them. I need not do so again. If they were to be made the

A foundation of any claim they should most certainly have been pleaded. They are not. Apart from this—of itself I think fatal—I cannot as a result of them find any kind of equity binding the conscience of the defendant towards the plaintiffs even if they had succeeded in establishing their right to rectify their own conveyance as against the vendors. I could not myself—in case of dispute—conclude anything from the somewhat happy-go-lucky proceedings at the auction, with the B auctioneer bidding vigorously for a lot the contents of which he himself thoroughly understood but which he had only vaguely described to the others present. I should not myself venture to vouch such proceedings as effective in case of dispute to bind anybody to anything or to notify anything to anybody. The only reason why, as I see it, the plaintiffs in relation to this auction stand on firmer ground than could anybody else is that, as between the auctioneer and themselves, there C was no room for misunderstanding. The truth is, I think, that the plaintiffs' difficulty, such as it is, results from their own carelessness and from nothing else. I have not hitherto said a word about them or about the extraordinary want of method and absence of consultation in respect of this purchase both between the two Messrs. Craddock, on the one hand, and between their company and its solicitors, on the other. Everyone of these people knew something: no one of D them knew everything. Yet apparently they never conferred.

The result is miscarriage, the consequences of which, with the assistance of acquiescence though not of support on the part of the vendors secured by a complete indemnity, they are seeking in these proceedings to throw on to the defendant. In my judgment this is mistaken action on their part, although I in no way blame them for it. The defendant has done them no wrong. If the E auctioneer's estimated rental value of the house he purchased is in any way correct he has paid a more than full price for all that his conveyance gives him. The plaintiffs by the same standard have paid little if anything too much for what they have got. But in respect of that they had a remedy against their vendors they did not think fit to pursue. Whether, however, they had pursued that remedy or not, they should, in my judgment, have left the defendant alone. F As I see this case, it is enough to defeat the plaintiffs' claim that they should fail at any one point. My opinion is—I express it with unfeigned respect and deference for all contrary views—that the plaintiffs fail at all points and I would be for dismissing their action and allowing this appeal.

Appeal dismissed.

G Solicitors: *Wainwright & Co.* for *E. L. Feibusch*, Wolverhampton; *Rawle, Johnstone & Co.* for *Fowler, Langley & Wright*, Wolverhampton.

[*Reported by* J. L. DENISON, ESQ., *Barrister-at-Law.*]

A

MANTON *v.* BROCKLEBANK

[COURT OF APPEAL (Lord Sterndale, M.R., Warrington and Atkin, L.JJ.), March 8, 9, 23, 1923]

[Reported [1923] 2 K.B. 212; 92 L.J.K.B. 624; 129 L.T. 135; 39 T.L.R. 344; 67 Sol. Jo. 455]

B

Animal—Horse—Injury caused by mare kicking gelding agisted in same field—Liability of owner of mare—No proof of scienter.

A mare, fourteen years old, warranted quiet and known to have been previously agisted with other horses, was agisted in a field in which was also agisted a gelding. No notice was given by the owner of the mare to the owner of the gelding that the mare was to be put in the field. The mare kicked the gelding and so injured it that it had to be destroyed. In an action by the plaintiff based on the principle in *Rylands* v. *Fletcher* (1) (1868), L.R. 3 H.L. 330, and on an allegation of negligence by the defendant,

C

Held: (i) the owner of an animal of the class described as mansuetae naturae in which there was a valuable property, e.g., a horse, was not, by reason of the fact of that property alone, responsible for the actions of the animal when they constituted a trespass to the goods of another person exactly in the same measure as if he had himself committed the trespass; while biting and kicking was not contrary to horse nature and so might occur when horses were in the same field, there was no ground, without proof of scienter, for bringing the mare within the class of dangerous animals which the owner must keep at his peril, and so the case did not fall within *Rylands* v. *Fletcher* (1); there was no evidence of negligence; and, therefore, the plaintiff's claim failed.

D

E

Decision of Divisional Court, [1923] 1 K.B. 406, reversed.

Notes. Applied: *Buckle* v. *Holmes*, [1926] All E.R.Rep. 90. Distinguished: *Wormald* v. *Cole*, [1954] 1 All E.R. 683. Referred to: *Gayler and Pope, Ltd.* v. *Davies*, [1924] All E.R.Rep. 94; *Glanville* v. *Sutton* (1927), 44 T.L.R. 98; *Cutler* v. *United Dairies (London), Ltd.*, [1933] All E.R.Rep. 594; *Lathall* v. *Joyce & Son*, [1939] 3 All E.R. 854.

F

As to the liability of owners of animals for damage done by the animals, see 1 HALSBURY'S LAWS (3rd Edn.) 663 et seq.; and for cases see 2 DIGEST (Repl.) 309 et seq.

Cases referred to:

G

(1) *Fletcher* v. *Rylands* (1866), L.R. 1 Exch. 265; 4 H. & C. 263; 35 L.J.Ex. 154; 14 L.T. 523; 30 J.P. 436; 12 Jur.N.S. 603; 14 W.R. 799, Ex. Ch.; affirmed sub nom. *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 2 Digest (Repl.) 313, *164*.

(2) *Lee* v. *Riley* (1865), 18 C.B.N.S. 722; 34 L.J.C.P. 212; 12 L.T. 388; 11 Jur.N.S. 527; 13 W.R. 751; 144 E.R. 629; sub nom. *Riley* v. *Lee*, 6 New Rep. 147; 2 Digest (Repl.) 312, *163*.

H

(3) *Ashby* v. *White* (1703), 1 Bro. Parl. Cas. 62; Holt, K.B. 524; 2 Ld. Raym. 938; 6 Mod. Rep. 45; 1 Salk. 19; 3 Salk. 17; 14 State Tr. 695; 1 Smith, L.C., 12th Edn., 266; 1 E.R. 417; 1 Digest 23, *187*.

(4) *Card* v. *Case* (1848), 5 C.B. 622; 17 L.J.C.P. 124; 10 L.T.O.S. 416; 12 Jur. 247; 136 E.R. 1022; 2 Digest (Repl.) 382, *563*.

I

(5) *Mason* v. *Keeling* (1699), 1 Ld. Raym. 606; 12 Mod. Rep. 332; 91 E.R. 1305; 2 Digest (Repl.) 382, *566*.

(6) *Tillett* v. *Ward* (1882), 10 Q.B.D. 17; 52 L.J.Q.B. 61; 47 L.T. 546; 47 J.P. 438; 31 W.R. 197; 2 Digest (Repl.) 310, *139*.

(7) *Hammack* v. *White* (1862), 11 C.B.N.S. 588; 31 L.J.C.P. 129; 5 L.T. 676; 8 Jur.N.S. 796; 10 W.R. 230; 142 E.R. 926; 2 Digest (Repl.) 317, *171*.

(8) *Manzoni* v. *Douglas* (1880), 6 Q.B.D. 145; 50 L.J.Q.B. 289; 45 J.P. 391; 29 W.R. 425; 2 Digest (Repl.) 317, *172*.

(9) *Ellis* v. *Loftus Iron Co.* (1874), L.R. 10 C.P. 10; 44 L.J.C.P. 24; 31 L.T. 483; 39 J.P. 88; 23 W.R. 246; 2 Digest (Repl.) 312, *158.*

(10) *Hudson* v. *Roberts* (1851), 6 Exch. 697; 20 L.J.Ex. 299; 17 L.T.O.S. 158; 155 E.R. 724; 2 Digest 334, *242.*

(11) *Filburn* v. *People's Palace and Aquarium Co., Ltd.* (1890), 25 Q.B.D. 258; 59 L.J.Q.B. 471; 55 J.P. 181; 38 W.R. 706; 6 T.L.R. 402, C.A.; 2 Digest (Repl.) 329, *219.*

(12) *Cox* v. *Burbidge* (1863), 13 C.B.N.S. 430; 1 New Rep. 238; 32 L.J.C.P. 89; 9 Jur.N.S. 970; 11 W.R. 435; 143 E.R. 171; 2 Digest (Repl.) 319, *187.*

(13) *Holmes* v. *Mather* (1875), L.R. 10 Exch. 261; 44 L.J.Ex. 176; 33 L.T. 361; 39 J.P. 567; 23 W.R. 869; 2 Digest (Repl.) 378, *539.*

(14) *Hadwell* v. *Righton*, [1907] 2 K.B. 345; 76 L.J.K.B. 891; 97 L.T. 133; 71 J.P. 499; 23 T.L.R. 548; 51 Sol. Jo. 500; 5 L.G.R. 881; 2 Digest (Repl.) 320, *191.*

(15) *Heath's Garage, Ltd.* v. *Hodges*, [1916] 2 K.B. 370; 85 L.J.K.B. 1289; 115 L.T. 129; 80 J.P. 231; 32 T.L.R. 570; 60 Sol. Jo. 554; 14 L.G.R. 911, C.A.; 2 Digest (Repl.) 321, *196.*

(16) *Read* v. *Edwards* (1864), 17 C.B.N.S. 245; 5 New Rep. 48; 34 L.J.C.P. 31; 11 L.T. 311; 144 E.R. 99; 2 Digest (Repl.) 377, *532.*

(17) *Clinton* v. *J. Lyons & Co., Ltd.*, [1912] 3 K.B. 198; 81 L.J.K.B. 923; 106 L.T. 988; 28 T.L.R. 462; 2 Digest (Repl.) 327, *210.*

Also referred to in argument:

Gaunt v. *Smith* (1856), Dec. 11, unreported.

Jackson v. *Smithson* (1846), 15 M. & W. 563; 4 Dow. & L. 45; 15 L.J.Ex. 311; 7 L.T.O.S. 231; 153 E.R. 973; 2 Digest (Repl.) 333, *239.*

Blackman v. *Simmons* (1827), 3 C. & P. 138; 2 Digest (Repl.) 331, *224.*

Cooke v. *Waring* (1863), 2 H. & C. 332; 32 L.J.Ex. 262; 9 L.T. 257; 159 E.R. 138; 2 Digest (Repl.) 404, *723.*

Daubney v. *Cooper* (1829), 10 B. & C. 237; 5 Man. & Ry.K.B. 314; 3 Man. & Ry.M.C. 23; 8 L.J.O.S.K.B. 21; 109 E.R. 438; subsequent proceedings 10 B. & C. 830; 16 Digest 128, *259.*

Anderson v. *Buckton* (1719), 1 Stra. 192; 11 Mod. Rep. 303; 93 E.R. 467; 2 Digest (Repl.) 403, *722.*

Bradley v. *Wallaces, Ltd.*, [1913] 3 K.B. 629; 82 L.J.K.B. 1074; 109 L.T. 281; 29 T.L.R. 705; 6 B.W.C.C. 706, C.A.; 2 Digest (Repl.) 327, *211.*

Jones v. *Lee* (1911), 106 L.T. 123; 76 J.P. 137; 28 T.L.R. 92; 56 Sol. Jo. 125; 2 Digest (Repl.) 320, *193.*

Higgins v. *Searle* (1909), 100 L.T. 280; 73 J.P. 185; 25 T.L.R. 301; 7 L.G.R. 640, C.A.; 2 Digest (Repl.) 320, *192.*

Stanley v. *Powell*, [1891] 1 Q.B. 86; 60 L.J.Q.B. 52; 63 L.T. 809; 55 J.P. 327; 39 W.R. 76; 7 T.L.R. 25; 43 Digest 431, *568.*

Appeal from an order of a Divisional Court (DARLING and SALTER, JJ.) reported [1923] 1 K.B. 406.

The plaintiff, Mrs. Manton, sued the defendant, George Brocklebank, for damages for injuries inflicted on her (the plaintiff's) horse which was in a field at agistment. In October, 1921, the plaintiff had a horse at agistment in a field belonging to a farmer. The defendant had obtained on approval a mare which had been warranted to be quiet. With the farmer's permission he placed this mare in the same field as that in which the plaintiff's horse was at agistment. He did not give the plaintiff any notice of his intention to do so. On the following morning the two animals were found in circumstances which led the deputy county court judge to hold that the defendant's mare had kicked the plaintiff's horse and broken its leg so that it had to be destroyed. The deputy county court judge also found that there was no custom that warning should be given to the owners of horses already in a field of the advent of another horse into the same field, and that it was natural to all horses, in such circumstances, to play or quarrel. He held that, if two horses

were lawfully in the same field and one injured the other in the course of a quarrel or scuffle, the owner of the horse causing the injury would be liable to the owner of the injured animal, and, further, that, if the failure to give notice of the introduction of the mare in question into the field in which the plaintiff's horse was at agistment was negligence, then the defendant was guilty of negligence. Accordingly, he gave judgment for the plaintiff for £49 damages, the amount claimed, with costs, and the defendant appealed to the Divisional Court (DARLING and SALTER, JJ.), who dismissed the appeal, and the defendant appealed to the Court of Appeal.

Sir Malcolm Macnaghten, K.C., and *D. Nowell Pritt* for the defendant.

J. B. Matthews, K.C., and *F. van den Berg* for the plaintiff.

Cur. adv. vult.

Mar. 23. The following judgments were read.

LORD STERNDALE, M.R.—This appeal from the decision of a Divisional Court, affirming a decision of the deputy county court judge of Kingston-upon-Hull, raises a new question, rightly, I think, described by the learned judges as a difficult one.

The plaintiff was the owner of a horse which she used in her business, and when not working it was kept in a field belonging to a Mr. Shillito—in legal terms, agisted with him. There had been other horses in the same field, and just before the occurrence which gives rise to this action, there was a horse of the defendant, described as a dark horse, there, which had been quite friendly with the plaintiff's horse. The defendant had bought or was negotiating a purchase of a black mare, fourteen years old, which had been warranted quiet, and had it sent to him on trial. He made an agreement with Mr. Shillito for the agistment of this black mare in the same field. The matter was in the hands of the defendant's son, who had asked before purchasing if the mare had been agisted before. The answer is not given in terms, but he said he acted on the vendor's representation, so, presumably, he was told that it had. When he put it into the field he said it seemed quite quiet, and he left it grazing. On the next morning it was found that the mare had kicked the plaintiff's horse on the off fore leg above the knee and broken the leg in such a manner that the horse had to be shot. Both horses were shod, as they were being worked; the plaintiff's horse had flat shoes while the defendant's mare had caulking—that is, turned-up ends on, at any rate, one side. I do not think the caulkings are of importance, except that they helped to identify the shoe that caused the injury; the result of a kick with a flat shoe would in all probability have been the same and there was no contention to the contrary, and no finding that the caulkings were wrong. In these circumstances the plaintiff sued the defendant for the loss of the horse and in answer to a request for particulars gave the following: "The plaintiff is the owner of a horse which was agisted with a Mr. Shillito at Preston in Holderness, and on Sunday, Oct. 9, 1921, the defendant or his servant turned a mare into the field where the plaintiff's horse was running, without any warning to the plaintiff and without first removing the shoes from the mare's hoofs, with the result that the plaintiff's horse was kicked by the defendant's mare and so severely injured that it had to be destroyed the following day."

No point was made of the allegation as to the shoes, and it would obviously be impracticable when a horse was being worked to take off the shoes every night and put them on again in the morning. The point, however, as to giving notice was pressed and was considered of importance by one of the learned judges. The deputy county court judge gave judgment for the plaintiff in these terms:

> "I hold (i) as a fact, that the plaintiff's horse was kicked by the defendant's mare and so severely injured that it had to be destroyed; (ii) I was not satisfied that there is a custom before turning out a horse to grass, that is to say, agist it, either to take off its shoes or to give notice to the owners of other horses already in the field, though it may be prudent to do so; (iii) I hold as a matter of law that when a horse is turned out to grass loose and uncontrolled among

A other strange horses and does injury to one of them, it is not necessary for the owner of the injured animal, in order to recover damages, to prove scienter, it being natural to all horses in such circumstances to kick and bite each other in play as well as in quarrel: *Lee* v. *Riley* (2); and, therefore, the plaintiff is entitled to recover against the owner of the animal doing the damage; (iv) if the mere non-giving of notice amount to negligence then I hold that there was
B negligence; (v) if it was necessary to prove scienter, then it was not proved."

His finding as to negligence is not very illuminating. If there was a duty to give notice, of course there was negligence, but there is no finding in fact or in law whether there was such a duty except that he finds there was no custom to give notice, and this is not conclusive as to the duty. The real ground of his
C judgment is in the third point, and this seems to me to be founded on the principle of *Fletcher* v. *Rylands* (1), that, in consequence of its being natural to all horses when turned into a field with other horses to kick and bite in play as well as in quarrel, they are dangerous animals which the owner must keep at his peril. I think the finding as to the natural disposition of horses proceeds partly upon the evidence in the case and partly upon general knowledge such as the learned judge
D seemed to think expressed in *Lee* v. *Riley* (2). The only evidence actually given was a statement by the defendant's son: "Strange horses are apt to play about a bit," and Mr. Shillito's evidence: "When you turn out animals to agist with others you run the risk of them being injured," though given with another intention, may be said to point indirectly in the same direction. I shall have to deal with the effects of this finding later.

E The deputy county court judge's judgment was affirmed by the Divisional Court. I am not sure that the learned judges proceeded upon quite the same grounds. DARLING, J., seems to have based his judgment chiefly upon the ground that in the circumstance it was negligent of the defendant not to give notice to the plaintiff that he was going to turn the mare into the field, though, if he had turned her out on a large common where there were a number of horses, there might have been
F no duty to do so. SALTER, J., appears to me to have founded his judgment, as I think the deputy county court judge did, upon the principle of *Fletcher* v. *Rylands* (1). I think that DARLING, J., would, if he had thought it necessary, have adopted this ground, and he did also rely upon the authority of *Ashby* v. *White* (3) as supporting his judgment. With respect, I cannot see the application of *Ashby* v. *White* (3). I think here there was either a well-recognised right of action or none
G at all.

The learned counsel for the plaintiff, however, took a much broader ground, namely, that the owner of an animal in which there is a valuable property, e.g., a horse and cattle, is responsible for the actions of that animal when they constitute a trespass to the goods of another person exactly in the same measure as if he had himself committed the trespass. Qui facit per equam aut per bovem facit per se.
H Therefore, he argued, if the defendant's horse kicks the plaintiff's the case is just the same as if the defendant had kicked it himself and produced the same results. This doctrine he admitted does not apply to animals in which there is not at common law a valuable property, e.g., those mentioned in BEVEN ON NEGLIGENCE (3rd Edn.), vol. 1, p. 525, as constituting an intermediate class—dogs, cats, squirrels, parrots, singing birds. The learned counsel produced, I think, every
I relevant case, and, I must say, no irrelevant ones, beginning from a very early time. I think he began, as some of the cases did, with the BOOK OF EXODUS, and one of the cases on this subject, *Card* v. *Case* (4), discusses the Mosaic law, the Athenian, the Roman, and the Code Civil. It must not be forgotten, however, that we are dealing with the English common law, and that these other systems of jurisprudence are only relevant so far as they throw light on this law. It is admitted that there is no decision that establishes this position. I think I am right in my view that we were referred to only one dictum—and that a doubtful one —which in any way supports it. We were referred to a passage in BLACKBURN, J.'s

judgment in *Fletcher* v. *Rylands* (1) (L.R. 1 Exch. at p. 280) which, divorced from its context, may seem quite wide enough to give some support to the argument, but, when read with its context, it clearly has no relation to this question at all. The one dictum that may support it is that of HOLT, C.J., and TURTON, J., in *Mason* v. *Keeling* (5) as follows (12 Mod. Rep. at p. 336):

> "If it had been said that the defendant knew the dog to be ferox, I should think it enough. The difference is between things in which the party has a valuable property, for he shall answer for all damages done by them; but of things in which he has no valuable property, if they are such as are naturally mischievous in their kind, he shall answer for hurt done by them without any notice; but if they are of a tame nature, there must be notice of the ill quality."

It is, however, unfortunate that in the report of the same case in 1 LORD RAYMOND at p. 608 the dictum is differently reported, and puts the duty as one only to take reasonable care, which is very different duty. It is as follows:

> "Per HOLT, C.J., and TURTON, J., the declaration is ill for want of showing that the defendant had notice that the dog was fierce. For there is a very great difference between horses and oxen, in which a man has a valuable property, and which are not so familiar to mankind, and dogs; the former the owner ought to confine, and take all reasonable caution, that they do no mischief, otherwise an action will lie against him."

Then the judgment proceeds as in the MODERN REPORTS. According to WALLACE'S REPORTERS neither of these reports is of great authority, but, as I think Lord Raymond was the Raymond who argued the case, the latter is probably to be preferred. At any rate, it is remarkable that, if this argument be correct, there is during the whole history of the English law nothing but one very doubtful dictum to be found which in any way supports it. Some American and colonial judgments were cited to us which, as mentioned in digests or textbooks, seem possibly to support the contention, but when the reports themselves are examined it is clear that they do not afford such support. In my opinion, moreover, it is opposed to the whole current of decisions, and, so far as such animals are concerned, makes the whole distinction between animals ferae naturae and animals mansuetae naturae absolutely idle in a case of direct trespass to goods. If it be sound, it must be immaterial whether the trespass is according to the ordinary nature of the animal or results from vice; the liability is the same as if the owner committed the trespass himself and the disposition of the animal in doing it is irrelevant. Again, if it be sound, an action would have lain on the facts in *Tillett* v. *Ward* (6), in *Hammack* v. *White* (7), and in *Manzoni* v. *Douglas* (8). I accept the contention of the learned counsel for the defendant that these cases are not direct authorities against him because in none of them was the action brought for the direct trespass to goods, but they all were founded on other alleged causes of action, generally on the case, but it is odd that, if such a simple cause of action did exist, none of them was brought upon it, and that in none of them and in no case cited to us, in their long expression of opinion did any of the judges say that the plaintiff really had a very simple cause of action and had only destroyed his remedy by choosing to sue in the wrong form. Moreover, some of them at any rate, were decided after powers of amendment had been conferred on the courts, and the matter, if it rested only on the form of action, could have been put right. The learned counsel also tried to distinguish these cases on the ground that they happened on the highway where the plaintiff had a right to bring his animal, but I cannot see that such a fact is relevant. The plaintiff's contention is that a trespass to goods by the animal is the same thing so far as concerns liability as a trespass by the owner, and the owner has no right to commit such a trespass on the highway than he has anywhere else. I can see no ground on principle or authority for the contention, and I think it must fail.

There is, however, another contention adopted by SALTER, J., and I am inclined to think by DARLING, J., also, which seems to me to present more difficulty. It is

A that the case falls within the principle of *Fletcher* v. *Rylands* (1), and that the defendant is liable on that principle. This is grounded on the finding of the deputy county court judge, which I have already read, namely, that it is natural in all horses in such circumstances to kick and bite each other in play as well as in quarrel. I have already alluded to the only evidence which is to be found in the notes on the subject, and I cannot see that there was any evidence given at the B trial to support such a broad proposition. The learned deputy judge, however, refers to *Lee* v. *Riley* (2) as supporting that proposition. I do not see that any such statement of fact was made by any of the judges who decided that case. What they decided was that if the defendant's horse was trespassing, and so giving a cause of action to the plaintiff, the act of the horse in kicking another was not so alien to horse nature as to make the resulting damage too remote to be recovered. C This was also the decision in *Ellis* v. *Loftus Iron Co.* (9), and neither of these cases seems to me to establish the proposition of fact stated by the deputy county court judge. I assume, however, that he acted, as did DARLING and SALTER, JJ., upon common knowledge of which the court must take notice. With respect, I think this is rather dangerous. There may be facts of such public notoriety that a court is bound to take notice of them, but the experience of different judges may D well lead them to different conclusions as to the habits of horses. Turning to the evidence in this case it appears that the plaintiff's horse had been agisted with other horses in the same field without injury, that the same was true of the defendant's mare, that the plaintiff knew that other horses were very likely to be agisted in the same field as hers, and there was evidence also that horses belonging to different owners often run loose in the same field, and must at one time have been E strange to one another. It seems to me that no more is established than that this biting and kicking is a thing that may or may not occur, and is not contrary to horse nature. The question is whether this is enough to put the owner of a mare, fourteen years old, warranted quiet, and known to have been previously agisted in company with other horses, in the same position as the owner of what the learned counsel called the judicial pet, namely, a tiger, in the sense that he is responsible F in any case for its actions, though there be on his part no negligence and no knowledge of any tendency of the kind in that particular animal. So to hold seems to me in effect to nullify most of the doctrine distinguishing animals mansuetae naturae from those ferae naturae. It is not confined to horses, but would apply to other animals, and for the purposes of this contention there is no difference between animals in which there is a valuable property and the other class to which G I have already referred. In the same way it might be said to be quite consonant with dog nature to run sheep, though all dogs do not do so, but no dog owner has been made liable in the absence of scienter; in fact I think there are decisions to the contrary. I do not think there is any ground for bringing this mare within the class of dangerous animals which the owner must keep at his peril. There is no decision affirming such a liability in English law though the liability of owners H of different kinds of animals has been the subject of discussion for centuries, and I think I can show that there are several cases in which if it existed it could not have escaped recognition.

The most striking case is *Ellis* v. *Loftus Iron Co.* (9). The county court judge there had given a judgment for the plaintiff on the ground of negligence. The Court of Common Pleas upheld the judgment, not on that ground for they had I doubts about it, but upon a very narrow and technical ground of trespass, namely, by the protrusion of the animal's head over the fence dividing the two fields so encroaching on the column of air to which the plaintiff was entitled usque ad coelum. This, also, was a case of stallions and mares where mischief might be more anticipated than in ordinary cases of animals. If there had been any ground for the contention now advanced the whole discussion as to negligence or trespass would have been idle, and the defendant's case would not have been arguable. The same observation is true with regard to *Lee* v. *Riley* (2) and *Hudson* v. *Roberts* (10). The question of trespass in the one case and scienter in the other

would have been quite irrelevant, and the defendant's liability would have been plain. As I have, therefore, pointed out, when a cause of action, whether in trespass or negligence, has once been established, the defendant may well be liable for any damage produced by acts not alien to the nature of the animals and cannot say such damage is too remote. This, however, does not lead to the conclusion that such acts constitute a cause of action in themselves when the animal is lawfully in the place where it is either by legal right or, as here, by contract. I think the facts of this case do not bring it within the principle of *Fletcher v. Rylands* (1), and do not establish any liability on that ground upon the defendant.

DARLING, J., however, has also based his judgment on the ground of negligence in not giving notice to the plaintiff that his mare would be put in the field. In the first place there is no finding of negligence on this head by the deputy county court judge, except the ambiguous one I have already mentioned. But I think the considerations with which I have already dealt show that there was no duty to give such notice. If the defendant was entitled to assume, as I think he was, that the mare, being mansuetae naturae, was primâ facie an innocent animal, and no facts pointing to her being otherwise had come to his notice, I can see no reason for his giving notice that he was going to put her into the field. I observe that the learned judge only considers a qualified duty to be established, namely, a duty where it is easy and convenient to give notice, not existing where it is difficult as in the case of a horse turned out on a large common. I do not, myself, see the difference in principle, but I do not think the duty exists in either case. I think that it might be contended that the plaintiff having put her horse into a field when she knew that other horses would also be agisted took the risk of what might happen in the circumstances, and this was the meaning of the evidence of Mr. Shillito to which I have already alluded. This would seem to be so especially on the assumption made by the learned judges that such occurrences as took place in this case were the normal results of other horses being turned into the field, and, therefore, known to the plaintiff as to the rest of the world. I prefer, however, not to base my judgment on this ground.

I think I ought to mention a contention of one of the learned counsel for the plaintiff to the effect that if their contentions of law were not accepted, there ought to be a new trial on the ground that the mare was in fact vicious. There was some evidence on which this could be found, and some to the contrary, but if the fact were relevant without proof of scienter, I think that the deputy county court judge should have been asked for a finding on the point, and he was not. I think we should keep strictly to the rule that if a point be not taken at the trial, especially one involving a finding of fact, it cannot afterwards be taken. No doubt, the judge was asked to find scienter, which would involve finding if the mare was vicious, for the defendant could not know of a vice which did not exist, but when he found there was no scienter, no one asked him to find the fact of vice, probably thinking, and I do not say wrongly, that it was irrelevant. The learned counsel, however, went further and said that there was evidence that the defendant suspected she was vicious as he took a warranty that she was quiet. I am not sure that I quite follow the reasoning, but, in any event, if the argument goes to anything, it goes to scienter, and, as I have said, that has been negatived. The appeal should be allowed and judgment entered for the defendant with costs here and below.

WARRINGTON, L.J.—The question in this case is whether the defendant is liable in damages for an injury caused to a horse of the plaintiff by a kick of the defendant's mare. Each of the parties had a contract of agistment with a farmer. Under these contracts on Oct. 9, 1921, the plaintiff turned out in the agister's field a gelding, and the defendant a mare. Both the horses were in work in the daytime, and were shod—the plaintiff's with flat shoes, the defendant's with shoes with "caulking" on one side of the foot only. The defendant's mare had been recently bought with a warranty that she was quiet. She was fourteen years old. The defendant had no reason to believe or suspect that she was given to kicking

A nor is there any evidence that she was so in fact. The defendant's son who took her to the field said he left her grazing, and she seemed as quiet as could be. Each of the parties knew that others had or might have the right to pasture a horse or horses in the field in which the animals were. There was evidence on the defendant's part that he had been agisting horses for twenty years, and that other horses had consequently been put in with his. There was no evidence of any accident B similar to that in question having previously happened. On the morning of Oct. 10 it was found that the plaintiff's horse had had its leg broken by a kick, and it had to be destroyed. It is found as a fact that the kick was inflicted by the defendant's mare. The county court judge decided in the plaintiff's favour on the ground that, as a matter of law, when a horse is turned out to grass loose and uncontrolled among other strange horses, and does injury to one of them, it is not necessary C for the owner of the injured animal, in order to recover damages, to prove scienter, "it being natural to all horses in such circumstances to kick and bite each other in play as well as in quarrel." He cites in support of his view *Lee* v. *Riley* (2). In the Divisional Court DARLING, J., approved the judgment of the county court judge on the ground on which he had decided the case, and on the further ground that the defendant had been guilty of negligence in not giving notice to the plaintiff D of his intention to put the mare in the field or failing to put someone there to watch. SALTER, J., also approved the judgment, founding his decision on the principle of *Fletcher* v. *Rylands* (1), as well as on the ground already mentioned. The question is whether in the circumstances of this case the defendant is liable for the injury done by his mare to the plaintiff's gelding.

The material circumstances are, in my opinion, as follows. The defendant had E a right to place the mare in the field. There was, in my opinion, with all respect to DARLING, J., no breach of any duty towards the plaintiff in failing to give notice of his intention to place the mare in the field or to leave a person on the watch or in charge, and there was, therefore, no negligence on his part, knowledge of any vicious propensity in the mare was not proved. Such cases as *Lee* v. *Riley* (2) and *Ellis* v. *Loftus Iron Co.* (9) are not in point. The cause of action in each case F was trespass quare clausum fregit, this being established, the further question arose whether the injury to the plaintiff's horse in his close was the natural consequence of the trespass, and, therefore, one for which damages could be recovered. This last point was decided in the plaintiff's favour, it being thought by the court that horses thus meeting may naturally either in sport or in quarrel do injury one to the other.

G Counsel for the plaintiff contended that the mere ownership of the animal which did the injury, being an animal in which the law recognises a valuable property, is sufficient without more to render the defendant liable for the consequences. In my opinion, this contention cannot be supported. The horse belongs to a class of animals "which" (to use the words of BOWEN, L.J., in *Filburn* v. *People's Palace and Aquarium Co., Ltd.* (11) (25 Q.B.D. at p. 261)):

H

> "according to the experience of mankind is not dangerous and not likely to do mischief, and if the class is dealt with by mankind on that footing a person may safely keep such an animal unless he knows that the particular animal that he keeps is likely to do mischief."

I If the proposition put forward were good law, I can see no occasion for the discussion which took place in *Lee* v. *Riley* (2) and *Ellis* v. *Loftus Iron Co.* (9), and in other cases of the same nature, nor for the consideration in *Filburn* v. *People's Palace and Aquarium Co., Ltd.* (11) of the question whether an elephant could be held to be within the class of animals referred to by BOWEN, L.J., inasmuch as, even if it were, the owner would, according to the contention in question, still be liable. Moreover, *Cox* v. *Burbidge* (12) must, I think, have been decided the other way, for I can see no distinction for this purpose between injury to the person and injury to the goods. I am satisfied that by English law the mere possession of an animal of the class usually described as mansuetae naturae does not render

the owner liable for injuries done by it to the person or to goods. In this respect our law apparently differs from the Roman law, and from the Code Napoléon: see the note to *Card* v. *Case* (4) (5 C.B. at p. 627). A

Where, as in the present case, there is no trespass, and the plaintiff's claim is founded solely on the injury done to his horse by that of the defendant, the horse being one of the class of animals described by BOWEN, L.J., as not dangerous and likely to do mischief, it is essential to the cause of action that the particular animal has vicious or dangerous qualities. This is well illustrated by *Cox* v. *Burbidge* (12). In that case, although the defendant's horse was, in fact, trespassing, or was assumed so to be, the action was not founded on the trespass, the plaintiff being a member of the public, having no rights of action in that respect. The decision in the defendant's favour was clearly founded on the absence of any knowledge on the defendant's part that the animal in question was of such a disposition as to be likely to kick: see particularly the judgment of WILKS, J. (13 C.B.N.S. at p. 439). But it is contended—and this construction has been accepted by the judge in the courts below—that the propensity of horses turned out with others to do an injury to each other either in sport or quarrel is so well known as to remove them in such circumstances from the class of animals regarded as not dangerous and thus to render their owners liable for an injury they may do to others without proof of a vicious tendency in the individual known to the owner. No authority for this proposition has been cited and I know of none. Indeed, I venture to doubt whether, without evidence, we are entitled to assume that a horse turned out with others is so dangerous to its companions and so likely to kick or otherwise injure them as to render him dangerous and so to exclude him for the time from the class of non-dangerous animals. It is true that in the trespass cases where the injury has naturally taken place the supposed propensity has been referred to as connecting the injury with the trespass, but that is a very different thing from saying that in all cases the knowledge of the probability of such an injury being caused must be imputed to the owner. It is a very familiar sight in a grass country to see several horses turned out in the same field without apparently any idea on the part of the owner that he is doing a dangerous thing, and DARLING, J., himself appears to realise that the principle upon which he acted in the present case could not be of universal application. There may, of course, be circumstances rendering a particular animal not usually of vicious tendencies dangerous for the time, e.g., a mare at seasons when she is subject to sexual excitement, but there is no evidence of any such circumstances in the present case. It is true the offending animal was a mare, and the injured one a gelding, but the season was mid-autumn, and there is no reason to suppose that she was dangerous for any such reason as I have suggested, still less that her supposed dangerous condition was known to the defendant. Moreover, if, as is said, the tendency of horses to injure each other when turned out together is so general as is suggested, then, seeing how common a thing it is for horses belonging to different owners to be so turned out, it is difficult to understand why the question raised in the present case should not have been determined before. B C D E F G H

The principle of *Rylands* v. *Fletcher* (1), in my opinion, carries the matter no further. Unless the dangerous character of the particular animal and the defendant's knowledge of it are proved, he is entitled to use it in any ordinary way he pleases without being responsible for injuries it may cause to others. Something was made of the fact that the mare was shod. But both she and the plaintiff's horse—which was also shod—were in work in the day and were only turned out at night. It would, of course, be impracticable to remove the shoes in such circumstances. Nor do I consider the fact that the mare's shoes had "caulking" to bear upon the question. There is nothing unusual in such a mode of shoeing, and there is no evidence that the risk of a broken leg as the result of a kick was thereby increased. On the whole, I am of opinion that the judgment in the plaintiff's favour was erroneous, and that the appeal ought to be allowed, and judgment entered for the defendant with costs here and below. I

ATKIN, L.J.—In this case—the facts of which it is not necessary for me to recapitulate—the plaintiff, in his particulars, claimed damages for negligence. The learned deputy county court judge, without finding negligence, decided in favour of the plaintiff, for reasons which I will summarise as being based on *Fletcher* v. *Rylands* (1). In the Divisional Court the learned judges dismissed the appeal for different reasons, DARLING, J., on the ground of negligence and SALTER, J., on the ground adopted by the learned county court judge. In this court the judgment was supported on three grounds—(a) negligence; (b) trespass to goods; (c) *Fletcher* v. *Rylands* (1). (a) The negligence alleged was in turning the mare into the field (i) without warning to the plaintiff; or (ii) without first removing her shoes. In any case I do not see how the plaintiff could be entitled to judgment on this ground which necessarily involves findings of fact both of negligence and of the damage alleged being caused by the negligence. The learned county court judge has made no such findings. But I further think that he has in substance negatived both. The point about the shoes is hopeless. Both the horse and the mare were shod, both being turned into the field at nights after working by day. As to notice, though the judge in terms negatives a "custom" to give notice, I think that he means to dispose of the suggestion in evidence that it is a usual practice to give such a notice, and, therefore, the omission to give it is proof of negligence. I will only add that, while in other cases notice may be proved and be a reasonable precaution, the decision must turn on the special circumstances of each case, and it may well be that notice to the agister who presumably knows the number and nature of the beasts already in the pasture, and the names and addresses of their owners, would be in any circumstances sufficient.

(b) Trespass to goods. This ground was but faintly argued. Compare *Holmes* v. *Mather* (13) which correctly decided that trespass to goods must be the result of an act either wilful or negligent. This damage was neither. But whatever be the true view of the law of trespass to goods, as to acts done by the defendant or his servants, I can find no trace of a man being held liable in such an action for the acts of his animals whether by way of asportavit or direct injury to goods. If there were such a liability in many contested claims for damages for injury to chattels caused by a collision of horse-drawn vehicles, negligence would have been irrelevant. The hen that flew into the bicycle (*Hadwell* v. *Righton* (14)) and the sheep that collided with the motor car (*Heath's Garage, Ltd.* v. *Hodges* (15)) would both have involved their owner in liability. I am satisfied that whether a horse directly injures a chattel or a dog accomplishes an asportavit of a golf ball he does not involve his owner in liability for trespass to goods, at any rate unless the owner has intentionally caused the act complained of.

(c) The principle contended for is that the owner of an animal is answerable for any damage done by it, provided it be of such a nature as is likely to arise from such an animal and the owner knows it. I think that the proposition so stated, which is taken from the judgment of ERLE, J., in *Cox* v. *Burbidge* (12), divorced from its context is too wide. It is true that the owner of an animal ferae naturae must keep him under control, and if he allows him to escape from control he is liable for damage done by such animal. It is also true that the owner of a domesticated animal mansuetae naturae which has acquired to his knowledge some vicious or mischievous propensity is responsible to the same degree as though it were an animal ferae naturae, because, as WELLER, J., says, it forms an exception to its class: *Cox* v. *Burbidge* (12) (13 C.B.N.S. at p. 440). It is further true that the owners of those classes of animals mansuetae naturae, of which the horse forms one, are liable for damage done by such animals when straying on the lands of another, and that among the reasons given for such liability is that the tendency to stray is one of the natural propensities of such animals known to the owner. But it does not appear to follow that the owner of an animal mansuetae naturae is responsible for all the consequences of the known propensities of its class even though they may be likely to result in damage. Cattle trespass is an old and well-known cause of action of which the foundation is the trespass to lands. The reason

for holding the owner liable for such trespass has varied from time to time and may now be taken to be the reason as stated by ERLE, C.J., in *Cox* v. *Burbidge* (12), adopted by SALTER, J., in this case, and stated by BLACKBURN, J., in his classic judgment in *Fletcher* v. *Rylands* (1) (L.R. 1 Exch. at p. 280). But if it is sought to extend the proposition so as to impose liability for all damage other than trespass, it can be demonstrated to be too wide. It would then cover the case of all animals whether wild or tame, and impose the same liability upon the owner of a tiger and a cow in respect of the natural propensities of both. Why, then, discuss the question of trespass at all? If it is the natural propensity of horses or cattle to consume the hay or corn they obtain access to, or to bite or kick strange horses, what is the relevance of the trespass in *Lee* v. *Riley* (2) or in *Ellis* v. *Loftus Iron Co.* (9)? The latter is an instructive case for the claim was for negligence, and so found by the county court judge, and the judgment was upheld by the court, not on the ground of negligence, as to which they had doubts, but expressly on trespass because the stallion had obtruded its head over the plaintiff's fence to bite the mare. It seems plain from the judgments that the members of the court would never have relied upon what was admittedly a technical ground if they had considered the large proposition now asserted to be established. Moreover, it is conceded that the doctrine does not apply to damage done by domestic animals on the highway. A bull may stray from the highway into a china shop without imposing liability on its owner: see *Tillett* v. *Ward* (6)—it was in that case an ironmonger's shop—and a horse may, with impunity, so it is said, on the highway kick another horse. But a tiger may neither trespass off the highway nor do damage on the highway without liability to the owner. The owner of a dog is not liable for its trespass and damage without proof of scienter of a special mischievous propensity to do such damage: cf. *Mason* v. *Keeling* (5), per HOLT, C.J. (1 Ld. Raym. at p. 608), and *Read* v. *Edwards* (16), a distinction quite illogical if the large proposition be correct. Presumably the owner would be liable if dog bit dog or cat. Such cases have occurred, I suppose, thousands of times without any trace that I can find of legal liability, and in the correlative case of cat biting dog the liability has been negatived: *Clinton* v. *J. Lyons & Co., Ltd.* (17); and, as has been put in argument in one of the cases, is the owner liable if a cat eats a neighbour's canary? There can be no distinction in principle, so far as this proposition is concerned, between animals subjects of larceny at common law and animals not such subjects. The truth is, I think, that the foundation of the liability in cases invoking *Fletcher* v. *Rylands* (1), and in the special case of cattle trespass, is the duty to keep the animal in control. It appears to me that the principle has no application to cases where tame animals with no special individual mischievous propensity are lawfully let loose in the course of the ordinary use of them, and the only danger to be apprehended is from contact with other animals in places where they may all lawfully be.

I think that the truth as to animals is correctly expressed with the proper limitations in the judgments of WILLIAMS and WILLES, JJ., in *Cox* v. *Burbidge* (12) (13 C.B.N.S. at pp. 438 and 439):

> "I apprehend the general rule of law to be perfectly plain. If I am the owner of an animal in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour; and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence is altogether immaterial. I am clearly liable for the trespass, and for all the ordinary consequences of the trespass, subject to a distinction which is taken very early in the books, that the animal is such that the owner of it may have a property in it which is recognisable by law. For instance, if a man's cattle or sheep, or poultry, stray into his neighbour's land or garden, and do such damage as might ordinarily be expected to be done by things of that sort, the owner is liable to his neighbour for the consequences."

WILLES, J., says:

"The distinction is clear between animals of a fierce nature and animals of a mild nature which do not ordinarily do mischief like that in question. As to the former, if a man chooses to keep them, he must take care to keep them under proper control, and, if he fails to do so, he is taken to know their propensities, and is held answerable for any damage that may be done by them before they escape from him and return to their natural state of liberty. As to animals which are not naturally of a mischievous disposition, the owner is not responsible for injuries of a personal nature done by them unless they are shown to have acquired some vicious or mischievous habit or propensity, and the owner is shown to have been aware of the fact. If the animal has such vicious propensity, and the owner knows of it, he is bound to take such care as he would of an animal which is ferae naturae, because it forms the exception to its class."

There appears to me to be no such general principle of law as is adopted by the county court judge. If there had been, it seems to me inconceivable that it should not have been enforced before this date. I may add that, in this particular case, I think that the true inference is that the owner of the horse, which he had placed in the field, took the risk of damage arising from the introduction of other animals, not due to any special mischievous propensity of such animal. But as this point does not appear to have been expressly raised in the county court, and in deference to the elaborate argument addressed to us on the other points, I have preferred to found my decision upon the reasons already given. I think, therefore, that, as there was here no negligence and no trespass, the appeal should be allowed with costs here and below, and judgment entered for the defendant with costs on the scale allowed by the county court judge.

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BRADBURY *v.* ENGLISH SEWING COTTON CO., LTD.

[HOUSE OF LORDS (Viscount Cave, L.C., Lord Shaw, Lord Sumner, Lord Wrenbury and Lord Phillimore), March 20, 22, 23, June 21, 1923]

[Reported [1923] A.C. 744; 92 L.J.K.B. 736; 129 L.T. 546; 39 T.L.R. 590; 67 Sol. Jo. 678; 8 Tax Cas. 481]

Income Tax—Foreign possessions—Stock of foreign company—Company resident in United Kingdom—Cessation of residence in United Kingdom—Computation of three year's average income—Income Tax Act, 1918 (8 *& 9 Geo. 5, c.* 40), *Sched. D, Case I, Case V.*

A company registered and carrying on business in the United Kingdom ("the taxpayer") owned the whole of the common stock of a company registered in the United States of America ("the American company"). Dividends of the American company were at all material times declared in the United States and remitted by cheque to the taxpayer. In 1903 the byelaws of the American company were altered so that decisions on various of its business affairs were to be taken by the board of directors of the taxpayer. The control so exercised over the American company by the taxpayer was such that the American company was assessed and held liable to income tax in the United Kingdom

for the years ending in 1915, 1916 and 1917 under Case I of Sched. D of the Income Tax Act, 1918, as a person resident in the United Kingdom for tax purposes. The American company again changed its byelaws so as to terminate its "residence" in the United Kingdom, and to transfer the whole control and management of its business to the United States, the transfer being completed shortly before April 5, 1917. In the tax year 1917–1918 and afterwards the American company was not liable to income tax in the United Kingdom, but the taxpayer was liable to income tax in respect of dividends received by it from the American company as being income from foreign possessions. In making the appropriate assessments in respect of such income for the tax years 1917–18, 1918–19 and 1919–20, the Crown desired to bring into computation for the three years' average to be struck under Case V of Sched. D the dividends received by the taxpayer on the common stock of the American company during the years ending in 1915, 1916 and 1917.

Held (LORD SUMNER dissenting): the American company having, during the years ending in 1915, 1916 and 1917, been resident (for tax purposes) in the United Kingdom, the dividends on its stock were not then income from foreign possessions of the taxpayer, and, therefore, they could not be brought into the computation for the purpose of the three years' average.

Decision of the Court of Appeal, [1922] 2 K.B. 569, affirmed.

Notes. Considered: *Swedish Central Rail. Co.* v. *Thompson*, [1924] All E.R.Rep. 710. Distinguished: *Fry* v. *Burma Corpn.*, [1930] All E.R.Rep. 800. Considered: *Leitch* v. *Emmott*, [1929] All E.R.Rep. 638; *I.R.Comrs.* v. *Cull*, [1938] 1 All E.R. 467; *Barnes* v. *Hely Hutchinson*, [1939] 3 All E.R. 803; *Cull* v. *I.R.Comrs.*, [1939] 3 All E.R. 761. Applied: *Canadian Eagle Oil Co.* v. *R.*, [1945] 2 All E.R. 499; *Selection Trust Co.* v. *Devitt*, [1945] 2 All E.R. 499. Referred to: *Egyptian Delta Land and Investment Co.* v. *Todd*, [1929] A.C. 1; *Hamilton* v. *I.R.Comrs.*, [1931] 2 K.B. 495; *Neumann* v. *I.R.Comrs.*, [1934] All E.R.Rep. 398; *I.R.Comrs.* v. *Reid's Trustees*, [1949] 1 All E.R. 354; *Union Corpn., Ltd.* v. *I.R.Comrs.*, *Johannesburg Consolidated Investment Co.* v. *I.R.Comrs.*, *Trinidad Leaseholds, Ltd.* v. *I.R.Comrs.*, [1952] 1 All E.R. 646.

As to the basis of the computation of income tax under Sched. D, Case V, see 20 HALSBURY'S LAWS (3rd Edn.) 276 et seq.; and for cases see 28 DIGEST (Repl.) 206 et seq. For Income Tax Act, 1918, see 12 HALSBURY'S STATUTES (2nd Edn.) 11; see also the Income Tax Act, 1952, s. 132, ibid., vol. 31, p. 128.

Cases referred to:

(1) *American Thread Co.* v. *Joyce* (1911), 104 L.T. 217; 27 T.L.R. 272; 6 Tax Cas. 1; affirmed (1912), 106 L.T. 171; 28 T.L.R. 233, C.A.; affirmed (1913), 108 L.T. 353; 29 T.L.R. 266; 57 Sol. Jo. 321; 6 Tax Cas. 163, H.L.; 28 Digest 257, *1137*.

(2) *Singer* v. *Williams*, [1921] 1 A.C. 41; 89 L.J.K.B. 1218; 123 L.T. 625; 36 T.L.R. 659; 64 Sol. Jo. 659; 7 Tax Cas. 419, H.L.; 28 Digest (Repl.) 203, *854*.

(3) *De Beers Consolidated Mines, Ltd.* v. *Howe*, [1906] A.C. 455; 75 L.J.K.B. 858; 95 L.T. 221; 22 T.L.R. 756; 50 Sol. Jo. 666; 5 Tax Cas. 198; 13 Mans. 394, H.L.; 28 Digest (Repl.) 257, *1135*.

(4) *In the Goods of Ewing* (1881), 6 P.D. 19; 50 L.J.P. 11; 44 L.T. 278; 45 J.P. 376; sub nom. *Hope* v. *Ewing*, 29 W.R. 474; 23 Digest (Repl.) 88, *886*.

(5) *Egyptian Hotels, Ltd.* v. *Mitchell*, [1914] 3 K.B. 118; 111 L.T. 189; 83 L.J.K.B. 1510; 30 T.L.R. 457; 58 Sol. Jo. 494, C.A.; affirmed, [1915] A.C. 1022; 84 L.J.K.B. 1772; 113 L.T. 882; 31 T.L.R. 546; 59 Sol. Jo. 649; 6 Tax Cas. 542, H.L.; 28 Digest (Repl.) 252, *1116*.

(6) *I.R.Comrs.* v. *Blott*, *I.R.Comrs.* v. *Greenwood*, [1921] 2 A.C. 171; 90 L.J.K.B. 1028; 125 L.T. 497; 37 T.L.R. 762; 65 Sol. Jo. 642; 8 Tax Cas. 101, H.L.; 28 Digest (Repl.) 345, *1525*.

A (7) *Gramophone and Typewriter, Ltd.* v. *Stanley*, [1908] 2 K.B. 89; 77 L.J.K.B. 834; 99 L.T. 39; 24 T.L.R. 480; 15 Mans. 251; 5 Tax Cas. 358, C.A.; 28 Digest (Repl.) *1133*.

Also referred to in argument:

B *Cesena Sulphur Co.* v. *Nicholson*, *Calcutta Jute Mills Co.* v. *Nicholson* (1876), 1 Ex.D. 428; 45 L.J.Q.B. 821; 35 L.T. 275; 25 W.R. 71; 1 Tax Cas. 83, 88; 28 Digest (Repl.) 251, *1113*.

Colquhoun v. *Brooks* (1889), 14 App. Cas. 493; 59 L.J.Q.B. 53; 61 L.T. 518; 54 J.P. 277; 38 W.R. 289; 5 T.L.R. 728; 2 Tax Cas. 490, H.L.; 28 Digest (Repl.) 206, *866*.

C *Ogilvie* v. *Kitton* (*Surveyor of Taxes*) (1908), 5 Tax Cas. 338; 28 Digest (Repl.) 258, **619*.

San Paulo Brazilian Rail. Co. v. *Carter*, [1896] A.C. 31; 65 L.J.Q.B. 161; 73 L.T. 538; 60 J.P. 84, 452; 44 W.R. 336; 12 T.L.R. 107; 3 Tax Cas. 407, H.L.; 28 Digest (Repl.) 253, *1119*.

Brown v. *National Provident Institution*, *Ogston* v. *Provident Mutual Life Association*, [1921] 2 A.C. 222; 90 L.J.K.B. 1009; 125 L.T. 417; 37 T.L.R. D 804; 18 Tax Cas. 57, H.L.; 28 Digest (Repl.) 161, *638*.

Purdie v. *R.*, [1914] 3 K.B. 112; 83 L.J.K.B. 1182; 111 L.T. 531; 30 T.L.R. 553; 28 Digest (Repl.) 271, *1205*.

A.-G. v. *L.C.C.*, [1907] A.C. 131; 76 L.J.K.B. 454; 96 L.T. 481; 71 J.P. 217; 23 T.L.R. 390; 51 Sol. Jo. 372; 5 L.G.R. 465; 5 Tax Cas. 242, H.L.; 28 Digest (Repl.) 192, *791*.

E *A.-G.* v. *Higgins* (1857), 2 H. & N. 339; 26 L.J.Ex. 403; 29 L.T.O.S. 184; 157 E.R. 140; 21 Digest 121, *914*.

Gilbertson v. *Ferguson* (1881), 7 Q.B.D. 562; 46 L.T. 10; 1 Tax Cas. 501, C.A.; 28 Digest (Repl.) 204, *858*.

L.C.C. v. *A.-G.*, [1901] A.C. 26; 70 L.J.Q.B. 77; 83 L.T. 605; 65 J.P. 227; 49 W.R. 686; 17 T.L.R. 131; 4 Tax Cas. 265, H.L.; 28 Digest (Repl.) 191, *790*.

F *Williams* v. *Singer*, *Pool* v. *Royal Exchange Assurance*, [1921] 1 A.C. 65; 89 L.J.K.B. 1151; 123 L.T. 632; 36 T.L.R. 661; 64 Sol. Jo. 569; 7 Tax Cas. 387, H.L.; 28 Digest (Repl.) 202, *844*.

Appeal by the Crown from the decision of the Court of Appeal, reported [1922] 2 K.B. 569, on a Case stated by the Commissioners for the Special Purposes of the G Income Tax Acts.

The facts appear in the opinions of the noble Lords.

Sir Leslie Scott, *K.C.*, and *R. P. Hills* (*The Attorney-General* (*Sir Douglas Hogg*, *K.C.*) with them) for the Crown.

Sir John Simon, *K.C.*, *Latter*, *K.C.*, and *Cyril King* for the taxpayers.

H The House took time for consideration.

June 21. The following opinions were read.

VISCOUNT CAVE, L.C. (read by Lord Shaw).—This appeal from the Court of Appeal in England raises the question whether certain dividends received by the respondent company (the English Sewing Cotton Co., Ltd.) on stock in an I American company called the American Thread Co. in the tax years 1914–15, 1915–16, and 1916–17, can be brought into average in computing the liability of the respondent company to be taxed on their income from foreign possessions in respect of the succeeding tax years 1917–18, 1918–19 and 1919–20.

The respondent company, a company registered and carrying on business in the United Kingdom, was during the above-mentioned years the holder (by itself or its nominees) of the whole of the common stock of the American Thread Co. That company was incorporated and registered in New Jersey, and its purchases and sales of cotton and thread were made in the United States or elsewhere abroad.

But in 1903 the byelaws of the American company were altered so as to provide that, while the current business of the company was to be carried on by an executive committee of directors sitting in New York, the decisions of the boards of directors on questions such as the purchase or leasing of any business or plant, the sale or lease of the company's real estate, the borrowing of money, the selection of the executive committee, the making of agreements which were to bind the company for more than a year, and the appointment of the principal officers, were to be dealt with exclusively by extraordinary meetings of the board to be held in Great Britain. This change was doubtless made at the instance of the respondent company, as the holder of the common stock of the American company, in order that all important questions of policy might be settled in England, where four of the seven directors of the American company (who were also directors of the respondent company) resided and under the eye of the respondent company; and this in fact happened, the extraordinary meetings of the board being held by permission of the respondent company at the respondent company's offices in Manchester, and being regularly attended by an assistant secretary who also resided in the United Kingdom.

Under these conditions the Inland Revenue Commissioners assessed the American company to income tax under Case I of Sched. D of the Income Tax Acts in respect of the tax years 1914–15, 1915–16, and 1916–17 (which I will call the first three years) on the whole of the annual profits and gains arising from its trade whenever carried on, the assessment being made on the ground that, having regard to the facts above recited, the American company had become for all income tax purposes a person resident in the United Kingdom. The American company appealed against this assessment to the General Commissioners of Income Tax for the Division of Manchester; but those commissioners, after hearing the parties, dismissed the appeal and, at the request of the American company, stated a Case for the opinion of the High Court. The material findings of the last-mentioned commissioners were stated in the Case as follows:

> "The commissioners have heard counsel on behalf of the appellant company and the inspector of taxes for the Inland Revenue, and, having taken into consideration the documents and the evidence of witnesses adduced before them, came to the conclusion that the control of the management of the affairs of the appellant company was intended to rest and did rest with the directors of the appellant company resident in England in extraordinary session, who constituted a majority of the board and who are also directors of the English Sewing Cotton Co., Ltd., which owns the entire common stock or ordinary shares of the appellant company, and further that such control was constantly exercised at meetings of the board of the appellant company in extraordinary session held in England. The commissioners determined that the appellant company is a person residing in the United Kingdom and is liable as such to be assessed under s. 2 of the Income Tax Act, 1853, Sched. D, para. 1 (1), on the whole of the annual profits and gains arising or accruing from its trade whether the same was carried on in the United Kingdom or elsewhere and accordingly confirmed the assessment."

The arguments on the Case so stated were heard by HAMILTON, J., who held that there was evidence on which the commissioners could come to the above conclusion, and accordingly affirmed their decision; and appeals against this judgment, first to the Court of Appeal and then to the House of Lords, were dismissed. The case is reported *American Thread Co.* v. *Joyce* (1).

During the period of three years above mentioned the dividends on the common stock of the American company, though apparently settled by the directors in England, were declared in the United States and were remitted by cheque from the United States to the respondent company, the income tax levied on the American company in England being deducted. After, and probably by reason of, this decision, the American company again altered its byelaws so as to put an end to

its "residence" in the United Kingdom, and to transfer the whole control and management of its business to the United States. This transfer was completed shortly before April 5, 1917; and, accordingly, as from the end of the tax year 1916–17, the Crown was no longer in a position to assess the American company to income tax, and could only assess the respondent company under Case V of Sched. D in respect of its dividends on the common stock in the American company, as being income from foreign possessions. In making this assessment for each of the tax years 1917–18, 1918–19 and 1919–20 (which I will call the second three years) the Inland Revenue Commissioners claimed a right to bring into computation for the three years average to be struck under Case V (in addition to the income of certain other foreign possessions, which need not be further mentioned) the dividends received by the respondent company on the common stock of the American company during the first three years. In other words, they contended that in assessing the respondents to tax on their receipts from foreign possessions for the tax year 1917–18, they were entitled to take into account the dividends received in England during the first three years, plus the tax deducted from those dividends, and to strike an average accordingly; and so as to each of the two following tax years. This claim was resisted by the respondents, who contended that the American company having during the first three years been resident in England, the dividends on its stock were not income from foreign possessions at all, and accordingly could not be brought into the computation for the purpose of the three years' average. It is this dispute which falls to be decided on the present appeal; and its importance to the parties may be gathered from the fact that the dividends so received amounted in the year 1914–15 to £111,600, in the year 1915–16 to £200,880, and in the year 1916–17 to £185,925 (gross before deduction of tax).

The dispute having been referred to the Special Commissioners of Income Tax, those commissioners, after hearing the parties, gave their decision in favour of the respondents, and reduced the assessments accordingly, but on the application of the Crown, stated a Case for the opinion of the High Court. In this Case the commissioners referred to, and in effect, adopted the findings in *American Thread Co.* v. *Joyce* (1) (to which I have accordingly freely referred in the above statement) and stated their conclusions as follows:

> "We are of opinion that dividends on shares in a company which, though incorporated in a foreign country, is resident and carries on business in the United Kingdom, and is assessed on the whole of its profits under Case I of Sched. D, are not income from a foreign possession within Case V, and that the dividends declared by the American Thread Co. and received by the English Sewing Cotton Co., Ltd., subject to deduction of tax, in the years 1914–15, 1915–16, and 1916–17, when the American Thread Co. was controlled in the United Kingdom, cannot for the purposes of Case V assessments on the English Sewing Cotton Co., Ltd., for subsequent years, be added to the income from foreign possessions originally brought into the average for assessment under Case V. We shall accordingly reduce the Case V assessments to the average of the income from foreign possessions exclusive of the dividends of the American Thread Co. prior to April 5, 1917, but inclusive of the dividends of that company payable after that date."

On the argument of the Case Stated before SANKEY, J., that learned judge held that the question was a question of fact for the commissioners, and that there was ample evidence on which they could have come to their conclusions, and held also that they had not erred in law; and he accordingly dismissed the appeal of the Inland Revenue Commissioners. On an appeal by the Crown to the Court of Appeal, that court, by a majority consisting of the Master of the Rolls and YOUNGER, L.J. (SCRUTTON, L.J., dissenting), affirmed the decision of SANKEY, J. Hence the present appeal.

I think that it is important to point out that there is here no question of a claim to double taxation. The respondents' dividends for the first three years have already paid tax by deduction, and could not now be taxed again; nor does the appellant allege that they could. His claim is, not to tax those dividends over again, but to tax the respondents' income from foreign possessions for the second three years, and for that purpose, and for that purpose only, to take account of the dividends received in the first three years, and to compute the tax for the later years on the average so obtained. As was pointed out in *Singer* v. *Williams* (2) the fact that the income of a previous year is not taxable, does not prevent it from being brought into computation for the purpose of assessing the tax payable in a later year, and so being treated as a measure, though not as a ground, of taxation. If the dividends for the first three years were in truth income from foreign possessions, the Crown is entitled (I think) to bring them into the computation; and as the case presents itself to me, the real question to be determined is whether they were in fact such income.

Then, were the dividends received in the first three years income from foreign possessions, or (in other words) was the common stock during the first three years a foreign possession of the respondents? This appears to me to be a question of some difficulty. On the one hand, the stock was stock in a company incorporated according to the law of New Jersey, and having its registered office there, and so American by birth and status. But, on the other hand, it was decided in *Joyce's Case* (1) and must be taken to be the fact that this American company was, during the three years in question, resident in England, where (to use the language of Lord Loreburn in *De Beers Consolidated Mines, Ltd.* v. *Howe* (3) the seat and directing power of the affairs of the company were located, and its chief operations both in the United Kingdom and elsewhere were controlled, managed, and directed. And the question, therefore, arises, whether the locality of the shares or stock of a company is to be determined by its place of incorporation and registration or by its place of residence and trading. After some doubt, I have come to the conclusion that the latter is the true view. Sir James Hannen in *In the Goods of William Ewing* (4) said (L.R. 6 P.D. at p. 23): "Shares in a company are locally situate where the head office is"; and I think this means that they are locally situate where the company's principal place of business is to be found. A share or a parcel of stock is an incorporeal thing, carrying a right to a share in the profits of a company; and where the company is, there the share is also, and there is the source of any dividend paid on it. It was decided in *Joyce's Case* (1) that during the first three years the American company was here for all the purposes of income tax; and the company being here, I find it impossible to hold that its stock was abroad. In any case I am unable to understand how the Crown, having in 1913 successfully maintained that the American company was then resident and trading in England, can now be heard to say that the profits of that trading when divided among the stockholders were income from foreign possessions. The fact that the dividends were declared in America and remitted by American cheque cannot, in my opinion, displace the inference to be drawn from the fact that the company resided and traded in England. The result may be unfortunate for the Crown, which will lose duty on some part of the later dividends; but the Crown succeeded in 1913 in establishing that for income tax purposes the American company was here, and must accept the consequences of its victory.

If this be the right view, then there is an end of this appeal, and it is unnecessary to deal with the further difficulty to which Younger, L.J., referred, viz., that the dividends received by the appellants in the first three years did not represent the full divisible income of the American company, but only that income diminished by the tax levied on it. It is enough to say that on the contention which is at the root of the appellant's case, viz., that the dividends received in the first three years were income received from foreign possessions, the appellant fails, and accordingly that, in my opinion, this appeal should be dismissed with costs.

LORD SHAW.—The position of the American Thread Co. in reference to income tax in the United Kingdom was settled in *American Thread Co.* v. *Joyce* (1). With reference to the taxing years 1914–15, 1915–16, and 1916–17 that decision clearly applies. It was to the effect that this House confirmed the finding in fact that the control and management of the affairs of the company resided with and was exercised by directors resident in England; the American Thread Co. accordingly must, for the purposes of income tax, be regarded as resident and carrying on business in the United Kingdom, and as consequently liable to assessment on the profits of its trade under Case I of Sched. D.

The first and very simple proposition which I make on this judgment is that, re-affirming various decisions, it settles, in the case of this Thread company, and settles in the negative, the proposition that a company necessarily resides where it is registered. And the second proposition is that residence is the true test for the purpose of enabling the officers of revenue to determine under which category or rule in Sched. D the assessment of income tax is to be laid on. In *De Beers Consolidated Mines, Ltd.* v. *Howe* (3), the proposition was put forward that a company resides where it is registered, and nowhere else. The House of Lords declined to adopt any such view. LORD LOREBURN, L.C., observed ([1906] A.C. at p. 458) that it was

> "maintained that a company resides where it is registered, and nowhere else. If that be so, the appellant company must succeed, for it is registered in South Africa. I cannot adopt Mr. Cohen's contention. In applying the conception of residence to a company, we ought, I think, to proceed as nearly as we can upon the analogy of an individual."

His observations go on to distinguish—as my noble and learned friend LORD WRENBURY, in a judgment which I have had the advantage of perusing, and which is now about to be read, also distinguishes—between nationality and residence. As applied to a company all the considerations affecting control, management, &c., of its affairs, supply the test and equivalent of residence, and that test has been definitely applied in this country to the American Thread Co. In my opinion, accordingly, it is settled beyond recall that during the years to which I have referred, the profits of the company were profits assessable as profits on a trading company residing in England.

I hold that by its nature this involves a direct negative to the proposition that for the purpose of taxation for revenue in this country under the Income Tax Acts the company, or the shares therein, can be treated as foreign possessions. In my humble opinion the Rules under Sched. D of the Income Tax Act were Rules made to apply so as to disintegrate into categories the cases of liability to taxation in the schedule. The separate Cases mean the separate instances to which, in fact, this schedule with its taxation will apply. According to the view which I have formed it is accordingly impossible to permit overlapping in these cases, because overlapping is the very opposite of that disintegration which was the object of the division into cases. Accordingly, when the profits from a trading concern are taxed on the footing that it is an English trading concern then, ex necessitate, this involves that the taxing authority is committed to that situation and is, for all purposes of the Income Tax Acts, precluded from placing or reckoning the income so treated under any other category. That fact, accepted or decided, concerning the profits or profit of what is settled to be an English trading company, is a negation of the conception that they can for the same years, and in respect of the same profits, be reckoned as a foreign possession. These things seem so clear that it would be unnecessary to refer to them but for the statement in the Case that it was contended on behalf of the Crown

> "that the dividends received by the respondents from the American Thread Co. on their holding of common stock in that company were at all material times, both before and after the transfer of the control of the American Thread Co. to America, income from a foreign possession."

In my opinion, for the reason I have given, this contention is altogether unsound. A

When the taxing year April, 1917–18, was reached, the American Thread Co., which, as an English company under the decision referred to, had, during the three preceding years, paid its dividends to the respondents, became an American company by the shifting of the locus of its management and control. In doing so it placed the income tax authorities in the position that it could no longer be looked on as an English company. A change had occurred; its English residence was lost, B and it was therefore a foreign possession out of which the English Sewing Cotton Co., Ltd., the respondents, drew its dividends. The case accordingly was simply one in which the facts were subsumed under Case V, the foreign possession Case, instead of under Case I, the English trading Case. Up to that date the American company had been English, after that it was foreign; and the contention of the Crown is that in the reckoning of income from foreign possessions, the taxpayer is C bound to bring into calculation for the purpose of a three-years' average applicable to foreign possessions those very years with regard to which it has been judicially determined that the American Thread Co. was not a foreign possession.

There are several answers to this, one of which is obvious enough, to the effect that the actual taxpayer in the three years 1914–17 was the American Thread Co., on account of its residence. That taxpayer was enabled, under the statute, to be D recouped by deducting from the dividends paid to the respondents the proportionate amounts appertaining to their dividends. But after the transfer to America, the American Thread Co. drops out; the actual taxpayer thenceforward is the respondents, and the respondents were not a taxpayer in those previous years. Consequently the identity of the respondents who are to pay on their foreign possessions subsequent to 1917 is not an identity with any taxpayer who paid on E foreign possessions prior to that date. For the respondents to include in their foreign possessions the shares in the American Thread Co. which they owned in the three years for which the American company, as English taxpayers, have already been taxed—and to make a return which would state that during the three years 1914–17 the respondents had been obtaining income from the American Thread Co., as a foreign possession—this, in view of the decision in *American* F *Thread Co.* v. *Joyce* (1), would have been to make a false return. The duties and obligations in regard to the three years of average which I have cited had been completely discharged by recouping the American Thread Co., as an English trading company, the tax imposed on the profits of that concern. When that was done, and the change of residence occurred, the correct category under Sched. D had been reached, and as I have indicated, when that has been done it appears to G me to exclude all other categories.

If it did not so exclude all other categories, it would, I fear, follow that it would be logically possible even during the three years while a taxpayer was paying under one category, to compel him also to pay taxation under another category, and that is clearly contrary to law. It appears to me to be as contrary to law in principle to compel him to go through the confusing process of treating profits which have H been already defined and taxed under one category, as to be taken into account for the purpose of averaging under another category. I see no justification for opening the past, which has definitely fixed the Case and its nature under which the profits have been classed, or to do so either for the purpose of doubling taxation completely, or doubling taxation partially, or doubling taxation ad interim. I am of opinion that the courts below have reached the correct conclusion. I

LORD SUMNER.—It seems not to be disputed that, after the control of the American Thread Co.'s business was removed from the United Kingdom, dividends on its common stock distributed to the respondents, when assessable, fall under Case V of Sched. D. The admission involves the further result that the stock held by them is part of their foreign possessions. Apart, however, from admissions, I think this must be so. The American Thread Co. has now nothing English about it except the fact that practically all its stock is owned in England, which is not in

itself of great significance in such a connection as this. Its property, its operation and its management are all in the United States. What else can its common stock now be to English holders except foreign possessions, unless indeed the place where the share certificates are kept is to be of moment? The quality of being foreign in respect of a "possession" must be relative to the taxpayer who possesses it, and to the time at which he is assessed. It is not requisite to say that the company is now necessarily or actually situated in New Jersey, where it is incorporated. Within the United States its local situation may be a question of degree and doubly, therefore, a question of fact. Its situation may change from time to time, but at any rate the situation of an English holding of its stock is, for present purposes, abroad. The words of the schedule and cases themselves invest shares with the further capacity of being "foreign," that is, of having locality, and that locality cannot simply be the locality of the shareholder, since he always is, ex hypothesi, in the United Kingdom and so is being assessed here. I think that primâ facie the locality of the shares must be the locality of the company, whose share capital is constituted by the shares into which it is divided, and that locality is abroad.

As to the duty to be charged, the statute is imperative. The duty has to be charged, at the appropriate rate of tax, on a sum, and that sum has to be computed for the purpose of being charged. The Act says that the sum shall be "not less than the full amount of the actual sums annually received in Great Britain." That will be the result of the computation. As to the method of it, the Act proceeds "computing the same on an average of the three preceding years, as directed in the first case," that is to say, "upon a fair and just average of three years," ending on a day in the year immediately preceding the year of assessment, which is fixed by the customary date for making up the accounts of the trade, the profits of which are being charged. The reference from Case V to Case I seems to show that Case V was originally framed, so far as trading foreign possessions are concerned, mainly with reference to trades carried on abroad by the taxpayer who is charged at home, and not to a case like the present, where the taxpayer is not the trader but only the holder of stock in a foreign incorporated company trading abroad. Accordingly, the two provisos in Case I seem to be wholly inapplicable to Case V under such circumstances, and the date on which the period of three years is to end becomes an arbitrary one, unless the trade and the profits of the American Thread Co. are regarded as the respondents' trade and profits, which in law they are not. This much, however, is clear, that, when the respondents are charged under Case V, they are charged on a sum which, on the one hand, must be deemed to be the sum actually received in Great Britain in the year of charge, since the words of the case direct the duty to be computed on a sum not less than the sum so actually received, and on the other will only be the same as that actually received in the year of charge, notionally or by accident, for it is the result of a computation from sums arising or received in other years. The basis of the computation appears to be that something is to be measured not by actually measuring it, but by measuring something else, more or less like it; in other words, the sums arising or received in previous years are only factors in a computation, while the sum taxed, as the result of that computation is a sum which was not taxed in previous years, since it did not then exist. As the respondents did, in the year of charge (by which I mean the first year of charge after the change in the place of management of the American Thread Co.) actually receive in Great Britain, by remittances from abroad, sums in respect of a foreign possession, viz., their holding of the common stock of the American Thread Co., and as those sums could be reached by the Inland Revenue in no other way than by the application of Case V, it seems to follow that the amount was rightly computed by striking an average of the dividends for the three preceding years, distributed by the American Thread Co. in respect of the same foreign possessions, remitted from the same quarter, and resulting from the same distribution to its stockholders.

I accept it as a principle now well recognised, that the various taxing Acts, with

which we are concerned, nowhere authorise the Crown to take income tax twice over in respect of the same source for the same period of time, and that this can only be done, if at all, under statutory authority. Though the Acts nowhere say so, this principle has long been assumed. Whether the contention may ever be raised, that the Crown is not bound by mere conventions of fair play current from time to time, hitherto, at any rate, the binding force of this principle has not been questioned.

The respondents' argument, as I apprehend it, is rested primarily on this ground. It is said that, if duty in respect of the dividends for the year of charge is charged on the respondents on a computation of the average of their dividends in the three preceding years, the Crown will be taxing the same thing, viz., the dividends in those three years, twice over, for they were only paid to the respondents out of profits, which had already been taxed in the hands of the American Thread Co., and the respondents in turn suffered a proportionate deduction in respect of that tax. Thus the dividends will be taxed over again, if they are brought into computation to ascertain the amount of duty to be paid in the year of charge. The argument that the Crown, having chosen to tax the profits of the American Thread Co. for the three previous years, is bound by its election and must act consistently throughout, is, I think, only an additional mode of stating the same point. The case is one neither of option nor of estoppel in the true sense of the words. The Crown does not make an arbitrary election between taxing A and taxing B. It follows the Act, and, having done so, is not estopped thereby from doing something else, which it is authorised to do. If it follows the Act again in another case when it arises, it acts within the law. The respondents, however, urge as the only way of introducing consistency into the whole proceedings, that the dividends which they received in the three previous years were not really sums received in respect of foreign possessions, but were sums distributed to its stockholders by a company which was, "for income tax purposes," an English company and was assessed accordingly. From this they say it follows that, even if the dividends received in the three previous years are introduced for purposes of computation only and are not sought to be made the subject of charge in any true sense during the year of charge, still, as a "fair and just" average, or any average at all, of the three preceding years involves an average only of things which are comparable, as being identical in character, no average can be struck of dividends received in respect of a foreign possession and of dividends received from what, at any rate "for income tax purposes," was an English trading company. Such is the argument. The question must be whether a company, which is in fact foreign and whose stock is primâ facie foreign, becomes the contrary either by reason of the language of the Income Tax Acts or by reason of the course taken on behalf of the Crown in administering them.

In substance the Income Tax Acts are confined to what is their proper business, viz., the provision of authority, under which specified taxation is to be raised from specified classes of taxpayers on specified subjects of charge. For the rest, the Acts take the general law as they find it. An American company for general purposes is an American company for income tax purposes, but there are circumstances under which an American company can be assessed to income tax here. In its appeal to your Lordships' House the American Thread Co. was not held to be an English company "for income tax purposes." What was held was that, if it resided in England and thence directed and controlled a business here and abroad, the Income Tax Acts made it liable to be assessed for income tax here on the whole of its profits, wherever made. If being assessed to British income tax makes an income a British income, then the American Thread Co. earned a British income, but it was a foreign company all the same, and, as its common stock did not belong to it but to the stockholders, there was no sense in which that stock was anything but a foreign possession of those to whom it belonged. An attempt was made at the bar to explain a foreign possession as being that kind of source of income which, being abroad, was beyond the reach of the English tax-gatherer's arm, so that he

had to levy on the recipient of its fruits in England, but I think that this contention fails for the simple reason that the words are foreign possessions, not foreign sources. It seems to me to follow that the respondents' shares in the American Thread Co. have been foreign possessions all along, and are so still, and that an average of the dividends actually received from them is a fair and just one, since they are all comparable and of the same character; that the reason why, in the earlier years, the respondents were not chargeable in respect of them simply was, that they were annual payments arising out of the property of another person, for which such other person ought to be, and was, charged by virtue of the Act of 1842, and not because the shares were not foreign possessions of the respondents, or because the other person, the American Thread Co., was for income tax or any other purposes, an English company. LORD STERNDALE, M.R., says, in the course of his judgment:

> "I agree that the American company is not transformed into an English company by the fact that circumstances have made it taxable in England, nor are its shares changed from a foreign possession into an English possession by such taxation."

So far I concur. Where I venture to differ from him is in thinking that the Crown really is "justified in making use of them as foreign possessions" now, because such action is not inconsistent in itself nor contrary to the language of the legislation. The question for us is not whether what has been done is extortionate but whether it is illegal.

Furthermore, I think there is here no question of taxing the same thing twice over. What was taxed in the three preceding years was the profit made by the American Thread Co. That did not belong to the respondents nor was tax paid on it by or for the respondents. It belonged to the American Thread Co., who paid tax on it for themselves. Apart from any peculiar provisions in their articles of association, the American Thread Co. might or might not have paid dividends in those years, as they chose; they might or might not have paid their dividends out of reserves, and not merely out of the profits of the year; they might or might not have deducted tax against their stockholders on the dividends paid. In fact, again subject to any special provisions in their articles, the respondents, by exercising their voting power in time, could have prevented any deduction being made at all, and if they themselves suffered tax by deduction, it was because they did not choose to prevent it. The Acts have regard to the economic identity of annual payments arising out of profits which are a taxable source, to the extent of taxing the payer, without requiring the payee to include them in his return, but this is under the express provisions of the legislation. Beyond that, effect must be given to the legal position, viz., that in the three preceding years the respondents' dividends were not taxed. The words of Case V must be read accordingly, and the result is that there has not been in this case any taxing a second time. A similar answer applies to the argument that, for the three preceding years, what the Crown seeks to bring into the computation is the gross dividend, though all that the respondents actually received was the residue after deduction of the proportionate amount of tax. The object of the computation is to arrive at a notional sum, which will be taken to be the full amount of the actual sum on which tax is to be levied for the year of charge; that is to say, the object is to get at a gross dividend, which has not yet been reduced by taxation, and so can be charged presently. Obviously the comparable sums here for the purpose of a fair and just average, are also the gross dividends before any deduction for tax has been made. In arriving at a conclusion, which is the contrary of that arrived at by the commissioners, by the learned trial judge, by the majority of the Court of Appeal, and, above all, by your Lordships, I am very sensible of my own unwisdom, but I should allow the appeal.

LORD WRENBURY.—In the case of a foreigner found in this country, residence, not nationality, is the test of the incidence of liability to income tax.

Bearing this in mind, I find no great difficulty in forming a judgment upon this case. A

For convenience I will call the financial years 1914–15, 1915–16, and 1916–17 the first three years. The American Thread Co. is a company incorporated in America which, during the first three years, so conducted its business and so controlled its affairs that, for the purposes of the Income Tax Acts, it resided in the United Kingdom and was assessable in this country to income tax on all its profits. This B was decided in 1913 in *American Thread Co.* v. *Joyce* (1), a decision of this House. It resulted that for the first three years the American company was liable to be assessed and it was assessed and paid income tax upon all its profits, and none the less because the profits were made in America. The company was resident here and was taxable here in respect of all its profits wherever made. LORD LOREBURN, in his judgment in *De Beers Consolidated Mines, Ltd.* v. *Howe* (3) points out that for C purposes of income tax the company resides where its real business is carried on and that is where the central management and control actually abides. In truth the place of registration is no more than one circumstance to be borne in mind. In result it is in many respects comparable with the nationality of a natural person. For purposes of income tax, nationality, if the person taxed is resident here, is irrelevant. An American citizen resident in this country is taxable on the whole D profits of his business although carried on in America. The same is true of an American corporation. The proposition may be illustrated by the converse case of the corporation which, although registered in the United Kingdom, yet carries on its business wholly abroad. That was the case in *Egyptian Hotels, Ltd.* v. *Mitchell* (5). The fact that it was registered here did not prevail over the fact that it was resident elsewhere in the sense that its whole business was carried on E and controlled elsewhere. It was held that it was taxable accordingly, that is to say, in respect only of profits remitted to this country.

The English Sewing Cotton Co. during the first three years held, and they subsequently continued to hold, all, or nearly all, the ordinary shares in the American company. They were entitled to receive, and did receive, dividends in respect of them. The fund available for their payment was not the profits of the F American company, but the differential sum remaining after deduction from those profits of the income tax which the American company was liable to pay and had paid, and the person to make payment to them was the American company. The case was one within s. 52 of the Income Tax Act, 1842. The English company as a holder of shares in the American company was a person to whom an annual payment was made out of property of the American company in respect of which G the American company was chargeable to income tax under the Act. The English company could not, during the first three years, be assessed and was not assessed in respect of the dividends thus received. The American company was the person, and the only person, who could be, assessed in respect of the profits of the business of the American company. The corporator bore his share of the tax by the deduction of the appropriate share of the collective tax paid by the corporation from his H dividend (*I.R.Comrs.* v. *Blott* (6)). Shortly before the beginning of the fourth year the control of the American company's trade was removed to the United States. That company ceased to be resident in this country and was no longer assessable in respect of its profits. As from the date when the American company ceased to reside in this country the interest of the English company in the American company was such that the dividends they received from their shares in the American com- I pany were profits from a foreign possession. As to this there is no dispute. The Crown, however, contends that in the fourth year the English company was assessable under Case V of Sched. D on the average of the first three years of the dividends they received in those years, because (it is argued) the shares of the American company were during the first three years a "foreign possession" of the English company. The English company had other foreign possessions in respect of which it is not disputed that they were assessable under Case V. The Crown contends that in their statement of average income from foreign possessions they

were bound to include a three years' average of the dividends received in the first three years on the shares in the American Thread Co. The question is whether in the first three years the English company's holding of shares in the American company was a foreign possession.

The English Companies Acts contain provisions under which a company limited by shares is to have "a capital divided into shares." The American law, I believe, is similar. A share is, therefore, a fractional part of the capital. It confers on the holder a certain right to a proportionate part of the assets of the corporation, whether by way of dividend or of distribution of assets in winding-up. It forms, however, a separate right of property. The capital is the property of the corporation. The share, although it is a fraction of the capital, is the property of the corporator. The aggregate of all the fractions if collected in two or three hands does not constitute the corporators the owners of the capital—that remains the property of the corporation. But, nevertheless, the share is a property in a fractional part of the capital. The Crown has argued that the share is necessarily a possession in the place where the corporation is incorporated. For the purposes of the Income Tax Acts and in a case where the foreign corporation is resident here, the proposition is, I think, unsound. For all purposes of the Income Tax Acts the company when resident here is not foreign. It is taxable by reason of residence and for that purpose and all purposes of liability to income tax the company and its capital and the members' interest in the capital is not foreign when the company is resident here. It is not possible that for determining the liability of the corporation to income tax it is here and for determining that of its members it shall be at the same moment foreign. The share is a right of property in a fraction of property of which the company resident here is the owner. Further, during the first three years, the English company had not a possession in any part of the profits of the American company in America. The possession of the English company was of shares which (if a dividend was declared) entitled them to receive from a company resident here a dividend whose source was the differential sum remaining in the hands of the company resident here after that company resident here had paid income tax on all its profits. The source was not in America, but here. The English company could not, during the first three years, have been assessed on their shares as a foreign possession, and in the fourth year they cannot be assessed on an average of the first three years on the footing that during that three years the shares were a foreign possession.

To ascertain whether a possession is a foreign possession or not I must look to see what is the source "of income" from which the profits of the possession arise. It is a "source of income" which the Act contemplates in all the schedules. Section 52 of the Act of 1842 speaks of "the sources chargeable under this Act" and "the sources contained in the several schedules." A profit arising from a foreign possession—a possession out of Great Britain—must be a profit coming from a source out of Great Britain. During the first three years the American company received profits arising from a source out of Great Britain, and being resident here it was liable to pay, and did pay, tax on them, although they came from such a source. But the English company did not receive profits from a source out of Great Britain. By virtue of action taken by a person resident here (viz., by a declaration of dividend made by a corporation resident here) the English company became entitled to receive money from the company resident here. The source, so far as the English company was concerned, was the company resident here, and none the less if the dividends were remitted by cheque from America. The appellants referred to the words "shares of any foreign company," which are found in the Income Tax Acts, e.g., in s. 10 of the Income Tax Act, 1853, and s. 36 of the Revenue (No. 2) Act, 1861, and sought to use them as an indication that a share in a company incorporated abroad is necessarily a foreign possession. The Acts contain no definition in that sense, and the words, I think, indicate nothing of the kind. If a company is foreign by incorporation and foreign by residence, no doubt shares in the company are foreign possessions: *Gramophone*

and Typewriter, Ltd. v. *Stanley* (7); *Singer* v. *Williams* (2). But for the purposes of the Income Tax Acts, having regard to the provisions which render a person resident here taxable in respect of all his foreign profits, the company ceases to be a foreign company so soon as by residence it becomes amenable to all the provisions of the Acts. It cannot be foreign for one purpose of the Acts and not for another. For this reason I am of opinion, as I said at the outset, that the whole of this case is covered by the consideration that residence, not nationality, is the test relevant to liability to income tax. In my opinion the appeal fails, and must be dismissed with costs.

LORD PHILLIMORE.—I have read and I agree with the opinions of the Lord Chancellor, LORD SHAW, and LORD WRENBURY, but I wish to add a few words.

This case seems to depend on the following considerations. A joint stock company is, under the Income Tax Act, 1842, treated as a person and is directed to make a return of its profits or gains according to Sched. D on a conventional figure, arrived at by taking an average of the three preceding years, and is liable to be assessed and taxed thereupon. If the principle of its being a distinct person, distinct from its shareholders or the aggregate of its shareholders, had been carried to a logical conclusion, there would have been no reason why each shareholder should not in his turn have to return as part of his profits or gains under Sched. D, the money received by him in dividends. Their taxation would seem to be logical, but it would be destructive of joint stock company enterprise, so the Act of 1842 has, apparently, proceeded on the idea that for revenue purposes a joint stock company should be treated as a large partnership, so that the payment of income tax by a company would discharge the quasi-partners. The reason for their discharge may be the avoidance of double taxation, or to speak accurately, the avoidance of increased taxation. But the law is not founded on the introduction of some equitable principle as modifying the statute; it is founded on the provisions of the statute itself; and the statute carries the analogy of a partnership further for it contemplates a company declaring a dividend on the gross gains, and then on the face of the dividend warrant making a proportionate deduction in respect of the duty, so that the shareholder whose total income is so small that he is exempt from income tax or pays at a lower rate, can get the income tax which has been deducted on the dividend warrant returned to him.

This is the state of the law with regard to companies known as such to the legislature. But the British taxpayer may be receiving annual sums from foreign possessions and thus become liable to be assessed and taxed on a three-yearly average computed in the same way as already mentioned, according to Case V of Sched. D, and it matters not what the foreign possession is, whether it is land or goods or shares in a foreign company. The periodic sums which are so remitted to him, must be entered by him in his return and are liable to assessment and taxation, not because they are dividends on shares in foreign companies, but simply because they are remittances from foreign sources. The officers of the Crown do not know and do not care what is the character of the sources from which the money comes. It may be a company, it may be a firm, it may be the taxpayer himself trading under an alias. It may call itself a company and not be one, or be a company and not so call itself. These questions are only important if it be desired to use the machinery of the Income Tax Act, 1853, s. 10. Otherwise it is enough that the taxpayer is in receipt of income "arising from securities, stocks, shares, and rents in any place out of the United Kingdom" (Finance Act, 1914, s. 5) or "sums annually received from foreign possessions" as the description in Case V under the Income Tax Act, 1842, runs. But if the company removes to Great Britain and acquires what I may call a taxable seat here, it becomes taxable as a company to which s. 40 of the Income Tax Act, 1842, applies; and as in ordinary cases of a taxed company the shareholder is taken to have paid the tax on his dividends through the company and is not assessed or taxed on them. This fact is conceded, if the reason be disputed. If the company again removes itself

A abroad so that it ceases to pay income tax as a company, the shareholder has as before to pay the tax on the dividends which he receives as on sums received from foreign possessions, because there is no longer a company which has paid income tax for him. To make the point simple let it be supposed (though it was not so in the present case) that the taxpayer had no other source of revenue which could be brought under Sched. D. Then during the years in which the company had a B taxable seat in Great Britain the shareholder if served with a notice under Sched. D would make a nil return; and he would continue to make a nil return till he had received a dividend from the company remitted to him after the company had removed its taxable seat from Great Britain.

It seems to be suggested for the Crown that a company may be a foreign company in suspense and the dividends declared by it may be treated as sums received from C foreign possessions held in suspense, so that when the company goes back abroad the right to treat it as having been all along a foreign company and its dividends all along as sums received from foreign possessions revives. I doubt if this idea would ever have been entertained if the company had been originally English, and there had been no question of its going back to a foreign country. Be this as it may, I find no warrant in law for such a conception. A company either comes D under s. 40 of the Act of 1842, or it does not. If it does not, it is not taxable; but in that event those who receive dividends from it will be taxable in respect of their dividends. If it does come under s. 40, its shareholders are not taxable for their dividends. This is so, not because of any implied rule of law against double taxation, a rule for which it would be difficult to find support in the books, but because dividends on shares in a taxed company do not come under Sched. D. E It is sought, nevertheless, to bring these dividends under the head of "sums received from foreign possessions" though only for the limited purpose of making an average in subsequent years. If they were such sums, they were taxable at the time. Nothing happened in 1917 to change the character of a dividend received in 1914. If in 1917 it was a sum received from a foreign possession, so it was in 1914. If it was such a sum in 1914, it ought to have been taxed then and there. F But everyone agrees that this would have been absurd. Wherefore I would dismiss this appeal.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue*; *Rawle, Johnstone & Co.*, for *Addleshaw, Sons & Latham*, Manchester.

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

A

SECRETARY OF STATE FOR HOME AFFAIRS *v.* O'BRIEN

[House of Lords (Earl of Birkenhead, Viscount Finlay, Lord Dunedin, Lord Atkinson and Lord Shaw), May 14, July 9, 1923]

[Reported [1923] A.C. 603; 92 L.J.K.B. 830; 129 L.T. 577; 87 J.P. 174; 39 T.L.R. 638; 67 Sol. Jo. 747; 21 L.G.R. 609; 27 Cox, C.C. 466] B

Habeas Corpus—Appeal—Grant of writ by Court of Appeal—Applicant no longer in custody of person to whom writ directed—Competency of appeal to House of Lords—Appellate Jurisdiction Act, 1876 (39 & 40 *Vict.*, *c.* 59), *s.* 3.

When once a legally constituted court has determined that a subject of the Crown, who is an applicant for the issue of a writ of habeas corpus, is entitled to his liberty, such a judgment cannot be overruled either by any other court or by any appellate tribunal. To sustain a jurisdiction to overrule would be to claim a right to circumvent or destroy that finality of liberation under the writ which has been long affirmed as a part of English constitutional law and a destruction of a liberty which has been affirmed as a matter of right in one of His Majesty's subjects. The same consequence follows when a court lays it down plainly that the subject is entitled to be discharged, but, for some reason, the court is precluded from actually directing and enforcing discharge. C D

Where, therefore, the Court of Appeal, reversing a decision of a King's Bench Divisional Court, made a rule absolute for the issue of a writ of habeas corpus directed to the Home Secretary commanding him to have the body of the applicant before the court before a specified date, and the Home Secretary was unable to do so as he no longer had the applicant in his custody, E

Held: despite the generality of the wording of s. 3 of the Appellate Jurisdiction Act, 1876, no appeal lay to the House of Lords at the instance of the Home Secretary.

Cox v. *Hakes* (1) (1890), 15 App. Cas. 506, applied.

Barnardo v. *Ford* (2), [1892] A.C. 326, distinguished. F

Notes. Considered: *Donald Campbell & Co., Ltd.* v. *Pollak*, [1927] All E.R. Rep. 1. Explained and distinguished: *Re Mwenya*, [1959] 3 All E.R. 528.

As to the writ of habeas corpus, see 11 Halsbury's Laws (3rd Edn.) 24 et seq.; and for cases see 16 Digest 248 et seq. For Appellate Jurisdiction Act, 1876, see 5 Halsbury's Statutes (2nd Edn.) 293. G

Cases referred to:

(1) *Ex parte Cox* (1887), 19 Q.B.D. 307; sub nom. *R.* v. *Lord Penzance and Hakes*, 56 L.J.Q.B. 532; reversed 20 Q.B.D. 1; 57 L.J.Q.B. 98; 58 L.T. 323; 52 J.P. 484; 36 W.R. 209; 4 T.L.R. 81, C.A.; reversed sub nom. *Cox* v. *Hakes* (1890), 15 App. Cas. 506; 54 J.P. 820; 60 L.J.Q.B. 89; 63 L.T. 392; 39 W.R. 145; 6 T.L.R. 465; 17 Cox, C.C. 158, H.L.; 19 Digest 355, *1721*. H

(2) *R.* v. *Barnardo, Gossage's Case* (1890), 24 Q.B.D. 283; 59 L.J.Q.B. 345; 38 W.R. 315; 6 T.L.R. 163, C.A.; on appeal sub nom. *Barnardo* v. *Ford, Gossage's Case*, [1892] A.C. 326; 61 L.J.Q.B. 728; 67 L.T. 1; 56 J.P. 629; 41 W.R. 333; 8 T.L.R. 728; 36 Sol. Jo. 681; 1 R. 17, H.L.; 16 Digest 248, *469*. I

(3) *Hobhouse's Case* (1820), 3 B. & Ald. 420; 1 State Tr.N.S.App. 1346; 106 E.R. 716; 2 Chit. 207; 16 Digest 248, *464*.

(4) *R.* v. *Barnardo, Jones's Case*, [1891] 1 Q.B. 194; 64 L.T. 72; 39 W.R. 195; 7 T.L.R. 109, C.A.; affirmed sub nom. *Barnardo* v. *McHugh*, [1891] A.C. 388; 61 L.J.Q.B. 721; 65 L.T. 423; 55 J.P. 628; 40 W.R. 97; 7 T.L.R. 726, H.L.; 16 Digest 270, *793*.

(5) *Darnel's Case* (1627), 3 State Tr. 1; 16 Digest 263, *693*.

(6) *R.* v. *Winton* (1792), 5 Term. Rep. 89; 101 E.R. 51; 16 Digest 267, *750*.

A (7) *Ex parte Anderson* (1861), 3 E. & E. 487; 30 L.J.Q.B. 129; 3 L.T. 622; 25 J.P. 116; 7 Jur.N.S. 122; 9 W.R. 255; 121 E.R. 525; 16 Digest 249, *492*.

(8) *Ex parte Partington* (1845), 13 M. & W. 679; 2 Dow. & L. 650; 14 L.J.Ex. 122; 9 J.P. 443; 9 Jur. 92; 153 E.R. 284; 16 Digest 258, *611*.

(9) *City of London Case* (1610), 8 Co. Rep. 121b; 77 E.R. 658.

(10) *Stradling* v. *Morgan* (1560), 1 Plowd. 201; 75 E.R. 308; 42 Digest 634, *376*.

B (11) *R.* v. *Halliday, Ex parte Zadig*, [1917] A.C. 260; 86 L.J.K.B. 1119; 116 L.T. 417; 81 J.P. 237; 33 T.L.R. 336; 61 Sol. Jo. 443; 25 Cox, C.C. 650, H.L.; 2 Digest (Repl.) 184, *124*.

Also referred to in argument:

R. v. *Brixton Prison (Governor), Ex parte Savarkar*, [1910] 2 K.B. 1056; 80 L.J.K.B. 57; 103 L.T. 473; 26 T.L.R. 561; 54 Sol. Jo. 635, C.A.; 16 Digest C 270, *797*.

R. v. *Cannon Row Police Station Inspector, Ex parte Brady* (1921), 91 L.J.K.B. 98; 126 L.T. 9; 85 J.P. 265; 27 Cox, C.C. 92, C.A.; Digest Supp.

R. v. *Wormwood Scrubbs Prison (Governor), Ex parte Foy*, [1920] 2 K.B. 305; 89 L.J.K.B. 759; 84 J.P. 94; 36 T.L.R. 432; 17 Digest (Repl.) 417, *3*.

D **Appeal** from an order of the Court of Appeal (BANKES, SCRUTTON and ATKIN, L.JJ.), reversing a decision of the Divisional Court (LORD HEWART, C.J., AVORY ROCHE, JJ.) refusing an ex parte application by the respondent, Art O'Brien, for a rule nisi for a writ of habeas corpus to be directed to the Home Secretary. On April 13, 1923, the Court of Appeal ordered a rule nisi to issue, and on May 9 they made the rule absolute. The Home Secretary appealed to the House of Lords, E whereupon a question was raised with regard to the jurisdiction of the House to entertain the appeal.

The facts appear in greater detail in their Lordships' opinions.

The Attorney-General (*Sir Douglas Hogg, K.C.*), *The Solicitor-General* (*Sir Thomas Inskip, K.C.*) and *Giveen* for the Home Secretary.

Hastings, K.C., *St. John Field*, *R. O'Sullivan* and *G. Anstey* for the respondent. F

The House took time for consideration.

July 9. The following opinions were read.

EARL OF BIRKENHEAD.—The facts in this case need no elaborate examination, inasmuch as the only question to be decided by the House is whether or not in the circumstances of the case an appeal is competent at all. I have no doubt G that in a matter like the present your Lordships have no jurisdiction to hear such an appeal. I confine myself, therefore, to such a brief statement of the facts as is necessary to illustrate and render intelligible the motion which I shall hereafter propose.

On Mar. 11, 1923, the respondent O'Brien was arrested at the instance of the Home Secretary, was conveyed to Liverpool and thence to Dublin, where he was H handed over to the authorities of the Irish Free State, who immediately confined him in Mountjoy Prison. Your Lordships are not, in the view which I have formed, authorised to examine the arguments in law by which, in the courts below, the Attorney-General attempted to justify these proceedings. I do not, therefore, even attempt an examination of the true construction of s. 1 of the Restoration of Order in Ireland Act, 1920 [rep.: Statute Law Revision Act, 1950]; indeed, having I regard to the view which I understand the majority of your Lordships have formed, the last authoritative word upon that section has been uttered by the Court of Appeal. This consideration, of course, makes it equally unnecessary to examine the ambit or authority of reg. 14B [of the Defence of the Realm Regulations then operative, applied as regulations under the Act of 1920]. It is merely necessary to take notice of the fact that it was in reliance upon this regulation that the Home Secretary directed the apprehension and deportation of the respondent. Nor are we concerned, if the view which I have formed is well founded, with the various constitutional provisions which brought into being the Irish Free State.

These instruments, whether conventional or statutory, are only material in relation to the merits of the controversy; and with those merits I have already made it plain that we have nothing to do. Your Lordships are, however, most deeply concerned with the question whether or not this House has jurisdiction to re-examine, and if necessary to set aside upon the merits of the question, the decision which the Court of Appeal reached and announced on May 9, 1923. In this connection the following points of time must be distinguished. On April 10, 1923, a Divisional Court, consisting of LORD HEWART, C.J., AVORY and ROCHE, JJ., refused the respondent's ex parte application for a rule nisi for a writ of habeas corpus to be directed to the Home Secretary. The Court of Appeal, differing from the Divisional Court, ordered a rule nisi to issue on April 13, 1923, and on May 9 made the rule absolute. It could not, however, direct positively the discharge of the respondent, because the Home Secretary declared on affidavit that he had parted with control over his body. It is attempted in the present appeal to test and to challenge the propriety of the order made by the Court of Appeal. When the hearing of the case before your Lordships commenced I thought it proper to suggest that the question of jurisdiction should first be decided. The debate which followed was thereupon limited to this topic. It soon appeared that in the opinion of the House no jurisdiction existed to hear the appeal. In these circumstances nothing was to be gained by an academic discussion upon the merits of the matter; for, having regard to the view which a majority of your Lordships had formed upon the preliminary question, we should evidently have been debarred from even expressing an opinion upon the merits, however protracted and conscientious our application to so interesting a topic might have been. Your Lordships, therefore, thought it proper to announce forthwith the conclusion that an appeal was not competent, while postponing a full exposition of the reasons which rendered this conclusion necessary.

I propose shortly to state the ground which convinced me of the soundness of your Lordships' decision, and I am bold enough to say plainly that had it not been for the view taken by one of your Lordships, I should have thought the matter too plain for argument. The determining considerations are partly general and partly particular. The first class is deeply involved in the history of the matter. We are dealing with a writ antecedent to statute, and throwing its roots deep into the genius of our common law. The writ with which we are concerned to-day was more fully known as habeas corpus ad subjiciendum. This writ, however, was one of many. Thus there was a writ ad respondendum, ad satisfaciendum, ad prosequendum, ad testificandum, and ad deliberandum. All these writs exhibited many features in common, but the most characteristic element of all was their peremptoriness. To-day the substitution of more modern remedies has left the writ ad subjiciendum, more shortly known as the writ of habeas corpus, in almost exclusive possession of the field. It is perhaps the most important writ known to the constitutional law of England, affording, as it does, a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I. It has through the ages been jealously maintained by courts of law as a check upon the illegal usurpation of power by the executive at the cost of the liege. In the course of time certain rules and principles have been evolved; and many of these have been declared so frequently and by such high authority as to become elementary. Perhaps the most important for our present purpose is that which lays it down that, if the writ is once directed to issue and discharge is ordered by a competent court, no appeal lies to any superior court. Correlative with this rule, and markedly indicative in itself of the spirit of our law, is that other which establishes that he who applies unsuccessfully for the issue of the writ may appeal from court to court until he reaches the highest tribunal in the land.

If I am right in treating these rules as familiar and well settled, some curiosity may be felt as to the grounds which led the present appellant, advised as he has been by the law officers of the Crown, to assume that an appeal lay to this House

A in the circumstances of the present case. The argument is, of course, founded upon the very wide language of s. 3 of the Appellate Jurisdiction Act, 1876—"an appeal shall lie to the House of Lords from any order or judgment of . . . Her Majesty's Court of Appeal in England"—which is undoubtedly general enough to cover this or almost any other case. It is certainly true that in terms the words are wide enough to give an appeal in such a matter as the present. But I should, B myself, if I approached the matter without the assistance of any authority at all, decline utterly to believe that a section couched in terms so general availed to deprive the subject of an ancient and universally recognised constitutional right.

But happily we are in a position to approach the matter with even greater confidence, for in *Cox* v. *Hakes* (1) a very similar matter was debated and decided by this House. The argument in that case depended upon the language of s. 19 of C the Supreme Court of Judicature Act, 1873, but this section was, in its statement of competent appeals, as sweeping as s. 3 of the Appellate Jurisdiction Act, 1876. The guidance and the authority of the decision upon the earlier Act are, therefore, fully available for our purposes in the present appeal. It was established and, indeed, very often repeated, in the learned opinions which were delivered in *Cox* v. *Hawkes* (1), that if, upon the return of the writ, it was adjudged that no legal D ground was made to appear justifying detention, the consequence was immediate release from custody, and if discharge followed, the legality of such discharge could never again be brought in question. LORD HALSBURY, L.C., summarised the matter in the following sentence (15 App. Cas. at p. 522):

> "It is the right of personal freedom in this country which is in debate; and I E for one should be very slow to believe, except it was done by express legislation, that the policy of centuries has been suddenly reversed and that the right of personal freedom is no longer to be determined summarily and finally, but is to be subject to the delay and uncertainty of ordinary litigation, so that the final determination of that question may only be arrived at by the last Court of Appeal."

F All the opinions in this case will repay study; but while they illustrate and elaborate the conclusion so lucidly declared by LORD HALSBURY, they do not, perhaps, add anything which is material to our present purpose. It follows, therefore, from *Cox's Case* (1) that no appeal lies to the Court of Appeal where discharge has been ordered; and, the language of the relevant statutes being for the present purpose indistinguishable, it equally follows by parity of reasoning that no appeal G lies in the present matter to the House of Lords, unless upon some ground of principle the present case can be distinguished from *Cox's Case* (1).

The Attorney-General attempted to establish such a distinction. He admitted first that had O'Brien been discharged on May 9 by the order of the Court of Appeal, the matter would not have been further appealable. He admitted in the second place that he could suggest no reason which would have led the Court of H Appeal to withhold his discharge on May 9, except the fact that the Home Secretary no longer had the body of the respondent in his custody, having (according to the view of the Court of Appeal) illegally handed O'Brien over to the authorities of the Irish Free State. Your Lordships will now be in a position to appreciate the Attorney-General's argument. Had the Home Secretary contented himself with one act of illegality—namely, the forcible internment within this country of the I respondent—it is admitted that discharge would have been automatic, and consequently that there could have been no appeal. But inasmuch as the Home Secretary has added a second illegality to the first, namely, by forcibly handing over the respondent to the government of the Irish Free States, he has thereby disabled the Court of Appeal from effectively ordering his discharge, so that the respondent, because there were two illegalities instead of one, is deprived of his ancient constitutional privilege. Nor does the matter end there. The Court of Appeal appointed May 16 as the date on which the return was to be made. Before that day a request by consent was made to your Lordships to expedite the matter in

view of its importance. Your Lordships were pleased, having regard to the importance of the issue, to assent to this application, so that it was actually disposed of before May 16. When the request was addressed to this House, no warning was given to your Lordships that an assent thereto might arm the executive with a right of appeal which otherwise it did not possess. In the course of the argument before your Lordships, counsel for the respondent became somewhat tardily aware of the disadvantageous position into which he had allowed himself to be manœuvred; and he, therefore, invited your Lordships to postpone the conclusion of the debate until the Court of Appeal had disposed of the matter on May 16. Had no other method presented itself of securing for the respondent what I hold to be an established constitutional protection, I should have been disposed to recommend an assent to this request. But the view which your Lordships had formed rendered the adoption of such a course unnecessary, for your Lordships were clearly of opinion that when LORD HALSBURY, L.C., laid it down that the discharge of him who sued for the writ denied any further appeal by the executive, common sense, the reason of the thing, and the very spirit of our Constitution, asserted the same consequence as inevitable when the court was precluded for any reason from actually directing discharge, but contented itself by laying it down plainly that the man was in law entitled to be discharged. It would, indeed, be a strange and repellant doctrine if we were to hold that the competency of appeal in such a matter depended neither upon a principle of law nor upon anything in the power either of the applicant to do or of the court to direct, but upon some disability which the executive could, if it chose to do so, create in methods infinitely various.

It remains only to distinguish *Barnardo* v. *Ford* (2), though, indeed, that decision affords no guidance in the wholly different circumstances of the present case. It is true that in that case the Queen's Bench Division made absolute an order for the issue of the writ; it is true that the Court of Appeal affirmed that order, and that this House sustained that affirmation. But in that case no question of merit was decided at all. One of the parties desired a return to the writ in order that upon a return further questions of evidence might be raised. All that this House decided was that in the circumstances of that case there ought to be further inquiry in order to ascertain beyond all doubt whether the child was or was not still under Dr. Barnardo's control. The process, in other words, in that case was resorted to, not to ascertain any right, but to obtain remedy for the wrong caused by parting with the child's custody. LINDLEY, L.J., put the matter with his usual clearness in *R.* v. *Barnardo, Jones's Case* (4) ([1891] 1 Q.B. at p. 209):

> "But then it is said that no appeal lies from the order directing a writ of habeas corpus to issue, and reliance was placed on the recent decision of the House of Lords in *Cox* v. *Hakes* (1). That decision, however, appears to me to have no application to such a case as this. The question whether a person in prison ought to be set at liberty or not is entirely different from the question which of several persons ought to have the custody of a child."

In moving, as I do, that this appeal be dismissed, I cannot refrain from expressing my satisfaction that the lacuna, if there was one in the decision in *Cox's Case* (1), has been happily filled by the present decision in a manner which effectively carries out the evolutionary development of the constitutional liberty of the subject.

VISCOUNT FINLAY (read by the EARL OF BIRKENHEAD).—The question is whether your Lordships' House has jurisdiction to hear this appeal.

The Restoration of Order in Ireland Act, 1920, became law on Aug. 9, 1920, and by s. 1 (1) of that Act it was provided that His Majesty in Council might issue regulations under the Defence of the Realm Consolidation Act, 1914, for securing the restoration and maintenance of order in Ireland. By an Order in Council, dated August, 1920, made in pursuance of the said Act, it was provided that the Defence of the Realm Regulations then operative should, subject to certain modi-

A fications, apply and be regulations under the said Act. One of these regulations so applied and modified was reg. 14 B, which provides for the internment, by order of the Secretary of State, of any person suspected of acting or being about to act in a manner prejudicial to order in Ireland. On Mar. 7, 1923, the Secretary of State made an order that the respondent, Mr. Art O'Brien, should be interned in the Irish Free State in such place as the Irish Free State government might deter-
B mine. On April 10, 1923, application was made ex parte on behalf of the respondent, O'Brien, to a Divisional Court for a rule nisi for a writ of habeas corpus directed to the Secretary of State. The court refused the writ, but on April 13, 1923, the following order was made by the Court of Appeal:

"In the Court of Appeal—On appeal from the High Court of Justice—King's
C Bench Division. Upon reading the affidavit of Art O'Brien and the several exhibits therein referred to it is ordered that Monday, the 23rd April inst., be given to His Majesty's Secretary of State for Home Affairs to show cause why a writ of habeas corpus should not issue directed to him to have the body of Art O'Brien immediately before this court at the Royal Courts of Justice London to undergo and receive all and singular such matters and things as this
D court shall then and there consider of concerning him in this behalf. Upon notice of this order to be given to His Majesty's Secretary of State for Home Affairs in the meantime."

On May 9, 1923, after argument for the Secretary of State and for Mr. Art O'Brien, the Court of Appeal made the following order:

E "In the Court of Appeal.—On appeal from the High Court of Justice.—King's Bench Division. Upon reading the affidavit of the Right Honourable William Clive Bridgeman and upon hearing Mr. Attorney-General of counsel for His Majesty's Secretary of State for Home Affairs and Mr. Hastings of counsel for Art O'Brien. It is ordered that a writ of habeas corpus do issue directed to His Majesty's Secretary of State for Home Affairs commanding him to have
F the body of Art O'Brien immediately before this court at the Royal Courts of Justice London to undergo and receive all and singular such matters and things as this court shall then and there consider of concerning him in this behalf, and it is ordered that the said Secretary of State for Home Affairs be allowed until the 16th May inst. within which to make his return to the said writ."

C The case filed on behalf of the Secretary of State on the present appeal contains the following statements with regard to the proceedings in the Divisional Court, and in the Court of Appeal:

"The King's Bench Division overruled the contentions of the respondent for reasons which are fully set out in the judgment of the Lord Chief Justice to which the appellant respectfully craves leave to refer. The Court of Appeal
H held that the effect of the enactment of the Irish Free State Constitution Act was to deprive the appellant of any power to order the internment of any person in the Irish Free State because it was a necessary incident of any valid order of internment that the interned person should remain under the control of the appellant, and the effect of the Irish Free State Constitution Act was to prevent any person interned in the Irish Free State from being under his
I control. ATKIN, L.J., further held that the form of the order was bad, and that the effect of the Orders in Council of Mar. 27, 1923, and April 21, 1923, was to render any order of internment in the Irish Free State invalid. BANKES, L.J., expressed no opinion on these two points, and SCRUTTON, L.J., held the said Orders in Council to be ultra vires and invalid. The court further held that, although the appellant has lost the legal control of the respondent so as to render the order of internment bad, he had not necessarily lost the de facto control, and that the rule should be made absolute in order to compel him to make a return to it."

It is, therefore, clear that the ground on which the Court of Appeal made the rule absolute was that the order of internment was invalid.

In these circumstances is the present appeal competent? In my opinion, this question must be answered in the negative. In *Cox* v. *Hakes* (1) the Reverend Mr. Cox had been arrested under a writ de contumace capiendo. A rule nisi for a habeas corpus was obtained on the ground that the arrest was illegal. The Queen's Bench Division (LORD COLERIDGE, C.J., and A. L. SMITH, J.) made the rule absolute. The Court of Appeal reversed this decision, holding that s. 19 of the Judicature Act, 1873, gave an appeal from orders made on application for habeas corpus, whether the order granted or refused the writ, and decided that the writ had been lawfully issued. On appeal to the House of Lords the decision of the Court of Appeal was set aside on the ground that where a person has been discharged from custody by an order of the High Court under a habeas corpus the Court of Appeal has no jurisdiction to entertain an appeal from the order. The Attorney-General on the present appeal argued that the decision in *Cox's Case* (1) was distinguishable from the present inasmuch as there had been an order of discharge in the Queen's Bench Division, and Mr. Cox had been actually discharged under that order, while in the present case the rule for a habeas corpus had merely been made absolute without any order of discharge or any actual discharge. It was argued that the decision in *Cox's Case* (1) proceeded really upon the ground that there was no machinery for re-arrest, when discharge had once taken place on habeas corpus, and that it was, therefore, inapplicable to the present case, where there had been no discharge. I agree that the decision in *Cox's Case* (1) does not in terms apply to the present case, but the question remains whether on principle the two cases stand on the same footing. LORD HERSCHELL, in *Cox's Case* (1), said (15 App. Cas. at p. 536):

> "It is unnecessary to determine whether an appeal would lie from an order for a writ of habeas corpus if it were brought to the Court of Appeal before there had been a discharge under it. No such point arises here."

The point now arises and it must be determined. In my opinion, when the substance of the thing is looked at, it is plain that there is no real difference between the two cases, and that the order of the Court of Appeal that a writ of habeas corpus do issue directed to the Secretary of State commanding him to have the body of Art O'Brien before the Court of Appeal, is no more appealable than the order of discharge itself if it had been made upon the return. The Court of Appeal had decided that the detention was illegal, and it was on this ground, and on this ground only, that the order for the issue of the writ was made.

The writ of habeas corpus is a writ of right; it is not, however, grantable as of course, but on probable cause for it being shown: *Hobhouse's Case* (3). To avoid the inconvenience of unnecessarily bringing up the body, possibly from a distance, the practice grew up having a rule nisi for the issue of the writ. The practice is stated in rr. 217 and 218, which will be found in SHORT AND MELLOR'S PRACTICE OF THE CROWN OFFICE (2nd Edn.), p. 320. These rules are as follows: Rule 217:

> "If made to the court, the application shall be by motion for an order, which if the court so direct may be made absolute ex parte for the writ to issue in the first instance; or if the court so direct they may grant an order nisi."

Rule 218:

> "If made to a judge he may order the writ to issue ex parte in the first instance, or may direct a summons for the writ to issue." [See now R.S.C. Ord. 59, rr. 14–25.]

On the rule nisi the case is argued upon the merits, and if the court holds the detention illegal there is a rule absolute for the issue of the writ, and the body is brought up and discharge ordered. Under the old practice the writ issued on an ex parte application, and the matter was disposed of at once. It would be strange if proceeding by rule nisi gives an appeal when if it were issued on an

ex parte application there would be none. The matter was really disposed of in the present case when the Court of Appeal delivered judgment to the effect that the order of internment was invalid. O'Brien was entitled to his discharge, and a custody which the court had declared to be illegal could not properly be continued for any time beyond that which was necessary for carrying through the formal proceedings culminating in the order for discharge. The Court of Appeal, in its order of May 9, fixed May 16 as the date on which the return was to be made. It was conceded in argument at your Lordship's Bar that when that day arrived O'Brien would be entitled to his discharge. Counsel on behalf of Mr. O'Brien, during the argument, asked that the case in the House of Lords should be adjourned until after that date, and if this had been granted he would have been discharged from custody and the appeal of the Secretary of State would be purposeless, as the man would be at liberty and as was shown in *Cox's Case* (1) there would be no process available for having him remanded into custody. Indeed, it was only the fact that the hearing of the appeal to the House of Lords had been expedited by consent, so that it came on before May 16, that made it possible for the Secretary of State to raise this argument. I cannot think that there is any substance in it. We must deal with the substance of the matter. When it has been decided that the detention of any person is illegal he is entitled to be discharged, and I do not think that a detention which ex hypothesi would be unlawful could be relied upon for the purposes of supporting a right of appeal. The Court of Appeal granted the delay of a week for the return to the writ of habeas corpus. We must, however, I think, look at this case as if O'Brien had been set at liberty, which was his right according to the judgment which the Court of Appeal had just pronounced.

The Attorney-General, in his argument for the Secretary of State, relied upon the decision of the House of Lords in *Barnardo* v. *Ford* (2). In my opinion, that case bears no analogy to the present. It was a case in which the mother claimed the custody of her boy. The boy had been in one of Dr. Barnardo's homes but had been sent to Canada. The issue of a writ of habeas corpus had been ordered by the Queen's Bench Division and affirmed by the Court of Appeal. The House of Lords held that the case was one in which an appeal lay under s. 19 of the Judicature Act, 1873, from the Divisional Court to the Court of Appeal, and itself entertained an appeal from the Court of Appeal, and held, affirming their order, that, without expressing any opinion as to the circumstances in which the child was sent to Canada, the writ ought to issue on the ground that the applicant was entitled to require a return to be made to the writ in order that the facts might be more fully investigated. There had been in that case no adjudication that the person was entitled to be discharged, and no objection to the appeal was possible on any such ground as that which arises in the present case. The distinction between cases such as the present and cases such as *Ford's Case* (2) was very clearly stated in the Court of Appeal in *R.* v. *Barnardo*, *Jones's Case* (4). LORD ESHER, M.R., said ([1891] 1 Q.B. at p. 204):

> "The procedure [habeas corpus] generally and originally has been used for the purpose of bringing up persons whose liberty was alleged to be actually interfered with; but the writ has also always been used with respect to the custody of infants, in order to determine whether the person who has the actual custody of them as children shall continue to have the custody of them as children. In such cases it is not a question of liberty, but of nurture, control, and education."

It was accordingly held that the decision in *Cox's Case* (1) had no application to such cases as to infants. LINDLEY, L.J., expressed himself in similar terms ([1891] 1 Q.B. at pp. 209, 210):

> "But then it is said that no appeal lies from the order directing a writ of habeas corpus to issue, and reliance was placed on the recent decision of the House of Lords in *Cox* v. *Hakes* (1). That decision, however, appears to me to have no application to such a case as this. The question whether a person

in prison ought to be set at liberty or not is entirely different from the question which of several persons ought to have the custody of a child."

LOPES, L.J., expressed himself to the same effect. In my opinion, this House has no jurisdiction.

LORD DUNEDIN.—The generality of expression of the clause which gives an appeal from a Divisional Court to the Court of Appeal is indistinguishable from the generality of the clause which gives an appeal from the Appeal Court to this House. It follows that the considerations urged in *Cox* v. *Hakes* (1), which case decided that appeal was not competent, are equally applicable when the question is whether appeal in such a case as the present lies from the Court of Appeal to this House. The appellant, the Attorney-General, pointed out that in *Cox* v. *Hakes* (1) there had been an order for discharge, and discharge followed thereon, whereas in this case no such order has been pronounced, and he contended that that fact made all the difference. In other words, he urged that it was only the absence of power in the appellate court to re-arrest that led to the conclusion that appeal was impossible. On the best consideration which I have been able to give on a question admittedly important, I have come to the conclusion that *Cox* v. *Hakes* (1) depended on a broader ground: to wit, that it is a cardinal principle of the law of England, ever jealous for personal liberty, that once a person has been held entitled to liberty by a competent court, there shall be no further question. It was pointed out by LORD HALSBURY that, in the older practice under habeas corpus, it was allowable for a person seeking his liberty to apply to successive courts of competent jurisdiction undeterred by previous refusals, but that if he once succeeded in obtaining a judgment in favour of liberty, that judgment could no longer be called in question.

"The essential and leading theory of the whole procedure is the immediate determination of the right to the applicant's freedom" (15 App. Cas. at p. 517).

LORD HERSCHELL, in the course of his opinion, said:

"A person detained in custody might then proceed from court to court until he obtained his liberty. And if he could succeed in convincing any one of the tribunals competent to issue the writ that he was entitled to be discharged, his right to his liberty could not afterwards be called in question" (ibid. at p. 527).

The expression, be it observed, is "entitled to be discharged," not "actually discharged."

Again:

"It is sufficient to say that no person could be detained in custody if any one of the tribunals having power to issue the writ of habeas corpus was of opinion that the custody was unlawful" (ibid. at p. 528).

If that is the true test it seems to me to follow that the mere fact that actual discharge has not taken place does not affect the question. The right to an order for discharge, and discharge itself, are only the corollaries of the judgment that the applicant is entitled to liberty. Under the older practice the question in its present form could not have arisen. The writ being issued ex parte, and as a matter of course, any question as to the liability of the person on whom the writ was served to bring up the body must, if raised, have been decided first, and that being settled against him there could then have been debated the question of the legality of the detention, with the immediate consequence of discharge in the case that illegality was found. It is not to be considered likely that the change of procedure involved in proceeding by way of rule nisi—a change introduced merely to obviate the unnecessary inconvenience and expense of bringing up the body—should entirely alter the general doctrine and give an appeal where none existed before. If the general principle be as I have stated, *Barnardo* v. *Ford* (2) presents no difficulty. In that case no question had ever been raised, or was ever intended to be raised,

as to the legality of detention. The sole question was whether the writ was directed against the proper person. The result of granting an appeal was only to allow of further consideration of that question, not to re-raise a question of legality which had been already determined. The decision, therefore, in no way contravenes what I have ventured to call the cardinal principle of the English law, that a person once found entitled to liberty should not be liable to have that determination again called in question. I am, therefore, of opinion that it should be decided that the appeal is incompetent.

LORD ATKINSON.—An ex parte application having been made to the King's Bench Division for an order calling on the Home Secretary to show cause why a writ of habeas corpus should not be issued directing him to have before that court the body of one Art O'Brien who address was given at length, cause was subsequently shown by an affidavit of the Home Secretary setting forth ground why this writ should not be issued. On April 10, 1923, judgment was delivered by the King's Bench Division refusing the application. An application precisely in the form of an original application grounded upon the same affidavit of the respondent on which the application to the Court of King's Bench Division had been grounded, or if not actually the same affidavit an affidavit to the same effect asking practically for the same relief as was asked for from the King's Bench Division, was made to the Court of Appeal, as if that court had original, not merely appellate, jurisdiction in the matter. [His Lordship read the order of the Court of Appeal: p. 447 ante.] It will, therefore, be observed that, by this order of May 9, the respondent obtained the relief for which he asked; all that he asked was an order on the Secretary of State to show cause why a writ of habeas corpus should not issue to him to bring up the body of the respondent. The order of May 9 is an order absolute commanding the Home Secretary to do that very thing. This order and none other is the order appealed from to this House. It seems to be in regular form. It discloses no defect upon its face, and was, apparently, such an order as the Court of Appeal had jurisdiction to make. No order was made in this case by any court that the detention of the respondent by the Home Secretary, or by his procurement, was illegal in character. Neither was any order expressly asked for, or made by any court, that the respondent was entitled to be discharged or should be discharged from custody. If the Court of Appeal had made an order that the respondent should be discharged from custody, though that order might not have been enforceable at law, it by no means follows that the independent executive of the Free State, in whose custody the respondent then was, would not have obeyed the order of the Court of Appeal. It cannot be assumed, therefore, that such an order, if made, would necessarily have been abortive. Neither can, I think, the order of May 9, 1923, be treated as an abortive order. It operates with coercive force upon the Home Secretary to compel him to produce in court the body of the respondent. If the executive of the Free State adheres to the arrangement made with him, he can with its aid discharge the obligation thus placed upon him. If the Irish executive should fail to help him, he would be placed in a very serious position. Unless this executive should break what has been styled its bargain with the Home Secretary he had, in effect, the respondent under his power and control. It would be rather unfair to this executive to assume gratuitously beforehand that it would not keep the bargain made with it simply because that bargain was not enforceable at law.

The Court of Appeal further ordered that the Home Secretary should be allowed until May 16 to make a return to this writ. What is the function of a return to a writ of habeas corpus? It is to set out the facts and the grounds of the detention to enable the court mentioned in the writ to determine two questions—first, whether the person to whom the writ is addressed, either directly by himself or by his agents, detained in custody the person named in the writ, and, second, if so, was that detention legal or illegal? That is very old law: see *Darnel's Case* (5); but it is well established that r. 222 of the Crown Office Rules provides that the

return to the writ shall contain a copy of all the causes of the prisoner's detention endorsed on the writ itself or in a separate schedule. It appears to me that it would be difficult to frame any order more inconsistent than the order appealed from with the idea that the case was at an end, that the Home Secretary had been held to be responsible for the detention of the respondent, or that the latter's detention had been decided to be illegal, or that he had been ordered to be discharged or was entitled to be discharged. The opportunity of making a return is given to the Home Secretary. He is entitled to avail himself of it. That was, under the order, his legal right. Non constat, but that he may have some grounds to put forward, to establish the legality of his action. For instance, if, as was decided in *R.* v. *Winton* (6) he could return that Art O'Brien, the respondent, was not in his possession or power, or anything to that effect, that would have been a sufficient return to exculpate him if established. It must, moreover, be assumed that the Court of Appeal thought it necessary to have a return made to enable them to dispose of the case, and that it was only just to the Home Secretary to give him the opportunity of making it.

It is, therefore, clear, as I shall presently show, that the facts which formed the basis of the judgment of this House in *Cox* v. *Hakes* (1) do not exist in this case. Those facts were that the person alleged to have been imprisoned had been by the Queen's Bench Division ordered to be discharged, and had, in fact, been discharged, with the result that, even if the House had held that he had been improperly discharged, he could not be re-taken into custody under any order which the Court of Appeal or this House might make, and that any such order would therefore be abortive. The majority of the House came to the conclusion that for this reason the order made by the Court of Appeal was not an appealable order within the meaning of s. 19 of the Judicature Act, 1873. Lord Watson and Lord Macnaghten approved of the opinion of Lord Herschell. In his opinion Lord Herschell said (15 App. Cas. at p. 535):

> "It will be seen that the reasoning which has led me to the conclusion that an appeal will not lie from an order discharging a person from custody under a writ of habeas corpus has no application to an appeal from an order refusing to discharge him."

Lord Bramwell, with whom Lord Watson also concurred, said (ibid. at p. 524):

> "I say that the absence of specific procedure in the Judicature Act to enforce an order reversing an order of discharge on a writ of habeas corpus, and the possible futility of such reversal, is a strong argument to show that an appeal does not lie. I cannot, with great submission, agree that the court may reverse though no good may come of it. If no good may come of it eventually, I think the argument is strong to show that the power is not given."

Later on he said (ibid. at p. 525):

> "These considerations show that the substantial question is whether the order for the discharge of the body which is to be brought up, or treated as though brought up, was right. Where there is an order of discharge I have a difficulty in seeing how a Court of Appeal can undo that order. The body is gone. The Court of Appeal cannot reverse what has been done. It cannot give the judgment that ought, if right, to have been given, viz.: that he be remanded. He is not there."

The Court of Appeal had reversed the order of the Queen's Bench Division. They held that the words of s. 19 of the Judicature Act giving the Court of Appeal jurisdiction and power to hear and determine appeals from any judgment or order, save as excepted, of Her Majesty's High Court of Justice or of any judges or judge thereof, enabled them, despite the order of discharge, and the subsequent discharge, in fact, of the persons imprisoned, to hear the appeal. The House reversed the judgment of the Court of Appeal and restored that of the Queen's Bench.

It was not contended that the words of s. 19 were not wide enough to cover the

order made by the Court of Appeal, but it was held that, as the absence of the prisoner who had been discharged from custody would make an order upholding the Court of Appeal abortive, a narrower construction must be given to the words of the statute in order to avoid this result. Despite the repeated efforts of all the noble lords who took part in *Cox* v. *Hakes* (1) to show that their decision and the reasoning which led to it had no application whatever to any case where the person imprisoned or detained had not been in fact discharged, yet in *R.* v. *Barnardo, Jones's Case* (4) one finds LORD ESHER, M.R., saying ([1891] 1 Q.B. at p. 204):

> "The House of Lords have determined (i.e., in *Cox* v. *Hakes* (1)), with respect to the one set of cases in which the liberty of persons brought before the courts is in question, that no appeal lies against the order for the issue of a writ of habeas corpus."

With all respect the House of Lords decided nothing of the kind. He proceeds:

> "It is said that their decision went further, and determined that in no case of a writ of habeas corpus would an appeal lie. Having carefully read the judgments of the House of Lords, I have come to the conclusion that they did not go so far as that. They said that the words of s. 19 of the Judicature Act, 1873, were large enough to give an appeal; but when they came to consider the question of an appeal with respect to a case in which the writ was used for the purpose of determining whether a person should be deprived of his liberty, they came to the conclusion that there were great constitutional reasons against an appeal."

With all respect this last passage is not quite in accord with the decision referred to. If the noble Lord had qualified the word "person" with the words "who had already been discharged from custody," the passage would have been more accurate. LOPES, L.J., takes, I think, a much more accurate view of the decision of the House in *Cox* v. *Hakes* (1). He says ([1891] 1 Q.B. at p. 213):

> "I feel that it is somewhat anomalous to hold that one order made under a writ of habeas corpus is an order within the meaning of the word 'order' used in s. 19 of the Judicature Act, 1873, and that another order is not."

He then quotes the words of the section, as well as some passages from LORD BRAMWELL'S judgment, and says quite accurately:

> "The ground, however, of the judgments in *Cox* v. *Hakes* (1) is that, there being no power to re-capture or re-arrest, an appeal after an order of discharge from custody would be useless; consequently, that the right way of dealing with the word 'order' in s. 19 is to limit its meaning to cases where the Court of Appeal, or the court appealed from, can execute the order or judgment of the court if required. . . . It is clear, therefore, that what the House of Lords decided was that, in the case of a discharge from custody under a writ of habeas corpus, there is no appeal, because the court cannot give effect to its order. This reasoning is inapplicable to this case now under consideration. There has been no discharge of the infant. The infant is within the control of the court, and the court can make what order it thinks fit with regard to his custody, and can give full effect to its order or judgment."

In *Barnardo* v. *Ford* (2) the Queen's Bench Division made an order absolute for the issue of a writ of habeas corpus directed to Dr. Barnardo to bring up into court the body of a child which had been entrusted to his care. The mother of the child claimed the custody of it. Affidavits were made on both sides which were used on the application for the issue of the writ. In Dr. Barnardo's affidavit he said that he had handed over the child to another person to be taken to Canada, whose address he did not know, and, therefore, could not produce the child. This statement was considered equivocal and was quite consistent with the person to whom the child was delivered, being in fact Dr. Barnardo's agent. The Court of Appeal affirmed the order of the Queen's Bench Division. He, Dr. Barnardo, appealed to this House. A preliminary objection was raised that no appeal lay to

the Court of Appeal from the Queen's Bench Division. It was held that an appeal did lie to the Court of Appeal; that the order absolute for the issue of a writ of habeas corpus was an order within the meaning of s. 19 of the Judicature Act, 1873, and that the writ ought to issue, and that, in order that the facts should be fully ascertained, Dr. Barnardo should make a return.

It cannot be questioned that in the present case an appeal did lie to the Court of Appeal from the order of the Queen's Bench Division, nor can it be questioned, I think, that s. 3 of the Appellate Jurisdiction Act, 1876, confers upon this House jurisdiction to entertain an appeal from such an order as that actually appealed from. That section provides that an appeal shall lie to the House of Lords from, among others, "any judgment or order of Her Majesty's Court of Appeal in England," and s. 4 empowers this House on the hearing of an appeal to "determine what of right ought to be done in the subject-matter of the appeal," or, in other words, to make such an order as the court appealed from should have made. Your Lordships were pressed, however, not to entertain the appeal on the ground of want of jurisdiction, though the order appealed from was on its face apparently valid; not to decide whether on the law and the facts it was valid or invalid, but to go behind it, to study the judgments delivered by the lords justices, to accept their opinions as sound without examining them, to hold that the order which they should have made consistently with those opinions was an order that the detention of Art O'Brien was illegal, that he should be discharged from custody (albeit that the Home Secretary should then have no opportunity of making a return), and by assuming that the order which you considered should have been made had, in fact, been made, hold that you had no jurisdiction to entertain the appeal at all, or to determine whether the order under appeal was less consistent with those opinions than would have been an order discharging the respondent from custody. I am quite unable to come to the conclusion that such a course as this or any course resembling it should be followed. I think it would be contrary to the practice, and be unsustained by authority. No authorities in support of it have been cited in argument, and though I have searched with diligence for one myself, I have failed to find it. Judicial dicta applicable enough to the old practice which existed before the Judicature Act, 1873, and the Appellate Jurisdiction Act, 1876, were passed, are misleading, I think, when applied to the new system of procedure brought into existence under those enactments. Under the old practice, when the detention of an applicant for the issue of a writ of habeas corpus was held by a court or judge to be illegal, it necessarily followed that the applicant should be discharged and set free, for the very sufficient reason that, however erroneous the decision might plainly be, there was no appeal from it to any tribunal. It was final and conclusive. But to hold that the same result is to follow under the new system, even in cases such as the present, where the applicant remained in custody and under control, would in effect amount to holding that in each of the above-mentioned statutes the word "order" is to be construed as an appealable order when it pronounces the applicant's detention to be legal, enabling him to appeal to the Court of Appeal and, if need be, to this House against it, but that an order pronouncing his detention to be illegal is not an appealable order within the meaning of the same statutes. I cannot think that a construction of these statutes which would lead to such a lop-sided, and, in my view, unjust, result is their true construction. I think it involves a modification of their provisions, not an interpretation of them. I cannot find in these statutes any indication of an intention that the applicant for a writ of habeas corpus is in all cases to have a right of appeal against all orders of a court or judge made to his detriment, and the Crown or a prosecutor no right of appeal against any order made in his favour pronouncing his detention to be illegal. For these reasons I think that the House had jurisdiction to hear the appeal in this case and should have heard it.

LORD SHAW.—The question to be decided in this appeal is of a preliminary nature, and it is accordingly advisable that the narrative of the facts here given

A should be restricted to a statement sufficient to bring clearly to view the particular point on which the House feels itself bound to decline the jurisdiction which is sought to be imposed upon it by the appellant.

The respondent is a British subject, who was born and has for many years past resided in England and carried on business there. In his case presented to this House it is added that he "has also acted as the representative in London of the B Irish Republican government." The reason for this aggressive intimation is not clear. On Mar. 11, 1923, the appellant, His Majesty's Secretary of State for Home Affairs, caused the respondent's home in London to be forcibly entered and the respondent to be arrested, to be conveyed to Chelsea police station, thence by train to Liverpool, and thence by a British warship to Dublin in the territory of the Irish Free State. On arrival there the respondent was taken to Mountjoy Prison, C where he was, until after these proceedings were initiated, incarcerated. He was detained there by the authorities of that prison, within, of course, the ambit of the Irish Free State, and within the administrative and executive jurisdiction of the government of that State. These proceedings did not take place in the ordinary course of the criminal law of this country. Every officer or servant of the Crown who carried them through was doing so upon what ex facie was a mere lettre de D cachet. The proceedings themselves constitute abduction, imprisonment, and enforced exile—a violation, if unwarranted, of the elementary rights and liberty of the subject.

The warrant and justification for these otherwise unconstitutional acts of violence is alleged to be found in s. 1 of the Restoration of Order in Ireland Act, 1920. It was there enacted that where it appeared to His Majesty in Council that owing to E the existence of the state of disorder in Ireland the ordinary law was inadequate for the prevention and punishment of crime or the maintenance of order, His Majesty in Council might issue regulations under the Defence of the Realm Consolidation Act, 1914, for securing restoration and maintenance of order in Ireland and as to the powers and duties for that purpose of the Lord Lieutenant and the Chief Secretary and of His Majesty's Forces and other persons acting on His F Majesty's behalf and in particular for the special purposes thereinafter mentioned. On Aug. 13 of that year a large number of regulations were issued by Order in Council. Regulation 14B so issued is in the following terms:

"14B. Where on the recommendation of a competent naval or military authority or of one of the advisory committees hereinafter mentioned it appears G to the Secretary of State that for securing the restoration or maintenance of order in Ireland it is expedient that a person who is suspected of acting or having acted or being about to act in a manner prejudicial to the restoration or maintenance of order in Ireland shall be subjected to such obligation and restrictions as are hereinafter mentioned the Secretary of State may by order require that person forthwith, or from time to time either to remain in, or to H proceed to and reside in, such place as may be specified in the order, and to comply with such directions as to reporting to the police, restriction of movement, and otherwise, as may be specified in the order, or to be interned in such place as may be specified in the order. . . . If any person in respect of whom any order is made under this regulation fails to comply with any of the provisions of the order he shall be guilty of an offence against these regu- I lations, and any person interned under such order shall be subject to the like restrictions and may be dealt with in like manner as a prisoner of war, except so far as the Secretary of State may modify such restrictions, and if any person so interned escapes or attempts to escape from the place of internment or commits any breach of the rules in force therein he shall be guilty of an offence against these regulations. . . . In the application of this regulation to Scotland and Ireland references to the Secretary for Scotland, and references to the Lord Lieutenant or Chief Secretary shall respectively be substituted for references to the Secretary of State, but an order under this regulation may require the

person to whom the order relates to reside or to be interned in any place in the British Islands."

It is under this regulation that the Home Secretary purported to act. He issued an order for the internment of the respondent, and the proceedings of apprehension, deportation, and imprisonment already mentioned took place.

Between the date of the Restoration of Order in Ireland Act, 1920, and the order of internment made by the Home Secretary an important historical circumstance had occurred—namely, the setting up of the Irish Free State. This transaction was preceded on Dec. 6, 1921, by what are named "Articles of Agreement for a Treaty between Great Britain and Ireland." The transaction was carried forward by an Act made about three months afterwards—namely, on Mar. 31, 1922—entitled "The Irish Free State Agreement Act, 1922." This gave the force of law to the preceding treaty. Finally, the transaction was consummated on Dec. 5 of the same year by an Act entitled "The Irish Free State Constitution Act, 1922." Under that Act the constitution of the Irish Free State became determined; and the status thereof became that of a self-governing dominion, analogous to, in particular, that of Canada. By this constitution, and as a part of the grant of self-government, not only a separate legislature, but a separate executive for the Free State was created. By the Habeas Corpus Act, 1862, which followed the decision in *Ex parte Anderson* (7), it was enacted that

"no writ of habeas corpus shall issue out of England by authority of any judge or court of justice therein, into any colony or foreign dominion of the Crown where Her Majesty has a lawfully established court or courts of justice having authority to grant and issue the said writ, and to insure the due execution thereof throughout such colony or dominion."

When this is mentioned it will be seen that a grave element of difficulty had arisen for determination, in addition to other and serious issues as to the liberty of the subject which arose for settlement. It is important that I should not give any colour of determination by the way of putting the questions. I, therefore, merely cite from one or two of the reasons appended to the respondent's case. Among these reasons occur the following: (a) Because it is a violation of the common law, of the Great Charter, and of the Habeas Corpus Act, 1679, to cause any person to be exiled and sent prisoner oversea without proper trial and conviction; (b) because the Restoration of Order in Ireland Act, 1920, did not authorise the enactment of any regulations which should apply or operate in England; (c) because the Order in Council made and dated Aug. 13, 1920, and made in pursuance of the Restoration of Order in Ireland Act, did not, upon the true construction thereof, make any regulations which applied or could operate in England; and (d) because any regulations made or purported to be made in pursuance of the Restoration of Order in Ireland Act, 1920, if and so far as they applied or operated in England, were ultra vires, invalid, and of no effect. A number of other reasons attack the validity of reg. 14B, and challenge the possibility of its being applied outside of Ireland. Of these one may be cited:

"(h) Because reg. 14B did not authorise the appellant to delegate to any person not under his immediate supervision and control the performance of his duties and obligations or the exercise of his powers under the said regulation."

Sufficient has been said to show what may, without exaggeration, be called the far-reaching and enormous importance of the issues raised in this case, which affected, on the one hand, the liberty of the subject, and, on the other, the autocratic power claimed by the executive in restraint thereof.

It is now proper to state the procedure in the case and the method in which the appellate jurisdiction of this House has been invoked. On April 10, 1923, the respondent applied ex parte to a Divisional Court (Lord Hewart, C.J., Avory and Roche, JJ.) for a rule nisi for a writ of habeas corpus directed to the present appellant. That court refused the rule. On April 13, 1923, the Court of Appeal ordered a rule nisi to issue, and on May 9 made the rule absolute. It is from this

order that the present appeal is brought. The jurisdiction of this House to entertain or deal with this appeal is challenged. The question raised by that challenge is important, not alone from the point of procedure, but on account of its constitutional significance. It was upon that question that your Lordships heard arguments. Having come to a decision thereupon, and the decision being to the effect that the challenge of your Lordships' jurisdiction is a sound challenge, any entry upon the merits of the appeal becomes unnecessary.

I am of opinion that the appeal against the order of the Court of Appeal was incompetent and that this House has no jurisdiction to entertain it. It is convenient to have the exact language of that order, dated May 9, 1923, fully before the House. [His Lordship read the order: see p. 447 ante.] It will be observed that this order does not include a warrant for the discharge of the respondent. He could not under its terms be said to be set at liberty. The Attorney-General, on behalf of the appellant, founded his argument on the terms of the order. From these he maintained that two consequences follow—first, that the order does not contain in its terms a discharge of the applicant; and secondly, that, being therefore a mere order stopping short of such a discharge, which would have set at liberty the respondent, it is an appealable order. He applied to this order s. 3 of the Appellate Jurisdiction Act, 1876. The relevant portion of that section is as follows:

> ". . . an appeal shall lie to the House of Lords from any order or judgment of any of the courts following; that is to say, (1) of Her Majesty's Court of Appeal in England."

This, said he, is an order of the Court of Appeal, to which the language of s. 3 of the statute of 1876 applies, the language of the section being language of complete generality. It may be that under such language the constitutional privileges, including the right of liberty of the subject, are infringed or curtailed; but there is nothing in this statute which makes an exception in regard to these topics.

The question is deeply important; it has never been considered with reference to the jurisdiction of this House. But in *Cox* v. *Hakes* (1) a closely analogous question did come here. It was argued at great length in July, 1889, and re-argued at great length in May, 1890; and the old and fundamental constitutional rule and practice of the law of England was there re-affirmed—namely, that where a person has once been discharged from custody by an order of the High Court under a habeas corpus the Court of Appeal has no jurisdiction to entertain an appeal, and that this rule was not impinged upon or repealed by the generality of language as to appeals used in the Judicature Act. Undoubtedly the generality of s. 19 of the Judicature Act, 1873, was as great as that of s. 3 of the Appellate Jurisdiction Act here founded upon. It was in these terms:

> "The Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order, save as hereinafter mentioned, of Her Majesty's High Court. . . ."

An order for the discharge of a person in custody did not come within any of the exceptions referred to in the section, and, therefore, so far as the language and its full generality went, such a discharge order was covered by the language permitting appeal. Elaborate opinions were pronounced in the case, and it was finally settled as the law of England that, where a person has been discharged from custody by an order of the High Court under a habeas corpus, the Court of Appeal has no jurisdiction to entertain an appeal. On behalf of the appellant it was admitted with entire propriety that the principle of *Cox* v. *Hakes* (1) would have applied to the present appeal had the body of the appellant been brought up in answer to the return, and had the appellant been discharged and set at liberty. But, it was argued, there was no such discharge in the order. The case had not gone to the length of setting the subject free. Had it done so, there would have been no jurisdiction to review such an order under the established law of England. But this was not done. This House, it was therefore contended, had jurisdiction

to entertain the appeal, and by the general words of the Appellate Jurisdiction Act, 1876, s. 3, it was bound to do so. A

The great importance happily attached by judges to the maintenance of the constitutional security for the liberty of the subject is well illustrated by the opinions in *Cox* v. *Hakes* (1), which I am about to cite. In support of the argument for the appeal it is undoubtedly true that they did attach importance to the fact that the appeal to the High Court, which was there challenged, was an appeal against a B discharge under a writ of habeas corpus. They were, of course, confronted with that as a fact. LORD HALSBURY, L.C., says, for instance (15 App. Cas. at p. 519):

> "It can hardly be disputed that no machinery is provided for giving effect to an appeal against a discharge under a writ of habeas corpus."

And LORD HERSCHELL, referring to the courts whose functions were transferred to C the High Court, says (ibid. at p. 530) that

> "None of these had any jurisdiction or authority to review a discharge by a competent court under a writ of habeas corpus or to enforce the arrest of one of those freed from custody."

The point, indeed, of the present appeal seems to have been expressly left open by D LORD HERSCHELL when he observes (ibid. at p. 536):

> "It is unnecessary to determine whether an appeal would lie from an order for a writ of habeas corpus if it were brought to the Court of Appeal before there had been a discharge under it."

We have accordingly here to determine a point in this important branch of the law never formally decided. It can only be decided as matter of principle. It is E fortunate, however, that the principle was also, as I view the judgment, set forth with great and authoritative power in *Cox* v. *Hakes* (1). LORD HALSBURY, L.C., observed (ibid. at p. 514):

> "For a period extending as far back as our legal history, the writ of habeas corpus has been regarded as one of the most important safeguards of the F liberty of the subject. If upon the return to the writ it was adjudged that no legal ground was made to appear justifying detention, the consequence was immediate release from custody. If release was refused, a person detained might—see *Ex parte Partington* (8)—make a fresh application to every judge or every court in turn, and each court or judge was bound to consider the question independently and not to be influenced by the previous decisions G refusing discharge. If discharge followed, the legality of that discharge could never be brought in question. No writ of error or demurrer was allowed: *City of London Case* (9). . . . In days of technical pleading no informality was allowed to prevent the substantial question of the right of the subject to his liberty being heard and determined. The right to an instant determination as to the lawfulness of an existing imprisonment, and the twofold quality of such H a determination that, if favourable to liberty it was without appeal, and if unfavourable it might be renewed until each jurisdiction had in turn been exhausted, have from time to time been pointed out by judges as securing in a marked and exceptional manner the personal freedom of the subject."

After citing the Habeas Corpus Act, 1876, with its preamble:

> "Whereas the writ of habeas corpus hath been found by experience to be an I expeditious and effectual method of resorting any person to his liberty who hath been unjustly deprived thereof: And whereas extending the remedy of such writ and enforcing obedience thereunto, and preventing delays in the execution thereof, will be advantageous to the public,"

the Lord Chancellor added (ibid. at p. 516):

> "It will be observed that the judge is to satisfy himself, and if he is satisfied that the matter returned is matter which if true would be a good return he is to do what justice requires, i.e., if he thinks the imprisonment lawful, to

remand to custody; if otherwise, to enforce the immediate liberation. If, on the other hand, he is doubtful, he may hold to bail. The essential and leading theory of the whole procedure is the immediate determination of the right to the applicant's freedom."

It had, however, been strenuously maintained that the right of appeal given by the Judicature Act was literally plain and perfectly general. This had to be admitted. But, notwithstanding this, it was held that it could not have been the intention under general words occurring in an Act regarding legal procedure to abrogate the fundamental rights of the citizen in regard to one of the most vital parts of our Constitution; and the intention of Parliament, even while using such words, fell to be considered. It was for that reason that *Stradling* v. *Morgan* (10) was cited. The passage is as follows (Plowd. at p. 205a):

"From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter, in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded on the intent of the legislature, which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the legislature, which they have always taken according to the necessity of the matter and according to that which is consonant to reason and good discretion."

The principle of the matter was thus dealt with by the Lord Chancellor (15 App. Cas. at p. 522):

"It is the right of personal freedom in this country which is in debate; and I for one should be very slow to believe, except it was done by express legislation, that the policy of centuries has been suddenly reversed and that the right of personal freedom is no longer to be determined summarily and finally, but is to be subject to the delay and uncertainty of ordinary litigation, so that the final determination upon that question may only be arrived at by the last Court of Appeal."

LORD BRAMWELL took the case as from the fact—that is, that discharge had occurred—but he himself says (ibid. at p. 526): "My reasons would, perhaps, apply to a case where a prisoner had been remanded." LORD HERSCHELL also dealt with the principle underlying the judgment, and with the practice of the court in these sentences (ibid. at p. 527):

"My Lords, the preliminary question argued upon the hearing of this appeal is one of great importance. It touches closely the liberty of the subject, and the protection afforded by discharge from custody under a writ of habeas corpus. The law of this country has been very jealous of any infringement of personal liberty, and a great safeguard against it has been provided by the manner in which the courts have exercised their jurisdiction to discharge under a writ of habeas corpus those detained unlawfully in custody. . . . It was always open to an applicant for it, if defeated in one court, at once to renew his application to another. No court was bound by the view taken by any other, or felt itself obliged to follow the law laid down by it. Each court exercised its independent judgment upon the case, and determined for itself whether the return to the writ established that the detention of the applicant was in accordance with the law. A person detained in custody might thus proceed from court to court until he obtained his liberty. And if he could succeed in convincing any one of the tribunals competent to issue the writ that he was entitled to be discharged, his right to his liberty could not after-

wards be called in question. There was no power in any court to review or control the proceedings of the tribunal which discharged him. I need not dwell upon the security which was thus afforded against any unlawful imprisonment. It is sufficient to say that no person could be detained in custody if any one of the tribunals having power to issue the writ of habeas corpus was of opinion that the custody was unlawful." A

I have cited enough from these judgments to make it, in my humble opinion, abundantly clear that the principle underlying the opinions is that, if one court of law having power to entertain an application for a writ of habeas corpus comes definitely to the conclusion that the applicant is entitled to his discharge, no other court, either by way of review or of appeal, can upset that judgment. In LORD HALSBURY'S language, the real decision is the determination of a right. B C

"The essential and leading theory of the whole procedure is the immediate determination of the right to the applicant's freedom" (ibid. at p. 517);

and in LORD HERSCHELL'S language:

"If he can succeed in convincing any one of the tribunals competent to issue the writ, that he was entitled to be discharged, his right to his liberty could not afterwards be called in question" (ibid. at p. 527). D

It is not for me to suggest for a moment any limitation of the principle there laid down. It is in accord with the legal and constitutional canons, which are, in my belief, worthy of veneration.

The only question is: Do these principles apply to the present case? Has there, in short, been a determination of the respondent's right to his liberty, and of the invalidity of the admitted infringement thereof by an order issuing from the Home Secretary. Had such a determination been made in proceedings ex parte, the result would have been the same. Yet on this subject the careful procedure taken by the Court of Appeal in the previous instance is worthy of remark. The case might have proceeded ex parte; but upon April 13, 1923, the learned judges, in view of the important question affecting the liberty of the subject, which was involved in granting leave to the Secretary of State for Home Affairs to show cause why a writ of habeas corpus should not issue, thought it right to intimate the proceedings to the Attorney-General. The officers of the Crown, accordingly, attended on the whole question, and there, without any doubt, the applicant's right to liberty was fully discussed. The statutes, orders, and regulations affecting the case, and the affidavits therein, were debated; and upon May 9 judgments full of care and learning were delivered, the whole of this being unquestionably done in foro contentioso. The question of right was determined and decided. Why, then, did not discharge follow? The reason was owing to the attitude taken up by the appellant, the Home Secretary. It seemed impossible to determine at that stage whether he could or could not bring up the body. Under his order the body had been removed beyond the jurisdiction of the ordinary courts of this country, and placed within the jurisdiction of the Irish Free State, being thereafter in an Irish prison administered by the officers of that State. What was the nature of the arrangement, if any, for re-delivering the body was uncertain. In these circumstances, their Lordships of the Court of Appeal made a warrant returnable within one week—that is, on May 16. Nothing required to be done in the case, except to set the applicant free and to award costs. The merits of the case were decided; the question of right was settled. In these circumstances I am of opinion that it would be contrary to the principle of our law to permit that question of right thus and then determined to be re-opened, and that your Lordships' House have no jurisdiction to review or to control what was then done. E F G H I

The appellant founded on *Barnardo* v. *Ford* (2), which, in its circumstances, is very far removed from the present case. That was an application by a parent for a writ of habeas corpus, in respect of a child, directed to the head of an institution for destitute children. It appeared that Dr. Barnardo had, with the approval of

A the child's mother, handed over the child to be taken to Canada, and the allegation was that he did not know the address of such person or where the child was. The Queen's Bench Division made absolute an order for the issue of the writ, and that order was affirmed by the Court of Appeal, a judgment which was sustained in this House. No question was determined as to its merits. It appears from the judgment of the Lord Chancellor that the parties (at least one of them) desired a return
B to the writ, so that upon the return further questions of evidence might be raised. The principal feeling of the House seems to have been expressed broadly by LORD MACNAGHTEN in these words:

> "I cannot say that this is a case in which there ought not to be an opportunity of further inquiry into the circumstances under which Dr. Barnardo parted with the child and ascertaining beyond all doubt whether the child is or is not
C still under Dr. Barnardo's control or within his reach" ([1892] A.C. at p. 340).

LORD WATSON puts it:

> "Seeing that the writ must go and that the appellant will have the opportunity of making further explanations, I refrain from comment upon the facts already in evidence" (ibid. at p. 333).

D It appeared that the process was being used, not for the purpose of ascertaining the right to compel the return of the child, but for the purpose of obtaining remedy for the legal wrong committed by having parted with the custody of the boy. The distinction between that class of case and the ordinary habeas corpus case was taken by all the judges, and was succinctly stated by LINDLEY, L.J., who said:

E > "The question whether a person in prison ought to be set at liberty or not is entirely different from the question which of several persons ought to have the custody of a child": *R.* v. *Barnardo, Jones's Case* (4) ([1891] 1 Q.B. at p. 210).

The case, accordingly, entirely differs from the present, where the facts are fully before the court, and where the defence of the seizure has failed.

I think the law of England to be long settled to the following effect—that when
F once a legally constituted court has determined that a subject of the Crown, who is an applicant for the issue of a writ of habeas corpus, is entitled to his liberty, such a judgment cannot be overruled either by any other court or by any court of review or appeal. It may be that a discharge may be postponed on account, for instance, of some temporary impediment to the production of the body, but if the question of right is settled there can be no appeal or review of that settlement.
G I think it right further to observe that urgency is written all over the face of habeas corpus proceedings. "Preventing delay," "immediate determination of the right to the applicant's freedom," and the avoidance of "the delay and uncertainty of ordinary litigation," these expressions are significant of urgency as an essential quality of the proceedings. The present case shows well how fully this is recognised by the courts of this country. The judgment of the Court of Appeal making
H the rule absolute was delivered on May 9. The appellant was ordered by the Court of Appeal to bring up the body of the respondent on May 16. Between these dates —namely, on May 11—Mr. Attorney-General appeared and asked the indulgence of the House to be heard upon May 14; and the House, following the salutary practice which favours the urgency to which I have referred, acceded to the request. But the case then took a curious turn. On May 14 the jurisdiction of this House
I was challenged on the ground of the incompetency of the appeal. The learned Attorney-General maintained that, as the judgment appealed from had not discharged the respondent and set him at liberty, therefore the appeal was competent. So far as this House is concerned, the very arguments on the question of jurisdiction were made possible by this House itself in its concession of a hearing to the appellant two days before that appointed for the bringing up of the body, and before discharge of the applicant had been accomplished as a necessary consequence of the decision of the Court of Appeal already delivered on May 9. I pass from the topic by declaring that I should not have been a consenting party to a transaction

of the kind had I been apprised that by doing so the House was being committed to the position that in argument was being presented, in restraint of the liberty of the appellant, which would have been impossible had the procedure taken its ordinary course and the concession to urgency not been made. I am perfectly sure that this had not appeared with its legal possibilities at the time when the application was made to this House. Of course, no consideration of such a kind can, however, determine the decision of the question of the fundamental principle involved.

In the view which I take of this appeal the question at stake transcends an ordinary case of jurisdiction. To sustain jurisdiction would be to claim a right to circumvent or destroy that finality of liberation which has been long affirmed as a part of English constitutional law. It would, in short, be a usurpation by this House of a right and power to destroy a liberty already properly affirmed as a matter of right in one of His Majesty's subjects. Your Lordships are thus determining not merely in the present case to decline a jurisdiction, but to decline a usurpation. That usurpation is forbidden. Beyond finality, I repeat that the point of urgency, an essential point, would also be violated by our assertion of a power to review a liberating judgment. The procedure of our courts in vindicating the right that

> "No freeman shall be taken or imprisoned or disseised or in any way destroyed, nor will we give upon him information sent upon him, except by the lawful judgment of his peers or by the law of the land"

is established. In the procedure in reference to the writ of habeas corpus this c. 39 of Magna Carta has been interpreted in the spirit of c. 40: "To no one will we sell, to no one will we refuse or delay, right or justice." An appeal against an unwarranted destruction of liberty is not to be refused or delayed. Promptitude is guaranteed, because without promptitude the illegal loss of liberty would be continued and enlarged. The occasions are frequent in which the temptations are severe to abridge these fundamental rights. Parliament may make such abridgment in plain language of its own, and, so to speak, with its eyes open, or it may do so in a form more concealed, looser, less open to scrutiny, and much more convenient and not unfamiliar to administrators, by giving power for the issue of orders or regulations by a committee of the Privy Council; but, of course, this has to be determined in its legality by the exact ambit of the delegated power. I do not say, in view of the affidavit by the respondent in this case, that the temptation was not great to take a swifter course against him than law permits. I must decline such short cuttings. There is hardly any great historical occasion on which a government might not plead its view of the public good and the public convenience as an excuse for a violent deprivation from the subject of those rights in which he is secured by law. In declining jurisdiction in this case, your Lordships are not doing more than affirming a settled principle and declining to permit an invasion of constitutional right. In the opinion which I had the honour to deliver in *R.* v. *Halliday* (11) I had the misfortune to dissent from the judgment then delivered. But there can be no dissent from what I there have ventured to call "Hallam's penetrating judgment" on this very topic. I think it not unfitting to repeat it here. After citing those chapters of Magna Carta to which I have alluded, Hallam adds (Constitutional History of England (6th Edn.) vol. 2, p. 449):

> "It is obvious that these words, interpreted by any honest court of law, convey an ample security for the two main rights of civil society. From the era, therefore, of King John's Charter it must have been a clear principle of our constitution that no man can be detained in prison without trial. Whether courts of justice framed the writs of habeas corpus in conformity to the spirit of this clause, or found it already in their register, it became from the era the right of every subject to demand it. That writ, rendered more actively remedial by the statute of Charles II, but founded upon the broad basis of Magna Carta, is the principal bulwark of English liberty; and if ever temporary

circumstances, or the doubtful plea of political necessity, shall lead men to look on its denial with apathy, the most distinguishing characteristic of our constitution will be effaced."

I agree to the motion proposed from the Woolsack.

Appeal dismissed.

Solicitors: *Treasury Solicitor*; *Gisborne, Woodhouse & Co.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

FOOD CONTROLLER AND ANOTHER *v.* CORK

[HOUSE OF LORDS (Earl of Birkenhead, Lord Atkinson, Lord Shaw, Lord Wrenbury and Lord Carson), June 4, 5, July 25, 1923]

[Reported [1923] A.C. 647; 92 L.J.Ch. 587; 130 L.T. 1; 39 T.L.R. 699; 67 Sol. Jo. 788; [1923] B. & C.R. 114]

Company—Winding-up—Preferential payment of debts—Crown debt—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 186 (1), *s.* 209.

On the construction of s. 186 (1) and s. 209 of the Companies (Consolidation) Act, 1908 [now s. 302 and s. 319 of the Companies Act, 1948], read together, the Crown has no prerogative right to require payment of a debt due to a government Department from a company which is in voluntary liquidation in priority to all other creditors of the company or to all such creditors as are not given priority by the Companies Acts.

Decision of the Court of Appeal, [1922] 2 Ch. 369, affirmed.

Notes. Applied: *Re Azoff-Don Commercial Bank*, [1954] 1 All E.R. 947. Referred to: *Re Winget*, *Burn* v. *Winget*, [1924] 1 Ch. 550; *Re Cockell*, *Jackson* v. *A.-G.*, [1931] 1 Ch. 389.

As to priority of debts in a winding-up, see 6 HALSBURY'S LAWS (3rd Edn.) 661–668, 747; and for cases see 10 DIGEST (Repl.) 991–997, 1058, 1059.

Cases referred to:

(1) *Re Galvin*, [1897] 1 I.R. 520; 4 Digest (Repl.) 518, **1998.*

(2) *New South Wales Taxation Comrs.* v. *Palmer*, [1907] A.C. 179; 76 L.J.P.C. 41; 96 L.T. 278; 23 T.L.R. 304; 14 Mans. 106, P.C.; 30 Digest (Repl.) 214, *559.*

(3) *R.* v. *Wells* (1807), 16 East, 278; 104 E.R. 1094; 16 Digest 225, *166.*

(4) *Re Henley & Co.* (1878), 9 Ch.D. 469; 48 L.J.Ch. 147; 39 L.T. 53; 26 W.R. 885; 1 Tax Cas. 209, C.A.; 10 Digest (Repl.) 1122, *7812.*

(5) *Quick's Case* (1611), 9 Co. Rep. 129 b.

Also referred to in argument:

A.-G. v. *De Keyser's Royal Hotel*, [1920] A.C. 508; 89 L.J.Ch. 417; 122 L.T. 691; 36 T.L.R. 600; 64 Sol. Jo. 513, H.L.; 17 Digest (Repl.) 437, *91.*

Richards v. *Kidderminster Overseers*, *Richards* v. *Kidderminster Corpn.*, [1896] 2 Ch. 212; 65 L.J.Ch. 502; 74 L.T. 483; 44 W.R. 505; 12 T.L.R. 340; 4 Mans. 169; 10 Digest (Repl.) 994, *6833.*

Re Oriental Bank Corpn., Ex parte R. (1884), 28 Ch.D. 643; 54 L.J.Ch. 327; 52 L.T. 170; 1 T.L.R. 42; 10 Digest (Repl.) 992, *6828.*

Re West London Commercial Bank (1888), 38 Ch.D. 364; 57 L.J.Ch. 925; 59 L.T. 296; 4 T.L.R. 446; 10 Digest (Repl.) 993, *6830.*

A.-G. v. *Leonard* (1888), 38 Ch.D. 622; 57 L.J.Ch. 860; 59 L.T. 624; 37 W.R. 24; 4 T.L.R. 479; 11 Digest (Repl.) 665, *901.*

Re Bonham, Ex parte Postmaster-General (1879), 10 Ch.D. 595; 48 L.J.Bcy. 84; sub nom. *Re Bonham, Ex parte Postmaster-General, Re Bonham, Ex parte Lords of the Treasury*, 40 L.T. 16; 27 W.R. 325, C.A.; 42 Digest 691, *1057*.

Appeal by the Food Controller from an order of the Court of Appeal reported sub nom. *Re H. J. Webb & Co. (Smithfield, London), Ltd.*, [1922] 2 Ch. 369.

By ss. 3 and 4 [now repealed] of the New Ministries and Secretaries Act, 1916, the Ministry of Food was established for the purpose of maintaining and regulating the supply of food during the emergency occasioned by the war of 1914–18. The Food Controller appointed a company, H. J. Webb & Co. (Smithfield, London) Ltd., to act as agents for the sale and distribution of consignments of frozen rabbits imported from Australia. The company disposed of the rabbits and subsequently went into voluntary liquidation without having previously made any payments to the Food Controller in respect of the rabbits sold by them, and at the time of the liquidation the sum of £9,089 5s. 10d. was owing to the Crown in respect of the rabbits. The Food Controller lodged a proof in the winding-up for this sum, and claimed (i) that it was a debt due to the Crown, and (ii) that the liquidator, in administering the assets of the company, was bound to pay the said sum in priority to all creditors, or, in the alternative, to all creditors to whom preference was not given by statute. The liquidator did not dispute that the money was due, but denied that the debt was a Crown debt, and contended that in any event the debt could only rank for dividend pari passu with the other debts due from the company. Upon a summons issued by the Food Controller the Court of Appeal held, reversing the decision of P. O. Lawrence, J., that in the winding-up of a company the Crown could not claim that Crown debts must be paid in priority to all other creditors, for such a claim was inconsistent with, and, therefore, abrogated by, the provisions of the Companies (Consolidation) Act, 1908, s. 186 (1) and s. 209 [see now s. 302 and s. 319 of the Companies Act, 1948], which gave certain debts priority over all other, including Crown, debts. The narrower prerogative right to take the assets of the company by writ of extent or otherwise to the exclusion of all other claims, and apart altogether from the winding-up, was also inconsistent with those sections and not maintainable. The Food Controller appealed to the House of Lords.

The Attorney-General (*Sir Douglas Hogg, K.C.*), *The Solicitor-General* (*Sir Thomas W. Inskip*), *Dighton Pollock* and *Roland Burrows* for the appellant.

Sir John Simon, K.C., *Montgomery, K.C.*, and *Costello* for the respondent.

The House took time for consideration.

July 25. The following opinions were read.

EARL OF BIRKENHEAD.—This is an appeal against an order of the Court of Appeal reversing the decision of P. O. Lawrence, J. The question for decision shortly stated is whether the admitted bankruptcy rule that Crown debts have no claim to priority of payment, other than is given by statute, obtains equally under the statutes now in force in the case of winding-up an insolvent company. The trial judge decided that the Crown's prerogative right of priority still exists in the case of the winding-up of a company, though extinguished in the case of bankruptcy. The Court of Appeal decided that the effect of the statutes now in force is that the rule is the same in both cases and that the Crown's prerogative right of priority in the winding-up of an insolvent company has been extinguished. I am of opinion that the decision of the Court of Appeal was right, and that the appeal therefore fails.

The matter is really concluded by the view which I understand that your Lordships have formed of the joint effect of s. 186 (1) and s. 209 of the Companies (Consolidation) Act, 1908 [see now ss. 302 and 319 of Companies Act, 1948, respectively] for, I think, the earlier Acts are only helpful to the history of the matter. The sections referred to are as follows:

"Section 186. The following consequences shall ensue on the voluntary winding-up of a company: (1) The property of the company shall be applied in satisfaction of its liabilities pari passu, and, subject thereto, shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company.

"Section 209 (1). In a winding-up there shall be paid in priority to all other debts—(a) all parochial or other local rates due from the company at the date hereinafter mentioned [i.e., the date of the commencement of the winding-up], and having become due and payable within twelve months next before that date, and all assessed taxes, land tax, property or income tax assessed on the company upon the fifth day of April next before that date, and not exceeding in the whole one year's assessment; (b) All wages or salary of any clerk or servant in respect of services rendered to the company during four months before the said date, not exceeding £50; and (c) all wages of any workman or labourer not exceeding £25, whether payable for time or for piece work, in respect of services rendered to the company during two months before the said date . . . (d) Unless the company is being wound-up voluntarily for the purposes of reconstruction or of amalgamation with another company, all amounts (not exceeding in any individual case £100) due in respect of compensation under the Workmen's Compensation Act, 1906, the liability wherefor accrued before the said date . . . (2) The foregoing debts shall—(a) rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions; and (b) in the case of a company registered in England or Ireland, so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company and be paid accordingly out of any property comprised in or subject to that charge."

It has been pointed out, and, indeed, is obvious, that these two sections are, if considered separately, irreconcilable, for it is impossible at one and the same time to apply the property of the company in satisfaction of its liabilities pari passu, and to allow the preferences permitted by s. 209. Obviously, therefore, the sections must be construed together, and the most harmonious construction evolved which the language and the evident intention of both permit. The effect of s. 209 is to allow priority to specified Crown debts, to specified wages, and to workmen's compensation. It necessarily follows that the generality of the language of s. 186 must be supplemented and corrected by the particularity of the exceptions enumerated in s. 209. Another conclusion would seem to be not less inevitable. At the time the Act of 1908 became law, it was fairly arguable that under the general law of prerogative, and in virtue of various statutory provisions, Crown debts were entitled to a general priority upon the winding-up of the company. No such claim can survive the particular enumeration contained in s. 209. For the legislature has indicated the general principle in s. 186, namely, that the property is to be distributable pari passu, but in s. 209 it enumerates certain exceptions which are to be admitted from the general rule already laid down. Among these exceptions are certain particular Crown debts. It would have been plainly impossible to adopt this form of legislation if it had been intended that other Crown debts should retain a priority inconsistent alike with the general language of s. 186 and with the motive which led to the specification of admitted exceptions contained in s. 209. My decision, therefore, is based simply upon inferences which seem to me to be necessary as to the effect of the clauses under consideration. The construction which I adopt makes it superfluous to embark upon any general consideration of the prerogative, or of the difference between Crown debts, as the term was used generations ago, and that term in a changed age, when it governs sums of money owing to the immense trading establishments which various government departments have been authorised to create. I mention, lest I appear

to have ignored it, the Irish case of *Re Galvin* (1). PALLES, C.B., pointed out in his judgment that there is a vital difference between the Irish and the English bankruptcy legislation in a very material respect, for the English Act provides that "save as mentioned in this section, all debts provable under the bankruptcy shall be paid pari passu." He added the observation that if any such provision had been part of the Irish bankruptcy law he would have taken the view that the Crown had lost all priority for any debts other than that provided by s. 49 of the Irish Bankruptcy Act, 1872. I was somewhat surprised that the Attorney-General founded himself upon a decision which, rightly considered, re-enforces the conclusion I have reached in the present case. I move that the appeal be dismissed with costs.

LORD ATKINSON.—The question for decision in this case is whether the Crown has any prerogative right to require payment of Crown debts due from a company which is insolvent and in voluntary liquidation in priority to all other creditors of the company or in priority to all such creditors of the company as are not given priority by the Companies Acts.

The facts and circumstances out of which this question has emerged may be shortly stated. H. J. Webb & Co. (Smithfield, London), Ltd., now insolvent and in liquidation (for convenience styled "the company"), was employed by the Food Controller, acting under the power conferred upon him by the New Ministries and Secretaries Act, 1916, and by certain regulations made under the Defence of the Realm Act, 1914, to sell on commission and distribute large quantities of frozen rabbits which, to meet the threatened shortage of food, the Board of Trade had purchased from certain State governments in Australia, paid for, and imported into this country. The course of business followed was this. This company, acting on behalf of the Food Controller, sold and delivered these rabbits to purchasers throughout England, collected from those purchasers the purchase money, which it was bound to pay over, less commission, to the Food Controller. On July 9, 1920, when the company went into liquidation, it owed to the Food Controller the large sum of £9,689 5s. 10d. in respect of money received for the rabbits sold but not accounted for. This is the debt for which the Crown claim priority.

I concur with the Master of the Rolls in thinking that the expression "Crown debts" and "debts due to the Crown" are unfortunate expressions, inasmuch as they suggest, at least to the uninitiated, that the Sovereign claims the right to be paid debts due to him to the exclusion of the rights of his subjects, either for his own use or for the public use as determined by him. Ages ago these words would probably be considered to apply to taxes or such like, but now, and especially during the late war, when the different departments of government became more like great trading and industrial corporations than anything else, it is obvious that it leads to misunderstanding when the trade debts due to those corporations are sought, by the exercise of the Royal prerogative, to be recovered in priority to those due to subject creditors. It is not to be wondered at, if it be true, that a tendency may be detected in the legislation passed from the year 1883 downwards dealing with bankruptcy, and the voluntary winding-up of companies, to place, to some extent at all events, the Crown substantially in the same position as private creditors. In *New South Wales Taxation Comrs.* v. *Palmer* (2), which was a case arising on the New South Wales Bankruptcy Act, 1898, a statute following closely the English Bankruptcy Act, 1883, but not containing any section corresponding to s. 150 of the latter statute, by which section it was provided [see now s. 151 of the Bankruptcy Act, 1914] :

> "Save as herein provided the provisions of this Act relating to the remedies against the property of a debtor, the priorities of debts, the effect of a composition or scheme of arrangement, and the effect of a discharge, shall bind the Crown."

LORD MACNAGHTEN, adopting the law as laid down by MACDONALD, C.B., in *R.* v. *Wells* (3), and following the decision of the Court of Appeal in *Re Henley & Co.* (4), laid it down that the decision in the latter case rested on two separate grounds and upon two distinct prerogatives. He said ([1907] A.C. at p. 184):

> "It was a case of winding-up, not of bankruptcy. The property had not passed out of the company. The court therefore held that the Crown was still at liberty to pursue its extreme rights against the company's property [i.e., evidently by writ of extent] and was on that ground entitled to priority. But the court also held that under the other and wider prerogative the claim of the Crown must prevail."

At p. 182 (ibid.) LORD MACNAGHTEN, after citing the following passage from the judgment of MACDONALD, C.B., in *R.* v. *Wells* (3):

> "I take it to be an incontrovertible rule of law that where the King's and the subject's title concur the King's shall be preferred,"

proceeded to say:

> "Except so far as the legislature has thought fit to interfere, the rule is one of universal application, and perhaps not unreasonable, when it is considered that, after all, it only means that the interests of individuals are to be postponed to the interests of the community."

If that be so, as no doubt it may be, I think it is to be regretted that some name or description has not been substituted for the description "Crown debts" or "debts due to the Crown" which would more clearly indicate than do these latter terms the benefit to the community intended to be conferred by the exercise of the Royal prerogative in these cases. The words "except so far as the legislature has thought fit to interfere," used by LORD MACNAGHTEN, are wide words. If one should find that schemes have been set up by statutes for the administration of the estates of bankrupts, and for the administration and application of the assets of insolvent limited liability companies which are being wound-up, of such a nature that the concurrent exercise by the Crown of one or both of its prerogatives produces unreasonable and absurd results, must not one come to the conclusion that the legislature must have intended to interfere with those prerogatives, and to trench upon them sufficiently to avoid these results?

Before dealing with some of those results, I may say that I share the view which LORD STERNDALE, M.R., stated, when the present case was before the Court of Appeal, he was inclined to entertain, namely, that the Crown really is not entitled to two prerogatives, but only to one prerogative enforced, no doubt, in two different ways and by two different methods, the right enforced by each method being the same right, namely, the right to require a debtor to the Crown to pay his debt before that debtor pays the debts he may owe to others. The Crown may assert its right by seizing under a writ of extent, if need be, all the assets of the debtor, where there has been no cessio bonorum, and satisfy out of these assets the debt due, or the Crown may come into a proceeding in bankruptcy or to the winding-up of an insolvent company or such like, prove its debt claimed, and insist upon payment of this debt in priority to the claims of other creditors. This is styled the wider prerogative, but in each case the same single and undoubted right, and that alone is enforced. To take a familiar instance by way of illustration. A lessor is entitled to receive from his lessee the rent reserved by the lease when it becomes due. If the lessee should not pay his rent, the lessor may distrain (seizing under a writ of extent has been styled, by COTTON, L.J., a distraint), or he may sue the lessee on the latter's covenant to pay the rent. What the lessor is in each case enforcing is the single simple right to be paid his rent, though he may enforce it by either of these two methods. I confess I cannot but think the Crown is somewhat in the same position.

I turn now to consider some of the cases in which the Royal prerogatives come into conflict in proceedings in bankruptcy and also in winding-up proceedings with

the statutory provisions dealing with these matters. The first section of the Preferential Payment in Bankruptcy Act, 1888, deals with the distribution of the property of a bankrupt and also with that of the assets of a company being wound-up under the Act of 1862. By s. 1 (6) this Act is made to apply to the case of a deceased person who died insolvent, as if he were a bankrupt, and as if the date of his death were the date of the receiving order; and by s. 3 the Act is made to apply also to the case of receiving orders, and orders for the administration of the estates of deceased debtors according to the law of bankruptcy made and winding-up proceedings commenced, after the commencement of the Act. All these instances are treated in similar terms, yet the Crown prerogative may treat entirely differently the persons or bodies named according as there has or has not been a cessio bonorum in the case. The first section enacts that in the distribution of the property of a bankrupt or in the distribution of the assets of a company being wound-up under the Act of 1862 certain debts shall be paid in priority to all other debts. These certain debts are:

> "(a) All parochial or other local rates due from the bankrupt or the company at the date of the receiving order or, as the case may be, at the commencement of the winding-up, and having become due and payable within twelve months before that time, and all assessed taxes, land tax, property or income tax assessed on the bankrupt or the company."

These latter are obviously debts due to the Crown. (b) Next come the salaries and wages due to clerks or servants. (c) Next, wages due to labourers and workmen. Then sub-s. (2) provides that these debts shall rank equally between themselves and shall be paid in full out of the assets, and in the event of the assets being insufficient they are to abate rateably. That involves a direct interference with at least the larger prerogative. The statute puts the Crown debt mentioned in its first section precisely on a level with parochial and local rates, and wages due to clerks, servants, or workmen. There may be debts due to the Crown other than those to which statutory priority is thus given. But it would seem to me that the second prerogative would, strictly speaking, enable the Crown to take no step whatever during all the time that the liquidator is ascertaining the liabilities of the company adjudicating on contesting claims, collecting the assets, and then at the last moment, but before these assets had been actually distributed by the liquidator, come in under a writ of extent, seize all the assets of the company in order to satisfy all the debts due to the Crown, and leave nothing whatever to satisfy the parochial and other rates, or the wages and salaries which had got statutory priority under the first section. That, I think, would be a strange, a grotesque, result.

I asked several times during the course of the argument if the Crown were not bound to elect which of the remedies it would pursue, but, as I understood, no admission was made that it was bound to do so. It is scarcely possible, it would appear to me, to hold that the legislature, when passing the Act of 1888, did not intend to interfere with and trench upon the Royal prerogative sufficiently to prevent such results as these. The legislature by statute gave to the Crown the right to secure priority for debts due to it of a certain class to be obtained in a certain prescribed way. I do not think it can secure priority for those very debts otherwise than in the way and by the means by which the statute has provided that this shall be done.

I now turn to the Companies (Consolidation) Act, 1908, s. 186. It is a reproduction of s. 133 of the Companies Act, 1862. It provides expressly that the property of a company shall be applied in satisfaction of its liabilities. Section 209 deals with preferential payments. It is little more than a re-enactment of s. 1 of the Act of 1888. It deals with Crown debts of a specified class, and secures that Crown debts of that class, together with debts of three other classes, namely, wages or salaries of clerks or servants, wages of workmen and labourers, and, under certain conditions, compensation to workmen under the Workmen's Compensation Act,

1906, shall all have equal priority. These debts rank equally among themselves and abate rateably if there be a deficiency of assets. This is the only statutory priority given. This Act, like every other Act, must be construed as a whole. Sections 186 and 209 must, as far as possible, be reconciled the one with the other and construed together. Section 186 would thus become binding on the Crown since it would deal with Crown debts, inasmuch as s. 209 qualifies it and restricts the area of reach of s. 186. The latter section must, therefore, be read as if the words "save as hereinafter provided" were written into it. This, I think, is clear, that all the property of the company not needed to implement s. 209 is irrevocably dedicated by this s. 186 to the satisfaction of the companies' liabilities (which, of course, must include debts) pari passu. Thus interpreted, this statute clearly deprives the Crown of all right to priority for any debts due to it other than that given by s. 209.

Much reliance was placed by the Crown on the judgment of PALLES, C.B., in *Re Galvin* (1). That was a case arising on the Bankruptcy (Ireland) Act, 1872. Section 49 of that Act provided, as does s. 32 of the English Bankruptcy Act, 1869, for the payment of certain classes of debts, Crown and others, in priority to all other debts, but the English section contained a vital provision which is omitted from the Irish Act, namely, this: "Save as aforesaid all debts provable under the bankruptcy shall be paid pari passu." The Chief Baron distinctly states that, had the Irish statute contained this provision or any provision to the same effect, he would have held that the Crown was deprived of the right of priority for any debts other than that expressly named in s. 49 of the Irish Act. If the provision that all debts other than those named should be paid pari passu were sufficient to deprive the Crown debts of their claimed priority, how much more potent, in the Chief Baron's opinion, must have been the words of s. 186 of the Act of 1908. In my opinion the appeal fails and should be dismissed with costs.

LORD SHAW (read by the EARL OF BIRKENHEAD).—I entirely agree with the judgment of LORD ATKINSON. The matter appears to me to be settled by the provisions of the Companies (Consolidation) Act, 1908, if only one does what one ought to do, viz., read s. 186 and s. 209, so as to make them work together. The first-named section says that the property of the company is to be applied in satisfaction of its liabilities pari passu. Section 209 deals with priorities among debts. These priorities include parochial and local rates, due for the past twelve months, and assessed taxes, land tax, property tax, or income tax up to April 5 before the winding-up; the wages of clerks, servants, workmen, or labourers; and amounts due for compensation under the Workmen's Compensation Act, 1906. All these debts are lumped together and must be paid in full unless the estates are insufficient to meet them, and in that case they shall be paid in equal proportions. The result of this is that certain particular Crown debts have a priority not over, but along with, certain wages and workmen's compensation. This priority of specified debts having been satisfied, the rights of all creditors, including the Crown in respect of debts other than those specified debts, are to rank pari passu. The Crown, as a creditor, is by its assent to this legislation plainly restricted in priority to the limited specification of Crown debts given. It follows that, beyond that point, the Crown assents to an equal division. Any supereminent right, whether under the name of prerogative or otherwise, has disappeared. The Crown stands plainly bound to that result.

It might be sufficient to leave the matter there, but in case the treatment of this appeal should ever be attempted as a precedent for recognition on a wide scale of what are Crown debts, I desire to make the following observations. I think, with LORD STERNDALE, M.R., that the expressions "Crown debts" and "debts due to the Crown" are unfortunate. They do suggest that, under the name of prerogative, something is being claimed higher than that justice which is distributed among subjects of the Crown, and this even under ordinary contracts, the construction of which among such subjects would not permit of the operation of

preference. As I am merely reserving the point, it is, of course, no part of my duty to go over the wide field of prerogative. But I may illustrate my reservation by *New South Wales Taxation Comrs.* v. *Palmer* (2). The judgment of the Privy Council was delivered by LORD MACNAGHTEN and naturally great authority must attach to it. His Lordship said:

> "In *R.* v. *Wells* (3), in a passage which has been often cited, MACDONALD, C.B., says (16 East, at p. 282): 'I take it to be an incontrovertible rule of law that where the King's and the subject's title concur the King's shall be preferred.' Except so far as the legislature has thought fit to interfere, the rule is one of universal application, and perhaps not unreasonable, when it is considered that, after all, it only means that the interests of individuals are to be postponed to the interests of the community. The rule is enunciated by LORD COKE in *Quick's Case* (5). From LORD COKE's time to the present day it has never been questioned as a rule of law, and, so far as their Lordships are aware, there has never been any attempt on the part of any court to limit the generality of application except in the present case, and in two recent cases in the colonies which will be referred to presently."

I venture to interpose much doubt into the application of extension of the expression used by MACDONALD, C.B., "that where the King's and the subject's title concur the King's shall be preferred," and the modernisation of that, given by LORD MACNAGHTEN, to cases of ordinary commercial or industrial contracts entered into by a government Department in the course of the business or enterprise which it carries on. If a special statute confers upon such Departments priorities, preferences, excuses for misfeasance or exemptions from liability, then, of course, the statute controls the situation. But if the propositions above cited should ever be used to justify or widen the Royal prerogative by the inclusion of ordinary contracts into the range of privilege, then it is, I think, very important to realise that this dictum of LORD MACNAGHTEN's occurred in a case in which the nature of the debts, as Crown debts, and that, in a very strict sense, was clear beyond all question. The claim of the Crown in the *Palmer Case* (2) was in respect of "the sum of £53 for land and income tax and fines, being a debt payable to the Crown by virtue of the Land and Income Tax Assessment Act, 1895, and Acts amending the same." There, accordingly, the Crown debt was clear as such and as being within a definite sphere of action plainly within the law applicable to the Royal prerogative.

Almost at the other end of the scale, however, stands the present case on its facts. What is alleged to be recoverable by preference under the Royal prerogative arises in the following way. (I quote from the respondent's Case):

> "8. Under the provisions of the New Ministries and Secretaries Act, 1916, and certain regulations made under the Defence of the Realm Consolidation Act, 1914, H. J. Webb & Co. (Smithfield, London), Ltd., hereinafter called 'the company,' agreed with the Food Controller to sell and distribute frozen rabbits which were being imported by the Board of Trade under some arrangement with certain State governments in Australia. The company was to retain a percentage upon the amount of the sales effected by it and was to pay over the balance to the Food Controller. 9. The company sold and delivered to various retail customers frozen rabbits received from the Food Controller and were paid the purchase moneys therefor. The company, however, did not pay to the Food Controller the whole of the sums due to him under his agreement with the company."

My opinion is now delivered with the most complete reservation of the point whether facts of such a nature could ever permit of the debt which has arisen being treated as a Crown debt within the scope of the Royal prerogative. How is this a Crown debt? It springs out of no power vested in the Crown by way of the imposition of a duty or a tax. It is not in the ordinary enumeration of debts incurred for the service of the country. It is an instance simply of a debt arising

under ordinary transactions of principal and agent. A government Department in the course of realising government property, appointed an agent to conduct a transaction. That agent defaulted to the extent of nearly £10,000 and then became bankrupt. The debt arises purely in commercio. It is unnecessary in this case to commit oneself to the proposition that when Departments of government enter into the commercial or industrial sphere they do so with such an enormous leverage against all competitors or subjects of the Crown. As at present advised, I can imagine nothing more damaging to the Royal prerogative. As time proceeds, the government does, no doubt, increasingly enter into the commercial or industrial sphere, but if the argument suggested be sound, it would further appear as a consequence that as spheres of government action widen, the prerogative of the Crown grows larger and larger and the escape from obligations or the use of preference over the rights of the ordinary citizens would in a greater and greater measure extend. These questions are enormously important. They will have, unless Parliament itself interposes to clarify the situation, to be decided some day. The respondent did not argue these broad questions, but conceded that he was willing to take the case on the ground that the debt was within the privileged category. This would not have necessarily precluded—it never could preclude —the court taking the point. But the learned counsel might have been of opinion that the statute of 1908 was so clear in its language that he need not embark on any further constitutional voyage. In my view, this opinion was sound; and, as stated, my opinion is that the appeal is put out of court by the sections of the Act which I have already cited.

LORD WRENBURY.—I listened with interest to the historical review which the Attorney-General gave your Lordships of the development of the statute law relevant to the matter before the House. But I derive little, if any, assistance from the knowledge that, for instance, a particular section is in terms identical with a section which, as the law previously stood, was found in a framework different from that in which it is now found. To ascertain the present law it is necessary to consider such a section in the framework in which it now stands. In other words, I have to consider the statute law as it is. In so doing I may confine myself for the present purpose to ss. 186 and 209 of the Companies (Consolidation) Act, 1908, with such assistance, if any, as is afforded by other sections of that Act.

The first observation to be made on ss. 186 and 209 is that they are obviously in conflict. Section 186 enacts that all liabilities shall be satisfied pari passu. Section 209 enacts that they shall not, but that some debts shall have priority over others. It is necessary, therefore, to read s. 186 as prefaced by some such words as "subject to the other provisions of this Act." The second observation is that s. 209 as affecting the rights of the Crown in respect of Crown debts is binding on the Crown. By assenting to an Act which affected the rights of the Crown it is obvious that the Crown waived its prerogative to the extent necessary to give effect to the Act so long as the Act was in operation. The third observation is that as s. 209 binds the Crown, s. 186, which deals with the same subject-matter, viz., the application of the assets in satisfying the liabilities, also binds the Crown.

With this preface I go on to consider, first, what is the prerogative or (if there be more than one) what are the prerogatives of the Crown, and, secondly, what is the operation of the statute in respect of them. The Crown, by virtue of its prerogative, is entitled to say: "In payment of debts I have the right to come first—and to enforce that right I can proceed by way of writ of extent." I should not myself describe this as two prerogative rights, of which one is larger than the other, but rather as one prerogative right and a prerogative remedy to enforce the right. I can understand that the Crown might surrender the latter, while retaining the former, but not that it could surrender the former while retaining the latter. If the right to come first is surrendered, the prerogative remedy to enforce that right by writ of extent must have been surrendered also. The question for decision, therefore, I think is, and is only, whether the Crown has surrendered

the prerogative right to come first. The effect of s. 209 is as follows. By s. 209 (1) (a) certain Crown debts, which I will call the specified Crown debts, are brought into the class of debts identified by s. 209 (1) (a), (b), (c), (d). Debts of this class are to be paid "in priority to all other debts," in priority, therefore, to (among others) the unspecified Crown debts. Subject to the priority right of this class, all liabilities are by s. 186 to be satisfied pari passu. The specified Crown debts, therefore, are to be paid pari passu with the other debts in the class created by s. 209 (1), and in priority to all other debts, whether Crown or not, which are not in that class. Further, all debts, whether Crown debts or not, which are not in that class are to be paid pari passu after satisfying the above priority. This is the statutory administration of the assets, and to this the Crown has given its assent. It follows from what I have said that the Crown is no longer in a position to say "I come first." It does not come first. Some debts have been raised by s. 209 (1) to a position in which they rank with the specified Crown debts, and that class comes first. Other debts have been raised by s. 186 to a position in which they rank with the unspecified Crown debts, and these are to be postponed and to be paid pari passu. By assenting to an Act which altered the rights of the Crown in manner above stated, the Crown surrendered its prerogative right to come first, and necessarily surrendered also its prerogative right to enforce by a writ of extent a right of priority which existed no longer.

In the course of the argument a phrase was used which, unless rightly understood, tends only to confusion. It was said that the Crown might remain "outside the winding-up" and might exercise its remedy by writ of extent because the statutory scheme of administration of the assets in the winding-up could not affect the Crown if it remained "outside the winding-up." The phrase "outside the winding-up" is an intelligible phrase if used, as it often is, with reference to a secured creditor, say a mortgagee. The mortgagee of a company in liquidation is in a position to say "the mortgaged property is to the extent of the mortgage my property. It is immaterial to me whether my mortgagor is in winding-up or not. I remain 'outside the winding-up' and shall enforce my rights as mortgagee." This is to be contrasted with the case in which such a creditor prefers to assert his right, not as a mortgagee, but as a creditor. He may say "I will prove in respect of my debt." If so, he comes into the winding-up. But an unsecured creditor cannot remain "outside the winding-up." He must, if he is bound by the Act, obtain in the winding-up such relief as the statute gives him. There is no cessio bonorum, it is true, but the authority of the liquidator is an authority which extends to all the assets of the company. In saying this there must be added one qualification already indicated. If the statute by express words or by necessary implication provides that, notwithstanding the winding-up, the rights of a defined person shall remain unaffected, then no doubt he is "outside the winding-up" for all purposes. If, therefore, the Crown stands in that position, then no doubt all its rights, both that of priority and that of enforcement by writ of extent, remain unaffected. But that is not this case. The Crown is obviously by the provisions of s. 209 within the Act. It cannot be both within it and without it.

It remains only to say a word as to *Re Henley & Co.* (4). In 1878, when that case was decided, the statute law stood as follows. Section 133 of the Companies Act, 1862, enacted that all liabilities should be satisfied pari passu, but the Act nowhere referred to Crown debts, and did not bind the Crown. Section 32 of the Bankruptcy Act, 1869, did refer to Crown debts and did bind the Crown; but s. 32 operated only in bankruptcy, and did not apply in winding-up. Section 10 of the Judicature Act, 1875, enacted that in winding-up the rules in bankruptcy in this matter should prevail and be observed. The bankruptcy rules, therefore, after 1875 prevailed in winding-up as regards all who were bound by the Act of 1875. But the Act of 1875 did not bind the Crown. It followed that so much of the Bankruptcy Act, 1869, as did bind the Crown was not by the Act of 1875 made applicable to the Crown in winding-up as distinguished from bankruptcy.

A It is singular that, although the question upon the Act of 1875 is referred to in the argument as reported before MALINS, V.-C. (9 Ch.D. at p. 471), it is nowhere dealt with in the judgments in the Court of Appeal. The lords justices decided the case upon the footing only that the Companies Act, 1862, did not bind the Crown. If they had added, as I do, that the Judicature Act, 1875, did not bind the Crown either, they would have made the matter complete. The decision in B *Re Henley & Co.* (4) is no authority upon the present case, because the statute law is not now that which it was when that case was decided. Section 209 of the Act of 1908 does bind the Crown, and it binds the Crown to a statutory scheme of administration of the assets wherein the prerogative right of the Crown to priority no longer exists. For these reasons I think that this appeal fails.

C **LORD CARSON.**—I concur.

Appeal dismissed.

Solicitors: *Solicitor to the Board of Trade*; *F. C. Mathews & Co.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

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BYGRAVES *v.* DICKER

[KING'S BENCH DIVISION (Lush and Salter, JJ.), April 26, 1923]

[Reported [1923] 2 K.B. 585; 92 L.J.K.B. 1021; 129 L.T. 688]

Hackney Carriage—Injury to passenger—Negligence of licensed driver—Liability of registered proprietor—Town Police Clauses Act, 1847 (10 *& 11 Vict.*, *s.* 89),
F *ss.* 45–63.

On the true construction of the Town Police Clauses Act, 1847, ss. 45–63, the registered proprietor of a hackney carriage (e.g., a taxicab), licensed under s. 37 of the Act to ply for hire outside London, although not the de facto employer of the licensed driver whom he permits to drive the vehicle, is in the position of the driver's employer, and, therefore, a person who is
G injured as a result of the negligence of the driver may maintain an action against the registered proprietor.

Notes. As to liability of hackney carriage proprietors for acts of licensed drivers, see 31 HALSBURY'S LAWS (2nd Edn.) 712, 715; and for cases see 34 DIGEST 34–36, 140, 141.

H Cases referred to:

(1) *Keen* v. *Henry*, [1894] 1 Q.B. 292; 63 L.J.Q.B. 211; 69 L.T. 671; 58 J.P. 262; 42 W.R. 214; 10 T.L.R. 96; 38 Sol. Jo. 77; 9 R. 102, C.A.; 34 Digest 141, *1105.*

(2) *Venables* v. *Smith* (1877), 2 Q.B.D. 279; 46 L.J.Q.B. 470; 36 L.T. 509; 41 J.P. 551; 25 W.R. 584, D.C.; 34 Digest 141, *1102.*

I (3) *Powles* v. *Hider* (1856), 6 E. & B. 207; 25 L.J.Q.B. 331; 27 L.T.O.S. 77; 21 J.P. 4; 2 Jur.N.S. 472; 4 W.R. 492; 119 E.R. 841; 34 Digest 140, *1101.*

Appeal from Brighton County Court.

The plaintiff's claim was for damages for personal injuries which he alleged were caused by the driver of the defendant's taxicab. The action was remitted to the county court and was there tried by the judge with a jury. The defendant was the registered proprietor of the taxicab and was licensed to use it as a hackney cab, which was a hackney carriage within the meaning of Town Police Clauses Act, 1847. The driver was duly licensed. The defendant denied the alleged

negligence or that the plaintiff had suffered damage, and he further denied that the licensed driver of the taxicab was his (the defendant's) servant, but the plaintiff contended that, under the Town Police Clauses Act, 1847, the defendant, as the registered proprietor of the taxicab, was liable for the negligence of the licensed driver. The plaintiff called eveidence to show that the driver was in fact the servant of the defendant, quite apart from any question under the Town Police Clauses Act, 1847. At the trial it was suggested by the learned county court judge that the question of the defendant's liability under the Town Police Clauses Act, 1847, should be reserved for further argument if the jury should find in the plaintiff's favour on the issues of negligence and damages. The learned judge offered to put these two questions to the jury, but the learned counsel for the plaintiff declined to accept this offer. Thereupon the judge non-suited the plaintiff. The plaintiff appealed.

Martin O'Connor (*M. O'Sullivan* with him) for the plaintiff.
E. M. Marx for the defendant.

LUSH, J.—In my opinion, this appeal succeeds and the case must go back to the county court for a new trial. The case seems to me to be reasonably clear. The defendant was the registered proprietor of a taxicab, and was licensed to use it as a hackney carriage. This was so stated by the plaintiff's counsel in opening his case in the county court, and no objection was taken by the defendant's counsel to this statement of the defendant's position. At the conclusion of the plaintiff's evidence, an argument took place on the Town Police Clauses Act, 1847, more especially on the provisions of that Act which bear only on the responsibility of the registered proprietor of a vehicle which was a hackney carriage within the meaning of that Act, for the acts of the licensed driver of the vehicle.

Venables v. *Smith* (2) and other cases which deal with the responsibility of the proprietor for the acts of the licensed driver of a hackney carriage were cited. Having regard to the argument which took place, it is impossible to assume that the present case was conducted on any other basis than that the defendant was the registered proprietor of the taxicab in question, and that, as such, he was liable for the acts of the licensed driver, for otherwise the argument would have been irrelevant. The learned county court judge suggested to counsel for the plaintiff that the case should go to the jury on two questions only, namely, the questions of negligence and damages, and, that then, in the event of the jury finding for the plaintiff on those two issues, the question of the defendant's liability under the Act of 1847 should be reserved for further argument. The learned judge was thus proposing to make the plaintiff an offer, subject to a condition which might deprive him of the opportunity of eliciting from the defendant an admission, and of obtaining from the jury a finding, that the relationship of master and servant in fact existed between the defendant and the driver of the taxicab in question, apart altogether from the Act of 1847. Therefore, I am not surprised that the plaintiff's counsel did not accept the suggestion, seeing what the condition was on which it was made. If the case were tried again, it might be clearly proved and found by the jury that the driver in this case was in fact the paid servant of the defendant. If that were proved to the satisfaction of the jury, it would become unnecessary to consider the question whether the defendant was liable, under the Act of 1847, for the alleged negligence of the driver, and all the difficulty of determining that question would thus disappear.

The appeal also raises the question whether the county court judge was right in holding that, although in London, under the London Hackney Carriages Act, 1843, the registered proprietor of a hackney carriage is responsible for any damage that may be caused by the negligence of the licensed driver, the same rule does not apply outside London, and the Town Police Clauses Act, 1847, which applies outside London, does not create the same artificial relationship between the registered proprietor of a hackney carriage and the licensed driver thereof. In my opinion, the learned county court judge was wrong in holding that the defendant was not

A liable for the acts of the driver. I think, even in the absence of the London Hackney Carriages Act, 1843, it would have been impossible, on the construction of the Town Police Clauses Act, 1847, ss. 45 to 63, to come to any other conclusion than that when the registered proprietor of a taxicab allows the taxicab to be in the hands of a licensed driver and damage is done by the negligence of that driver the registered proprietor must treat the licensed driver as his servant in respect of B liability for the consequences of his acts. The sections seem to me to be conclusive. Section 46 provides that no person shall act as driver of any hackney carriage licensed in pursuance of the Act without first obtaining a licence from the commissioners. Section 47 provides that if any person acts as driver without having obtained such licence, or if the proprietor employ any person as driver who has not obtained such licence, such driver and such proprietor shall respectively be C liable to a penalty. Section 48 provides that in every case in which the proprietor permits or employs any licensed person to act as driver, the proprietor shall cause to be delivered to him and shall retain in his possession the licence of the driver while the driver remains in his employ. Section 49 provides that when any driver leaves the service of the proprietor by whom he is employed, without having been guilty of any misconduct, such proprietor shall forthwith return to such driver D the licence belonging to him; but if such driver has been guilty of any misconduct, the proprietor shall not return his licence, but shall give him notice of the complaint intended to be preferred against him. The words "any driver" in that section mean every driver in the service of a registered proprietor. The section speaks of "any driver" leaving the service of the proprietor and it thus implies that every driver is in the employment of a registered proprietor. The question E whether in the case of the taxicab, the licensed driver is the servant of the registered proprietor must, therefore, be answered in the affirmative. Section 60 provides that no person authorised by the proprietor of any hackney carriage to act as driver of such carriage shall suffer any other person to act as driver of such carriage without the consent of the proprietor thereof, and no person, whether licensed or not, shall act as driver of any such carriage without the consent of the F proprietor, and any person so suffering another person to act as driver, and any person so acting as driver without such consent, shall be liable to a penalty. That section treats the driver as the agent of the proprietor. By s. 63, in every case in which any hurt or damage has been caused to any person or property by the driver of any carriage let to hire, the justice before whom such driver has been convicted may direct that the proprietor of such carriage shall pay such a sum not exceeding G £5, as appears to the justice a reasonable compensation for such hurt or damage; and every proprietor who pays any such compensation may recover the same from the driver, and such compensation shall be recoverable from such proprietor, and by him from such driver, as damages.

How is it consistent with these sections to say that no artificial or statutory relationship of master and servant exists between the owner of the taxicab and H the driver? The Act speaks in express terms of the driver being in the service of, or employed by the registered proprietor. Though the driver may have another master he has the statutory master as well, when he is a licensed driver. It was pointed out by LORD ESHER, M.R., in *Keen* v. *Henry* (1), that the person injured may sue either the real master or the statutory master.

But we are not left to our own unaided view on the construction of the Act of I 1847. That Act followed the London Hackney Carriages Act, 1843, and the provisions of the earlier Act are identical in substance with those of the later Act. When the question arose, under the earlier Act, who was liable for damage caused by the negligence of the licensed driver of a hackney carriage, the courts, in a series of decisions, extending from *Powles* v. *Hider* (3) to *Keen* v. *Henry* (1), have always held that the registered proprietor could always be sued. The effect of the decisions is that, for the protection of the public the licensed driver of a hackney carriage is to be treated as being in the service of the registered proprietor of the hackney carriage, and the registered proprietor was liable for any damage caused

by any act or acts of the licensed driver as if the relationship of master and servant existed between them, although in fact such relationship did not exist between them. This position was adopted by the court in *Keen* v. *Henry* (1), after reviewing all the earlier authorities. If the court has so construed one Act as to make the licensed driver of a hackney carriage the servant of the registered proprietor of that hackney carriage, and a similar provision is found in a later Act, it is impossible to say that a different conclusion must be arrived at on the construction of the provisions of the later Act from that which was arrived at on the provisions of the earlier Act. On the true construction of the relevant provisions of the Town Police Clauses Act, 1847, the licensed driver of the taxicab should be treated as the servant of the registered proprietor, for, where a particular construction has been placed on an Act of Parliament, a similar construction should apply to a later Act of Parliament passed in pari materia. The person injured by the negligence of the licensed driver of a hackney carriage, may, therefore, at his option, sue the person who is, in fact, the employer of the licensed driver, or the registered proprietor of the hackney carriage. For these reasons the judgment of the learned county court judge should be set aside, and the case should be sent back for a new trial.

SALTER, J.—I am of the same opinion. It is well settled that the London Hackney Carriages Act, 1843, establishes the relationship of master and servant between the registered proprietor of a hackney carriage and a licensed person whom the registered proprietor permits to act as its driver, and also makes the registered proprietor responsible for the acts of the driver when plying for hire. In my view, the Town Police Clauses Act, 1847, establishes a similar relationship in the cases to which it applies. It is unnecessary in the present case to consider whether the registered proprietor of a hackney carriage would be liable for the acts of an unlicensed driver to whom the licensed driver had improperly entrusted the hackney carriage. The case has been fought throughout on the footing that the defendant was the registered proprietor of the taxicab in question, and that the driver was a licensed driver entrusted by him with its management.

Appeal allowed.

Solicitors: *J. Nixon Watts & Co.*; *F. H. Carpenter.*

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

R. *v.* FORDE

[Court of Criminal Appeal (Lord Hewart, C.J., Avory and Salter, JJ.), March 12, 19, 1923]

[Reported [1923] 2 K.B. 400; 92 L.J.K.B. 501; 128 L.T. 798; 87 J.P. 76; 39 T.L.R. 322; 67 Sol. Jo. 539; 27 Cox, C.C. 406; 17 Cr. App. Rep. 99]

Criminal Law—Indecent assault—Defence—Reasonable belief that girl over sixteen—Defendant under age of twenty-three—Assault charged act of intercourse—Reasonable belief question for jury—Criminal Law Amendment Act, 1922 (12 & 13 *Geo.* 5, *c.* 56), *s.* 2.

The appellant, a man under twenty-three years of age, pleaded Guilty at the Central Criminal Court to a charge of indecently assaulting a girl under the age of sixteen. The indecent assault was in fact the act of having unlawful carnal knowledge of the girl. The Recorder of London found that the appellant had reasonable cause to believe that the girl was over the age of sixteen years.

Held: although the act of indecency charged was the carnal knowledge of the girl the defence afforded in a case of carnal knowledge by the proviso to s. 2 of the Criminal Law Amendment Act, 1922, was not available in a case of indecent assault, and, therefore, the appellant's conviction must stand.

Held, further: the question whether a defendant had reasonable cause to believe that the girl was over the age of sixteen was, at the trial, one for the jury and not for the judge.

Criminal Law—Appeal—Plea of Guilty—When appeal competent.

The Court of Criminal Appeal can only entertain an appeal against a conviction on a plea of Guilty if it appears (i) that the appellant did not appreciate the nature of the charge, or did not intend to admit he was guilty of it, or (ii) that upon the admitted facts he could not in law have been convicted of the offence charged.

Notes. Section 52 of the Offences Against the Person Act, 1861, and the whole of the Criminal Law Amendment Act, 1885, were repealed by the Sexual Offences Act, 1956. Section 5 (1) of the Act of 1885 and s. 2 of the Criminal Law Amendment Act, 1922, have been replaced by s. 6 (1) and (3) of the Act of 1956.

Explained: *R.* v. *Keech* (1929), 21 Cr. App. Rep. 125. Considered: *R.* v. *Maughan* (1934), 24 Cr. App. Rep. 130; *R.* v. *West Kent Quarter Sessions Appeal Committee, Ex parte Files*, [1951] 2 All E.R. 728.

As to appeals to the Court of Criminal Appeal, see 10 Halsbury's Laws (3rd Edn.) 521 et seq.; and as to unlawful carnal knowledge and indecent assault see ibid., pp. 750–753, 755. For cases, see 14 Digest (Repl.) 599 et seq., and 15 Digest (Repl.) 1026–1028. For Offences Against the Person Act, 1801, Criminal Law Amendment Acts, 1885 and 1922, see 5 Halsbury's Statutes (2nd Edn.) 786, 905, 1054; and for Sexual Offences Act, 1956, see ibid., vol. 36, p. 215.

Cases referred to in argument:

R. v. *Cade*, [1914] 2 K.B. 209; 83 L.J.K.B. 796; 110 L.T. 624; 78 J.P. 240; 30 T.L.R. 289; 58 Sol. Jo. 288; 24 Cox, C.C. 131; 10 Cr. App. Rep. 23, C.C.A.; 17 Digest (Repl.) 253, *570*.

Grey v. *Pearson* (1857), 6 H.L.Cas. 61; 26 L.J.Ch. 473; 29 L.T.O.S. 67; 3 Jur.N.S. 823; 5 W.R. 454; 10 E.R. 1216, H.L.; 17 Digest (Repl.) 274, *794*.

Henderson v. *Sherborne* (1837), 2 M. & W. 236; Murp. & H. 40; 6 L.J.M.C. 28; 1 Jur. 152; 150 E.R. 743; 42 Digest 766, *1933*.

St. John, Hampstead, Vestry v. *Cotton* (1886), 12 App. Cas. 1; 56 L.J.Q.B. 225; 56 L.T. 1; 51 J.P. 340; 35 W.R. 505; 3 T.L.R. 161, H.L.; 42 Digest 620, *208*.

Miller v. *Salomons* (1852), 7 Exch. 475; 8 State Tr. N.S. 111; 21 L.J.Ex. 161; 19 L.T.O.S. 68; 16 Jur. 375; 155 E.R. 1036; affirmed (1853), 8 Exch. 778; 42 Digest 626, *273*.

Appeal against conviction (on certificate).

The appellant, a man under twenty-three years of age, pleaded Guilty before the Recorder of London at the Central Criminal Court to an indecent assault on a girl under the age of sixteen and was bound over. The indictment contained four counts. The first charged him with having unlawful carnal knowledge of the girl; the second with attempting to have unlawful carnal knowledge of her; and the third and fourth counts with indecently assaulting her. The indecent assault was in fact the act of having unlawful carnal knowledge. At the trial the appellant, on the advice of his counsel, pleaded Guilty to the third count, and the prosecution accepted that plea and did not proceed with the remaining counts. The learned recorder found as a fact that the appellant had reasonable cause to believe that the girl was over the age of sixteen years.

By the Offences Against the Person Act, 1861, s. 52:

"Whosoever shall be convicted of any indecent assault upon any female . . . shall be liable . . . to be imprisoned . . ."

By the Criminal Law Amendment Act, 1885, s. 5:

"Any person who—(1) unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any girl being of or above the age of thirteen years and under the age of sixteen years . . . shall be guilty of a misdemeanour . . . ; provided that it shall be a sufficient defence to any charge under subsection one of this section if it shall be made to appear to the court or jury before whom the charge shall be brought that the person so charged had reasonable cause to believe that the girl was of or above the age of sixteen years. . . ."

By the Criminal Law Amendment Act, 1922:

"Section 1: It shall be no defence to a charge or indictment for an indecent assault on a child or young person under the age of sixteen to prove that he or she consented to the act of indecency. Section 2: Reasonable cause to believe that a girl was of or above the age of sixteen years shall not be a defence to a charge under ss. 5 or 6 of the Criminal Law Amendment Act, 1885 . . . Provided that in the case of a man of twenty-three years of age or under the presence of reasonable cause to believe that the girl was over the age of sixteen years shall be a valid defence on the first occasion on which he is charged with an offence under this section."

F. B. Merriman, K.C., and *Walter Frampton* for the appellant.
Eustace Fulton for the Crown.

Cur. adv. vult.

Mar. 19. **AVORY, J.,** read the following judgment of the court.—This appeal raises a question as to the meaning and effect of ss. 1 and 2 of the Criminal Law Amendment Act, 1922. The appellant, who is under twenty-three years of age, pleaded Guilty to a count in the indictment charging him with indecent assault on a girl under sixteen years of age, contrary to s. 52 of the Offences Against the Person Act, 1861. Another count in the indictment charged him with carnal knowledge of the same girl contrary to s. 5 (1) of the Criminal Law Amendment Act, 1885. Counsel for the prosecution at the trial accepted this plea and elected not to proceed further on the indictment, and the appellant thereupon became entitled, if he had so insisted, to have a verdict of Not Guilty recorded on the charge of carnal knowledge, the prosecution having admitted that the only indecent assault alleged was the act of carnal knowledge. The learned Recorder of London has granted a certificate for an appeal to this court upon the grounds

"that the alleged indecent assault consisted solely in the act of carnal knowledge of a girl under sixteen by a man under twenty-three, who had, in law and in fact, a complete defence to such act of carnal knowledge."

From the observations made by him it appears that he was under the impression that it was for him to determine as a question of fact whether the appellant had in

A the circumstances reasonable grounds for believing that the girl was of or above the age of sixteen years. In this view we think he was wrong. The words in the proviso to s. 1 (5) of the Criminal Law Amendment Act, 1885, "if it shall be made to appear to the court or jury before whom the charge shall be brought," have always been construed to apply respectively to the court, i.e., the magistrate or justices before whom the accused is brought with a view to his committal for trial, B and the jury when he is put upon his trial. This proviso is repealed by the Act of 1922, and although the proviso to s. 2 of that Act does not contain the words "the court or jury," we think that upon the trial this question of fact is to be determined by the jury. It may, however, be assumed for the purposes of this appeal that the prosecution was satisfied that if the indictment had been proceeded with on the charge of carnal knowledge, the appellant would have had a good C defence under the proviso to s. 2 of the Act of 1922, and for that reason accepted the plea to the indecent assault.

The first question that arises is whether this court can entertain the appeal. A plea of Guilty having been recorded, this court can only entertain an appeal against conviction if it appears: (i) That the appellant did not appreciate the nature of the charge, or did not intend to admit that he was guilty of it; or (ii) that D upon the admitted facts he could not in law have been convicted of the offence charged. The first ground is not open to the appellant, as he was advised by counsel of experience, who had given careful consideration to the facts and to the provisions of the amending statute of 1922, but it has been strenuously contended on his behalf in this court that upon the admitted facts the appellant could not in law have been convicted of the indecent assault, and his counsel invited the court E to say that the defence provided in s. 2 of the Act of 1922 was, in the circumstances, equally available upon the charge of indecent assault, an offence dealt with in s. 1, and that the statute should be so construed to avoid the absurdity which otherwise would result in circumstances such as those of the present case. In support of this argument he cited cases in which the language of a statute has been construed in a modified sense with reference to the obvious intention of the legislature, but F the authorities are clear that, if there is nothing to modify, nothing to alter, nothing to qualify the language, it must be construed in the ordinary and natural meaning of the words and sentences. The words of a statute cannot be construed contrary to their meaning as embracing cases merely because no good reason appears why they should be excluded. It is not the duty of the court to make the law reasonable, but to expound it as it stands according to the real sense of the G words, and, applying that principle, we can find no justification for reading the proviso to s. 2 of the Act, which in terms is limited to charges of offences under that section, as applicable to a charge of indecent assault, which is separately dealt with in s. 1. It is only by a benevolent construction that any effect can be given to this proviso, seeing that no offence is created under s. 2, but if it be assumed to apply to charges under s. 5 or s. 6 of the Criminal Law Amendment H Act, 1885, which are referred to in the earlier part of the section, there is no canon of construction which would justify the court in applying it to s. 1, bearing in mind the various forms of indecent assault which do not amount to carnal knowledge.

The result of this legislation is that a boy who is tempted and induced to have carnal knowledge of a girl who misrepresents herself to be over sixteen, and who appears to be so, has no possible answer if he is charged with indecent assault and I not with the full offence. It is to be observed that the effect of the proviso in s. 2 being applied to charges under s. 5 or s. 6 of the Criminal Law Amendment Act, 1885, will be to afford a new defence to a man under twenty-three years of age who has carnal knowledge of an idiot or imbecile female contrary to s. 5 (2) of that statute, a result which probably was never intended, seeing that the object of the Act of 1922 was to curtail and not to extend the defences which were previously open to the accused. Other serious questions will arise in the practical application of this proviso as to the burden of proof and the manner in which it is to be ascertained whether the accused has been previously charged with an offence under

the section, whatever that may mean, and the effect of such evidence in a case where the previous charge has been dismissed. Any such questions will have to be determined when they arise, and we express no opinion upon them in anticipation. For the reasons given the court is of opinion that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Percy Robinson & Co.*; *Wontner & Sons.*

[*Reported by* J. N. Fletcher, Esq., *Barrister-at-Law.*]

GLASGOW CORPORATION *v.* BARCLAY, CURLE & CO., LTD.

[House of Lords (Earl of Birkenhead, Viscount Finlay, Lord Dunedin, Lord Atkinson and Lord Shaw), May 3, 4, 7, 8, July 6, 1923]

[Reported [1923] W.N. 257; 93 L.J.P.C. 1; 130 L.T. 33; 87 J.P. 160; 21 L.G.R. 565; 67 Sol. Jo. 724; 39 T.L.R. 621; 1923 S.C. 78; 60 Sc.L.R. 617]

Highway—Damage—Excessive or unreasonable traffic—Right of highway authority to recover—Matters to be considered.

A highway authority can recover damages in an action for nuisance in respect of damage to the highway caused by its user by excessive or unreasonable traffic, but it cannot complain of fair wear and tear. What is fair wear and tear is a question of fact and of degree to be decided on the facts of the particular case, for it is impossible to lay down with precision any line separating traffic which is reasonable from that which is unreasonable and unlawful. Among the matters which must be considered is the length of time during which traffic of the type complained of has been using the highway in question; if there has been toleration of such traffic for a substantial period, e.g., a quarter of a century, it would be a very strong thing for any court, in the absence of proof of negligence, to regard its continuance as a nuisance entitling the highway authority to treat as wrongdoers those engaged in it. The damage done by the traffic might well then fall within fair wear and tear. Other matters which must be taken into account in deciding what is fair wear and tear with regard to any highway situated within a city or town is the situation of the city or town, the prevailing climate there, the trade and business carried on, the necessities of that trade or business, and the mode in which it is the habit of the population to meet those necessities. But users of the highway are not entitled to increase the weights sent over the highway to any extent that suits their business, leaving it to the highway authority to alter the structure of the streets so as to support new burdens. On the contrary, there is an imperative obligation on users of the highway to take all possible precautions to minimise the danger that might arise from the heavy traffic.

Notes. As to damage to highways, see 19 Halsbury's Laws (3rd Edn.) 270 et seq.; and for cases see 26 Digest 460 et seq.

Cases referred to:

(1) *Wednesbury Corpn.* v. *Lodge Holes Colliery Co., Ltd.*, [1905] 2 K.B. 823; 75 L.J.K.B. 112; 93 L.T. 307; 69 J.P. 323; 21 T.L.R. 569; reversed [1907] 1 K.B. 78; 76 L.J.K.B. 68; 95 L.T. 815; 71 J.P. 73; 23 T.L.R. 80, C.A.; reversed sub nom. *Lodge Holes Colliery Co., Ltd.* v. *Wednesbury Corpn.*,

A [1908] A.C. 323; 77 L.J.K.B. 847; 99 L.T. 210; 72 J.P. 417; 24 T.L.R. 771; 52 Sol. Jo. 620; 6 L.G.R. 924, H.L.; 26 Digest 331, *630.*

(2) *Egerly's Case* (1641), 3 Salk. 183; 91 E.R. 764; 26 Digest 432, *1511.*

(3) *R.* v. *Leech* (1704), 6 Mod. Rep. 145.

(4) *R.* v. *Chittenden* (1885), 49 J.P. 503; 15 Cox, C.C. 725; 26 Digest 430, *1497.*

(5) *Glasgow Coal Exchange* v. *Glasgow City and District Railway* (1883), 10 B R. (Ct. of Sess.) 128.

Also referred to in argument:

Chichester Corpn. v. *Foster*, [1906] 1 K.B. 167; 75 L.J.K.B. 33; 93 L.T. 750; 70 J.P. 73; 54 W.R. 199; 22 T.L.R. 18; 4 L.G.R. 205, D.C.; 26 Digest 431, *1500.*

C *Armagh Union* v. *Bell*, [1900] 2 I.R. 371.

Port Glasgow and Newark Sailcloth Co. v. *Caledonian Rail. Co.* (1893), 9 T.L.R. 300, H.L.; 36 Digest (Repl.) 141, *740.*

Appeal from an interlocutor of the First Division of the Court of Session in Scotland affirming an interlocutor of the Lord Ordinary.

The action was brought by Glasgow Corporation to recover £460 damages for D injury caused to Kelvinhaugh Street, Argyle Street, and Finnieston Street, public streets of the city, by excessive traffic of the defenders who had large engineering works in Kelvinhaugh Street and had been in the habit of carrying large boilers made by them from their works to the quay. It was alleged by the corporation that on April 22, 27, and 30, 1918, the defenders conveyed along Kelvinhaugh Street, Argyle Street, and Finnieston Street boilers which, with the bogies used E in carrying them, were of weights ranging from 60 tons to 80 tons, and that by these excessive weights the granite setts in the roadway were crushed and destroyed. The corporation pleaded that these acts were in excess of lawful user of the roadway, causing damage other than that which would result from fair wear and tear, and that the defenders were bound to compensate the corporation as owner of the streets. The defenders denied the alleged wrongful acts, and further pleaded that F the traffic complained of was not unusual, extraordinary, or excessive, having regard to the locality and the nature and extent of the industries carried on therein, and that it had been conveyed with due care to prevent unnecessary damage. They also pleaded that the damage had been caused, or materially contributed to, by the failure of the corporation to construct and maintain the roads in a condition to bear the traffic usually passing and reasonably to be expected thereon. The case G came before Lord Ashmore, Lord Ordinary, who decided in favour of the defenders, and on appeal his decision was affirmed by the First Division (1922 S.C. 413) (Lord President (Lord Clyde) and Lord Mackenzie, Lord Skerrington and Lord Cullen). The corporation appealed.

Condie Sandeman, K.C., Graham Robertson, K.C., Archibald Crawford (all of the Scottish Bar) and *W. Kerr Chalmers* for the corporation. H

Macmillan, K.C., Gentles, K.C., and *James A. Gilchrist* (all of the Scottish Bar) for the respondents.

The House took time for consideration.

July 6. The following opinions were read.

EARL OF BIRKENHEAD.—The issues raised in this appeal have caused me I considerable doubt. Indeed, had I been sitting alone I am inclined to think that I should have decided the matter favourably to the appellants. But I should have regarded such decision as highly disputable. I have now had the advantage of reading the opinions of those of your Lordships who sat with me to hear the appeal. I find that all your Lordships, including my noble friends Lord Dunedin and Lord Shaw, who advise with so much authority on matters appertaining to the law of Scotland, are of opinion that the appeal fails. In a Scottish appeal, raising some matters at least which are peculiar to the practice and law of Scotland, I am not prepared to set myself against so great a weight of authority. I do not, therefore,

great as is the doubt which I have entertained, record a dissenting opinion, but I move that the appeal be dismissed.

VISCOUNT FINLAY.—This appeal raises a question of interest and great importance as to the right of user of public highways. The action was brought by the Glasgow Corporation to recover damages in respect of injury caused to certain streets in Glasgow by the defenders. The defenders have large engineering works in Kelvinhaugh Street and have been in the habit of carrying large boilers made by them from their works to the quay. It is alleged by the pursuers that on April 22, 27, and 30, 1918, the defenders conveyed along Kelvinhaugh Street, Argyle Street, and Finnieston Street boilers which, with bogies used in carrying them, were of weights ranging from 60 tons or thereabouts to 80 tons, and that by these excessive weights the granite setts in the roadway were crushed and destroyed. The pursuers claimed that these acts were in excess of lawful user of the roadway, causing damage other than that which would result from fair wear and tear, and that the defenders are bound to compensate the pursuers as owners of the streets. The defenders denied the commission of the alleged wrongful acts. They further pleaded that the traffic complained of was not unusual, extraordinary, or excessive, having regard to the locality and the nature and extent of the industries carried on therein, and that it had been conveyed with due care to prevent unnecessary damage. They also pleaded that the damage had been caused or materially contributed to by the failure of the pursuers to construct and maintain the roads in a condition to bear the traffic usually passing and reasonably to be expected thereon. LORD ASHMORE, the Lord Ordinary, assoilzied the defenders, and his decision was on appeal affirmed by the First Division.

With reference to the law applicable to such cases, I desire to express my concurrence with the judgment of the Lord President. He gives a masterly outline of the law of Scotland and of the law of England as to the user of highways so far as relevant. The two systems appear to me not to differ in any particular material for the purposes of this case. Roads are made to be used, and no road authority can complain of fair wear and tear. The question in the present case is whether the damage caused by the defenders was in the nature of fair wear and tear, or was caused by abuse of the roads by bringing over them weights of an unusual and excessive description. There are, of course, very different descriptions of traffic, and some roads are constructed for use only with light traffic, and to bring a heavy motor or traction engine upon such a road would be to destroy it. The streets in Glasgow with which we are concerned must be taken to have been constructed to carry heavy traffic, heavy, that is, within reasonable limits. It is alleged that the defenders transgressed these limits. The Lord Ordinary and all the judges who sat on the appeal in the Inner House were of the opinion that the pursuers had failed to establish their case upon this point.

The case resolves itself into questions of fact, and I propose shortly to examine the evidence. The first witness for the corporation was Mr. Somers, a civil engineer and chief assistant to the master of works in Glasgow. In his cross-examination occurs the following passage with reference to the boiler traffic:

"(Q.) This traffic is not confined, I understand, to the three streets traversed by the defenders' bogies? (A.) No, the boiler traffic is not.—(Q.) It is to be found in other industrial parts of Glasgow? (A.) Yes, generally in the streets parallel with the river.—(Q.) And it has been going on there for a long time? (A.) No doubt.—(Q.) In the present case, the boilers with which we are particularly charged with having taken over the streets to the damage of the fabric appear to have weighed 55 and 55½ tons on the occasion on April 22, 1918, and on April 27 71 tons and 72 tons, and on April 30 and May 1 55 tons. These weights are not at all out of the ordinary, are they? (A.) They are excessive weights as far as the streets are concerned.—(Q.) They are not out of the ordinary for boiler traffic? (A.) No.—(Q.) And to that kind of traffic

A you say your streets have been subjected for the best part of half a century? (A.) Yes."

There is a considerable volume of evidence bearing upon this point. Mr. Todd, of the firm of Messrs. David Rowan & Co., boilermakers, a witness for the defenders, said that the weights of the defenders' traffic are not exceptional at all. B "These weights," he says, "have been taken over the streets of Glasgow for many, many years." From time to time complaints were made by the corporation with regard to the defenders' traffic. Mr. Somers himself says that when the matter first came before the corporation in 1904 the negotiations dragged out a considerable length of time, and there was a strong indication given to the corporation committee by the shipbuilders generally that the corporation should avoid doing any- C thing that would entail restricting the engineering industry. The witness adds: "The committee of the corporation at the time was somewhat sympathetic to that view, and the general feeling was just to let the thing drift for a little bit." The tramway department of the corporation were always willing to raise the wires to facilitate the passage of the boilers. "They [the defenders] used to ask whether the street was open and ask for a safe passage, and the general reply was that they D must take the road as they found it and we would do what we could to see that they got safe through." The evidence on this point is summarised by LORD ASHMORE in his judgment. He begins by making an observation, the correctness of which cannot be disputed, that in judging of the reasonableness, or unreasonableness of the weights sent over it is proper to keep in view the general and long-continued practice in the industrial parts of the city in transporting heavy traffic E over the streets. He then gives particulars from the evidence showing that traffic of this sort, quite as heavy as that carried by the defenders, had been carried on in Glasgow from the year 1900 onwards. Novelty is certainly an important element in determining that any particular kind of traffic is so much out of the ordinary course as to amount to an abuse of the streets. If there has been toleration of such traffic for a quarter of a century it would, in my opinion, be a very strong F thing for any court to regard its continuance now as a nuisance which entitles the corporation to treat as wrong-doers those engaged in it. The acts complained of in this action are far from being anything in the nature of a new departure. Indeed, it appears that the corporation themselves sent on some occasions traffic of a similar description over the streets. As time goes on traffic in a great centre of business like Glasgow may increase both in volume and in weight, and what is G complained of in this action is not in excess of what has gone on for the last twenty-five years or so in these streets. It is quite impossible to lay down with precision any line separating traffic which is reasonable and lawful from that which is unreasonable and unlawful; each case must be judged upon its facts. I think that the effect on the whole of the evidence in this case is to lead to the conclusion that the traffic now in question is in the nature of that use of highways which is H lawful, and that the damage resulting is in the nature of fair wear and tear. It has made necessary the more frequent repair of the roads, but this is an incident of all increase of traffic. There has been no destruction of the road by these heavy weights. The same sort of traffic has gone on at other centres where the industry of boilermaking is carried on. In Glasgow the trolleys now said to be dangerous have been in use for many years, and they are the same as those generally used I elsewhere, with the one exception of Dundee. At Dundee a bogie has been used which is said to be much safer than that generally in use. It has been said for the corporation in the present case that the defenders are in fault for not having adopted the Dundee bogie with its beechwood tyres and the locks or swivels which facilitate turning. If this type of bogie is so much superior to the Glasgow trolley as has been contended, it is somewhat remarkable that its use appears to be confined to Dundee. This is explained by the evidence given on behalf of the defenders as to possible dangers incident to the use of the Dundee bogie, particularly in Glasgow. I may refer to the evidence of Mr. Kerr, whose firm does a great deal

of haulage, and of Mr. Brodie, a civil engineer conversant with traffic conditions in Glasgow. Mr. Gilchrist, one of the directors of the defenders' company, says that he does not consider that the Dundee bogie is safe, and that in working it would be unsuitable for Glasgow traffic. In my opinion, the courts below were right in refusing to condemn the defenders in the present action for not using a form of bogie which is used nowhere except in one town in Scotland, and the merits of which are very much in controversy.

It is clearly established that the defenders took all care to avoid damage to the streets. They communicated with the corporation and arranged for the hours most suitable for such traffic. They lightened the load as far as was possible, and put steel plates over manholes and other spots requiring protection. I cannot agree with the position taken up by some of the defenders' witnesses when they seem to say that in taking such precautions the defenders were, so to speak, conferring a favour upon the corporation. On the contrary, there was an imperative obligation upon them to take all possible precautions to minimise the danger that might arise from this heavy traffic, but, in fact, they did take such precautions. I desire to make it clear that I repudiate any idea that the defenders had a right to go on increasing the weights sent over the pavement to any extent that suited their business without regard to the effect upon the streets, leaving it to the corporation to alter the structure of the streets so as to support these new burdens. The Lord President says in this connection:

> "The defenders, on the other hand, assert an absolute right to use the streets for their boiler traffic, and to load weight on the wheels of the bogies up to any limit which suits their business requirements, regardless of the effect produced on the structure of the street."

I cannot think that an attitude so unreasonable as this represents the permanent views of the defenders, and if they tried to act on any such view of the law in practice they would certainly have reason to regret it.

It was strongly contended for the defenders that the damage was the result of the defective pavement of the streets by the corporation. It was said that the crushing of the setts was caused by the irregular surface which they presented. I am not prepared to differ from the conclusion of the Lord President upon this point when he says:

> "I should add that while it is true that any inequality in a causewayed surface exposes the setts in its vicinity to exceptional stress, I do not think the defenders were successful in making out that the damage done was substantially due to the deficient repair of the streets."

It is no doubt true, as Mr. Frew, C.E., a witness for the pursuers, said, that from the engineering point of view it is possible to construct a street which would carry any weight of traffic. But Mr. Frew went on to add: "It would be useless for other users and also for getting at all the pipes that are laid in a street. It would have to be constructed of ferro-concrete, or something like that," and being asked whether that would be unsuitable for ordinary traffic, he said: "It would be dangerous for ordinary traffic; it would be prohibitive from a financial point of view, not only in its initial cost, but also in the expense of getting at gas-pipes, water-pipes, drains, and so on."

All the five judges in the courts below, before whom this case has come, have taken substantially the same view on what is really a question of fact. The law applicable to the consideration of such questions has, I think, been stated by the Lord President with perfect correctness, and on the facts proved in evidence it appears to me that the pursuers have failed to establish any legal case for recovering damages. I agree with the view taken in the courts below, and think that the appeal should be dismissed with costs.

LORD DUNEDIN.—I think this action fails. It fails first on the ground that the appellants have, in my judgment, been unable to prove, with the precision

A required, that the respondents owe the sum of money which is demanded in name of damages. This is an action of an admittedly unprecedented character so far as the experience of Scotland is concerned. There is no recorded instance of an action at common law by road authority for damage done to the road by traffic. This does not prove that such an action is incompetent. But as heavy traffic has existed and has certainly to a greater or lesser extent worn, and therefore injured, B the streets of Glasgow for many years, it was, I think, incumbent on the appellants, if they proposed to claim damages in respect of the respondents' operations by an action of which the respondents could have no hint or expectation, to have given fair notice of their intention and not to do as they did—to take the passage of a certain boiler as a test case, make their own observations, give no hint to the respondents, and then months afterwards, when a careful and contemporaneous C examination of the results of the transit of the boiler was no longer possible, to raise action. Even on the appellants' proof as it is, the actual amount of damages is brought out by a mere rule of thumb calculation as to what proportion of total damage done is due to the operations of the respondents. Further, I think it fails on much broader grounds. That a person who, by his action, did something which made the highway impassable and so destroyed the use of that highway by others D could be interdicted at the instance of a road authority I do not doubt, even though what I have denominated his action was connected with the use of the highway by himself. Though suits for damages in respect of such action may be sought for in vain in the books, I do not doubt that they would lie. But in order that such interdict or damage should be made good, it would be necessary to show that the person against whom the suit was directed had been guilty of some negligence E which had resulted in the destroying or restricting that right of passage on the highway which others besides himself enjoy. I agree entirely with what the learned Lord President said in the Court of Session as to common law rights in this matter. Now, when I look at the facts I find no such evidence of negligence. The weights dealt with are no greater than weights that for many years have been taken along these highways. The precautions taken have been the usual pre- F cautions, nor have the respondents omitted to do anything which the appellants have suggested to minimise injury to the streets. The Dundee bogie was, I think, a complete afterthought, and looking to the fact that the type of bogie used by the respondents is no new invention of their own, but is the recognised type which has been used in Glasgow and in other cities for many years, I cannot think that the mere suggestion of what has been practised at Dundee can be held to show a G negligent want of precaution on the part of the respondents. As to interference with the use of the streets by others there is not a tittle of evidence to show that anyone has been damnified or has complained. No doubt heavy traffic will cause damage. That is one of the necessities of the situation, and in other cases it has been recognised and dealt with by the legislature. I refer to the provisions of the Locomotive Acts, and still more to the extraordinary traffic section of the Roads H and Bridges (Scotland) Act, 1878. The very insertion of that section is, in my view, if I may so phrase it, a statutory condemnation of the common law doctrine as the appellants would have it. I should have examined the evidence at greater length had it not been that I have had the advantage of perusing the opinion which will be delivered by my noble and learned friend LORD SHAW. Except that I do not share his doubts, that opinion so exactly expresses what I think is the just I result of the evidence that I feel it would be useless for me simply to reiterate what he has said. The unanimous judgments of the Lord Ordinary and of the First Division are, in my opinion, right, and I think the appeal should be dismissed.

LORD ATKINSON.—The action out of which this appeal has arisen was brought by the corporation of Glasgow to recover the sum of £460, the cost of repairing the injury alleged to have been done to three streets in the city, namely, Kelvinhaugh Street, Argyle Street, and Finnieston Street, by the transport over these streets on bogies from the works of the respondents to the quay of boilers of the very heavy

weight of, in some instances, 90 tons. It was not disputed that these three streets, with others, and the tramway laid upon them, are vested in the corporation. I do not think the precise provisions of the statute or statutes so vesting the streets were opened to the House on the argument of the appeal, but the rights they confer can scarcely be more extended than those conferred upon urban authorities in England by s. 149 of the Public Health Act, 1875. That section provides that within an urban district highways repairable by the inhabitants at large and the pavements, stones, and other materials thereof, and all buildings, implements, and other things provided for the purposes thereof, shall vest in and be under the control of the urban authority. Yet it was held by JELF, J., in *Wednesbury Corpn.* v. *Lodge Holes Colliery Co., Ltd.* (1), that the proprietary right of the urban authority in the highways within their district was a limited right only, and was confined to what was necessary to maintain them as a highway. The defendants in that case were mineowners. In the working of their mines they had let down a highway vested in the urban authority and had also let down lands adjoining it. The urban authority had spent a sum of £400 in raising the highway to its former level, which sum they sued to recover from the mineowners. The latter pleaded that the urban authority could have made the highway as reasonably commodious to the public as it was before at a cost of £80, and brought that sum into court. This defence was held by JELF, J., at the trial to be a good defence. On appeal to the Court of Appeal that decision was reversed, and on a further appeal to the House of Lords the decision of the Court of Appeal was reversed and the decision of JELF, J., restored. That case undoubtedly decides that for certain kinds of injury to a highway within an urban district the urban council may recover damages from the person who or body which inflicts that injury, but I think the injury must be different from that necessarily caused to all highways by traffic of a kind and character which it has for many years been the well-established custom of the people of the locality to carry over them, at all events provided it is conducted without negligence.

Counsel, in opening the appeal, defined ordinary wear and tear of a thing, as I understood him, as the wear and tear sustained in the use to which it may lawfully and without negligence be put. But, even so, in deciding what is wear and tear with regard to any highway situated within a city or town, one must have regard to the situation of the city or town, the prevailing climate there, the trade and business carried on in it, the necessities of that trade or business, and the mode in which it is the habit of the population to meet those necessities. What might be ordinary wear and tear of streets in Bath or Leamington or Oxford would be very different, I should think, from what would fairly come within that description in Glasgow, Liverpool, or Leeds. In the first place, the user of the streets by the respondents does not admittedly amount to a nuisance. Injury, inconvenience, danger, or obstruction to the general public is a necessary ingredient of a nuisance. Traversing a highway with loads of excessive weight may cause a nuisance if these ingredients be present: see *Egerly's Case* (2); *R.* v. *Leech* (3); *R.* v. *Chittenden* (4). I concur with my noble friend LORD FINLAY in the opinion that the Lord President has, in a judgment with which I entirely concur, given a masterly summary of the laws of both Scotland and England as to the user of highways so far as is relevant to this case. I think, however, he has done more than that. I have carefully read through all the evidence, and it appears to me that the Lord President has summed up its effect and result with perfect accuracy in the following passage in his judgment:

> "The damaged streets are causewayed, the causeway being supported on a cambered bed of concrete 6 in. thick; this is covered by a layer of sand, on which a causeway of granite setts suitably grouted is laid or built. The effect of the passage of the boilers was that a considerable number of the setts lying in the track of the bogie wheels were (I use the words employed by the leading witnesses for both parties) 'crushed and ground.' No damage was done to the

supporting concrete, and the causewayed surface was not cut into ruts; but many of the setts were so far destroyed as to render the fragments to which they were reduced liable to be worked loose and displaced by the regular street traffic, and to make it impossible to put the setts to any further service by re-dressing and re-laying them in the usual way. On the one hand, the street was not made dangerous or inconvenient for public use, although the date when considerations of safety and convenience would require the causeway to be re-laid was no doubt anticipated; on the other hand, a part of the (relatively speaking) permanent material of the causeway was so damaged as to be beyond repair, and to necessitate—whenever the operation of putting the streets in order has to be undertaken—complete renewal. The cost of restoring the causeway by supplying and laying new setts in place of those which were 'crushed and ground' to pieces is the measure of the damages sued for. . . . In the streets with which the present case is concerned, the defenders' occasional boiler traffic is the only traffic of its kind. In some other streets of the city there is similar occasional boiler traffic belonging to other firms, which produces more or less similar effects on the causeways. No other traffic using the streets of the city 'crushes and grinds' the setts as above described, except this kind of traffic. There is thus no difficulty in showing that the peculiar form of damage done to the streets which gives rise to this case was directly attributable to the defenders' use of them for the transportation of their boilers."

There is no proof that the respondents did not conduct this traffic with all proper care and caution. And I think the appellants have failed to establish that the respondents were under any duty to the corporation to discard the kind of bogies they had for many years been in the habit of using, and to use in their stead Dundee bogies. The respondents made many objections to the Dundee bogie. They alleged it would be dangerous, unsuitable to their traffic, and ineffective in use, and I do not think the appellants established that these objections were groundless. In the cross-examination of Mr. Thomas Sumner, the chief assistant to the master of works in the city, and the first of the witnesses examined on behalf of the corporation, the following facts were elicited. This class of traffic (i.e., boiler traffic) has been traversing the streets of Glasgow for probably half a century. From 1879 to the date of the trial, 800 heavy boilers were taken over the streets from the defendants' works. In 1879 boilers of 53 tons weight were carried over them from the defendants' works. In subsequent years, boilers of greater and some of lesser weight were carried over them. In 1890 boilers up to 60 tons were manufactured by the respondents and carried over the streets. In 1903 boilers up to 84 tons, and later, up to between 90 and 100 tons, were similarly transported. The boiler traffic is not confined to the streets named. It is found in other industrial parts of the city in streets parallel to the river. It has been going on there for a long time. The boilers, the transport of which by the respondents by their usual method is alleged to have caused the injury and damage complained of, were carried thus—two of 55 and 55½ tons respectively, on April 22, 1918; two others, weighing 71 and 72 tons respectively, on the 30th of the same month; one on May 1, 1918. These, the witness admitted, are not out of the way for boiler traffic. The streets have been subjected to that kind of traffic for a quarter of a century. The weights the respondents have transported are not out of the ordinary as far as this boiler transport is concerned. They are not exceptional. He said it was not possible to take traffic of this weight over them with the present type of bogie without causing damage. If the vehicle was altered he thinks the present damage would disappear or be lessened considerably. Peter Anderson, the foreman of the Glasgow Corporation Station Labour Department, proves the damage done, and, on cross-examination, he says that when boiler traffic passes over the street, it leaves the street quite safe. It does not make the road dangerous. All that happens is that the part so traversed goes out of repair much sooner than other

parts of the road. It is a question of having to repair these parts oftener than other parts of the road. Mr. John Conway, a civil engineer, a member of the Institute of Civil Engineers, who has practised his profession in Glasgow for twenty-five years, was also examined on the part of the corporation. On cross-examination, he proved, among other things, that the vehicles in use for carrying all boilers have been the same for more than twenty years. They have been regularly used in Glasgow for all that time, and the roads have borne the traffic though probably they have cost more. The matter is no better and no worse than it has been for twenty-five years.

From this evidence, even if it stood alone, which it does not, it is, I think, clear that this boiler traffic, as it has been styled, is a section of the ordinary traffic of the city which has passed over these streets in different parts of Glasgow for the last twenty-five years. There has been little, if any, difference in that time in the make or action of the vehicle on which the boilers were carried, and no very great difference in the weight of the boilers carried. The injurious consequences of the traffic are invariable in character and substantially invariable in degree. The result, no doubt, is that the corporation have to repair the roads over which the traffic is carried more frequently, and at greater cost, than they would have been obliged to do if this traffic did not exist, but as the boiler traffic has been long established, is invariable in its character, nature and mode of conduct, is permitted, and apparently assented to, if not encouraged, by the appellants, I fail to see how the unchanging effects upon the street which invariably result from it must not now be regarded as ordinary wear and tear incident to the use of the streets over which it passes. I think it is ordinary wear and tear, and that, therefore, the appeal fails, but I do not desire for a moment to give any countenance to the respondents' contention that they are entitled to transport over the Glasgow streets whatever weights they please, irrespective of the results to the streets. I think the appeal should be dismissed with costs.

LORD SHAW.—My Lords, I do not conceal from your Lordships that I have had serious difficulties in regard to this case. The result that I am now about to state has been arrived at after very anxious consideration of the reciprocal rights and duties upon an accurate balancing of which the true principle regulating the relations of the parties can be arrived at. Put briefly and brusquely, the appellants say that the respondents' operations unjustifiably tend to ruin the well-made and maintained streets of the city, and should, therefore, be stopped. The respondents reply that the stoppage of their operations will unjustifiably tend to ruin the well and carefully conducted traffic of the city.

It is, in the first place, important to state exactly the legal position of the appellants, the corporation of Glasgow, with regard to these streets. In the view which I take of the case, it is unnecessary to go into the ancient history of those particular roadways. It is admitted that the streets are "public streets," and that they are duly and properly on the list of such kept, under statute, by the corporation. By the Glasgow Police Act, 1866, s. 289, such streets were vested in the corporation. It is unnecessary to quote that section because it has been repealed by the Glasgow Buildings Regulation Act, 1900. By s. 16 of that Act it is provided that:

> "Every public street for the objects and purposes thereof and of the Police Acts and the public sewers for the drainage thereof shall vest in the corporation, but the proprietors of lands and heritages adjoining any such street whose title extends beyond the wall of the building adjoining such street may with the consent of the corporation construct cellars . . ."

This section is substantially a repetition of s. 289 of the Glasgow Police Act, 1866, already mentioned. That section was under construction in *Glasgow Coal Exchange Co.* v. *Glasgow City and District Railway* (5). Qua ownership, the Lord President (Lord Ingles) stated the law, which is very similar, in these brief sentences:

A "I think the magistrates under the Police Act have right to the surface for all the purposes of the statute, and that they have also right to the sub-soil immediately below the surface to such a depth as is necessary for the purpose of constructing sewers, and laying gas and water pipes, and that everything beyond that remains the property of the owners under their infeftments."

B So far as to ownership. As to maintenance, the section of the Glasgow Police Act governing that is s. 310. It is in the following terms:

"Subject to the obligations hereinafter imposed on the proprietors of lands and heritages, the Board shall make provision for maintaining, and so far as thought expedient for causewaying, the public streets in a suitable manner, and for altering, repairing, and renewing the said causeway."

C

Looking to the enormous traffic over these streets and to its great weight as well as volume, I regard it as well established by the evidence that over a long course of years the corporation have discharged their responsible task, not only of construction, but of maintenance of the streets, in a manner which must be reckoned most highly satisfactory. So far as construction goes, the laying of a concrete bed D 6 in. thick, covered with causeway setts laid in a thin stratum of sand, has been such that, although wear and tear and occasional damage has been caused to the setts, the great and sometimes exceptional weight of the traffic spoken to has in no instance punctured the concrete bed. The damage has been entirely confined to the wearing and alleged destruction of the setts. It was argued on behalf of the respondents that the corporation was proved to have insufficiently and negligently E allowed the surface of the street, more particularly the setts adjoining the tramway lines, to be out of repair. I cannot say that I was impressed by the argument. I hold it to be established by the proof that, considering the enormous traffic carried, no charge of neglect in upkeep can be established against the corporation. Setts must get loose occasionally, and must be destroyed occasionally; and the heavier the traffic the oftener this must happen. This involves a constant and watchful F care in the matter of repair against such wear and tear. I do not think it to be established that the corporation have failed in discharging this duty. On the other hand, it appears to me to be also established that the respondents, Messrs. Barclay, Curle & Co., have conducted their traffic in the mode accepted as proper for about half a century, and have done so with due regard to the interests of the users of the street so as to avoid either destruction, interruption of traffic, or the production G of such disrepair as can be characterised as being in excess of that wear and tear to which both the past history and the present requirements of the traffic show that the streets must submit. They have arranged with the corporation to conduct the traffic mostly overnight, to have the overhead tramway wires removed so as to be safe from injury, and to lay over the manholes in the streets steel plates to prevent possible injury at those points of weakness for superincumbent weight. In the H result, accordingly, the case stands, to my mind, in the position that, on the one hand, the corporation is not open to the charge of having constructed or maintained the streets badly, nor, on the other, are Messrs. Barclay, Curle & Co. open to the charge of having used the streets badly.

The whole of this is in the region of fact, and I am happy to be able to place myself in complete accord with the carefully and deeply considered judgments I thereon come to by the learned Lord Ordinary and the judges of the First Division. There are, however, two questions of law which were submitted to this House. The one was maintained as a simple doctrine flowing from the rights of property. It was said on behalf of the corporation: "We have causeway setts in these streets: the respondents have broken them and, therefore, must pay." I cannot agree with this argument, which would have been quite the same if the respondents were charged with having stolen the stones or bombed the streets. The argument on property completely loses sight of the limited and fiduciary nature of the surface of the streets vested by Act of Parliament in the corporation. These streets are

constructed and the stones are laid in order to be used as of right by the inhabitants and traders. That use is a question of degree far from easy to settle; but if in the exercise of that use the line between permissible and non-permissible wear and tear has been exceeded, any argument from property does not help to a solution of this question of degree of use. I put the argument from property accordingly entirely to one side. The other legal argument is that mere wear and tear cannot be predicated of the operations of the respondents, which are proved to have actually broken, and, in some cases, pulverised, several of the stones over which their traffic passed This argument is, of course, in the region of fact. But assuming the physical consequences of the traffic to have been what I have just stated, the question of law is whether the respondents—producing these occasional results of breakage and pulverisation—have thereby put their traffic beyond the category of wear and tear. In such questions of degree it is difficult to lay down a principle, but the first consideration appears to me to be one arising from the history of the roads in question and the traffic thereon. It is acknowledged that upon the two occasions which are the subject of challenge the weights of the single boilers drawn across the street upon four-wheeled bogies preceded by locomotives were 55 tons and 72 tons respectively. These are heavy weights, but since 1879 weights as high as 53 tons each were carried, and the later unchallenged figures are put thus: "In 1900, single weights of 89 tons were carried; in 1909, 103 tons; in 1911, 104 tons; in 1915, 122 tons; and in 1917, 111 tons." It seems plain enough, accordingly, that on the two occasions libelled Messrs. Barclay, Curle & Co. were doing no more than had been done as occasion required for very many years past. On the occasions challenged they had lightened the weight by removing all spare and detachable parts, and this had been done, no doubt, as a matter of practice, as on former occasions. If this was a nuisance I do not suggest to the House that any prescriptive right could be set up to commit it; but the fact that it occurred and occurred publicly and over this long space of years—the streets being maintained by the same authority—seems conclusive against the idea of nuisance as such.

I will now, however, mention what appears to me to be a striking fact in the case. This great corporation, which has had its streets frequently the subject of private Bill legislation, has not up to the present seen occasion to make any application to Parliament to have the subject dealt with under the head of extraordinary or exceptional damage. I say so, having in view particularly the Roads and Bridges (Scotland) Act, 1878, which contains clauses on that topic. That statute does not extend to Glasgow, and no private Act of Parliament applicable in this sense to Glasgow has yet been passed. One reason of this is, no doubt, the exceptionally good construction and maintenance of the streets by the corporation, and the other the willingness of those conveying heavy traffic to do all in their power to lessen the burden of their operations. But the point is relative to what may be considered in the whole circumstances, and with such a traffic, as reasonable wear and tear. After much consideration, I have come to the opinion that both parties stand committed to the traffic, of which the two instances given are examples, as being within this category.

Before, however, giving my final determination upon this point, I desire specially to note that, in my opinion, the gravamen of the charge made by the appellants against the respondents is that the bogie used on the two occasions libelled was imperfect, and such in its construction as to cause pressure and pulverisation. I do not pass by the instance given of what I think must be considered to be a better bogie from Dundee. But how do the facts stand with regard to that? It does not seem to have been suggested by the corporation until the proof in this case had been begun. No doubt, the respondents will consider the matter now that the idea has been put before them, and they may have grave responsibilities if they do not do so; but, so far as anything anterior to this case is concerned, I am of opinion that the corporation stands committed to the view that the bogies employed upon the occasions challenged were reckoned to be the ordinary and suitable bogies. I

refer in particular to a letter addressed by Mr. Thomas Nesbitt, the experienced master of works of the appellants, dated Mar. 21, 1916. It is addressed to the respondents, beginning:

> "I have your letter of the 18th inst. intimating that you purpose hauling the four main boilers and auxiliary boiler . . . from your boiler works . . . to-night, Tuesday, and asking me to arrange that no opening of the roadway is in operation at that time. So far as this department is concerned, there are no operations being carried on in the line of streets to be traversed."

Mr. Nesbitt then proceeds to say that his assistant reports that he made an inspection of the ground, and that the flanges of the wheels of three of the bogies, being 13 in. and 12½ in. broad, are badly broken, reducing the breadth of the flange

> "in one case from 13½ in. to 11⅛ in., and in another case from 12¼ in. to 8⅛ in. in breadth. This is most unsatisfactory in view of the weight being carried which, I understand, is about 70 tons, and is likely to increase any damage that may be done by taking boilers over the streets."

He then adds these two sentences:

> "My assistant further reports that the causeway where the boilers are standing at the head of Kelvinhaugh Street has subsided owing to the boilers standing there, which will necessitate the street being repaired. Probably this could have been avoided if steel plates had been placed on the causeway for the wheels to rest upon. . . . I shall be glad to hear from you that in future you will see that the bogies employed to take such boilers over streets are in a proper state of repair."

In view of that letter and of the fact that there is no complaint whatsoever that the necessary steel plates had not been supplied or that the bogies were not in a proper state of repair, I must decline to accept the view that as between these two parties, both of them highly skilled and well advised, the conduct of this traffic fell within the category of nuisance, or, secondly, that the mode of conduct by bogies such as had been so long employed was one to be condemned. It was, upon the contrary, accepted, and I must take it, accordingly, so far as my judgment goes, to be the case, that the ordinary wear and tear of these streets of Glasgow did include this heavy traffic in this particular manner. The onus probandi would, in any view, have lain upon the appellants to prove in the circumstances an excess over ordinary and understood wear and tear. But I ground my judgment on the broader facts of the history and practice to which I have alluded.

Had, however, the facts been otherwise, and had it been established that the use of the streets had so far exceeded wear and tear as to amount to abuse by reason of impropriety in method or of excess, I must, in consequence of the shape which the arguments at the Bar took, altogether disclaim the view that such abuse would not have sounded in damages under the law of Scotland. There is nothing in precedent or the absence of it, and certainly there is nothing in principle, against that. The respondents in their Case very properly admit that "an individual . . . is not entitled to use the highway in such a manner as will result in the destruction of separate private property subjacent to the road or otherwise, or in causing material inconvenience or obstruction to the free passage of other users." If to this had been added the further consideration that the estimate as to material inconvenience or obstruction must not be minimised by reason of quite abnormal expenses having to be promptly defrayed after the passage of the respondents' traffic so as to restore the ordinary users against the destruction or waste caused, then I think the admission would have been complete, and would have been in accord with sound law. Whether it may be expedient or proper to adopt the relevant provisions of the Roads and Bridges Act I do not know. But the case does appear to be eminently one for mutual arrangement—possibly to be ratified by

private statute so as to avoid the mutual danger that a change in facts—after all the point is almost entirely a question of degree—might be followed by a change in legal result. This case, however, must depend upon its own established facts, and on these the appeal fails.

Appeal dismissed.

Solicitors: *Martin & Co.*, for *Sir John Lindsay*, Town Clerk, Glasgow; *Campbell & Smith*, S.S.C., Edinburgh; *Beveridge & Co.*, for *Biggart, Lumsden & Co.*, writers, Glasgow; *Morton, Smart, Macdonald & Prosser*, W.S., Edinburgh.

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

DARRELL *v.* WHITAKER AND ANOTHER

[King's Bench Division (Lush and McCardie, JJ.), April 30, May 1, 1923]

[Reported 92 L.J.K.B. 882; 129 L.T. 672; 39 T.L.R. 447; 67 Sol. Jo. 727; 21 L.G.R. 505]

Rent Restriction—Apportionment—"Separate and self-contained flat or tenement"—Self-sufficiency—Complete residence containing all needed for occupiers—No need for outer door cutting off flat from rest of house—Refusal of application—Substantial alteration of house—Basis of principle—Appeal—Questions of fact and law—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12 (3) (9).

The expression "separate and self-contained flats or tenements" in s. 12 (9) of the Increase of Rent, &c., (Restrictions) Act, 1920, means that the flat or tenement is a complete residence, containing all that is reasonably necessary for the persons who reside there, and is, therefore, self-sufficient. It is not necessary that all the rooms should be within one outer door, or cut off from other parts of the house. The mere presence or absence of a partition is not the test.

Per Lush, J.: The inferences from the facts of a case drawn by the county court judge to determine whether the tenant of a dwelling-house comprised in larger premises is entitled to an apportionment of the rent of the comprising premises in order to arrive at the rent of the dwelling-house he occupies are conclusions of fact from which, if there is evidence to support them, no appeal lies.

Per McCardie, J.: Such inferences are matters, not of pure fact, but of mixed fact and law, and the decision of the county court judge can be reviewed on appeal.

Per Lush, J.: The principle that the substantial alteration of a house prevents an apportionment of rent rests on the fact that the landlord cannot be said to increase the rent of a house which has been so substantially altered that it is no longer the same subject-matter as it was.

Notes. Referred to: *Stockham* v. *Easton*, [1924] 1 K.B. 52.

As to apportionment, see 23 Halsbury's Laws (3rd Edn.) 724–726; and for cases see 31 Digest (Repl.) 685–688. For Increase of Rent &c. (Restrictions) Act, 1920, see 13 Halsbury's Statutes (2nd Edn.) 981.

Cases referred to:

(1) *How* v. *Martin* (1923), The Times, Feb. 28, unreported.

(2) *Phillips* v. *Barnett*, [1921] 2 K.B. 799; 90 L.J.K.B. 1086; 37 T.L.R. 687; affirmed [1922] 1 K.B. 222; 91 L.J.K.B. 198; 126 L.T. 173; 38 T.L.R. 39; 66 Sol. Jo. 124; 20 L.G.R. 1, C.A.; 31 Digest (Repl.) 674, *7695*.

(3) *Smith* v. *Prime* (1923), post, p. 495; 129 L.T. 441; 39 T.L.R. 403; 67 Sol. Jo. 557; 21 L.G.R. 368, N.P.; 31 Digest (Repl.) 666, *7650.*

(4) *Sinclair* v. *Powell*, [1922] 1 K.B. 393; 91 L.J.K.B. 220; 126 L.T. 210; 38 T.L.R. 239; 66 Sol. Jo. 235; 20 L.G.R. 73, C.A.; 31 Digest (Repl.) 673, *7691.*

Appeal from Blackpool County Court.

On Aug. 3, 1914, the premises, No. 27, Clifton Street, Blackpool, consisting of four floors, were let as one dwelling-house at a rent of £65 per annum. In February and March, 1921, the following alterations were made to the premises. The ground floor was made into a separate lock-up shop, with a sitting-room, scullery, w.c., and a separate entrance to the shop from the street; the first floor was let off as offices. On the second floor a room formerly a bedroom was partitioned and a w.c. provided, and another room was provided with a hot water boiler and sink, but no fireplace or gas stove. The former entrance to the house was left as an entrance to the offices on the first floor and to the second and top floors. The second and top floors were let at a weekly rental of 30s., afterwards reduced to 25s., to the plaintiff, Darrall, and were separately rated. The plaintiff had a separate check meter to check the electric meter, but the gas meter was on the ground floor. The cost of making the alterations to the house amounted to nearly £900, and the landlords, the defendants, expended over £62 on decorating the premises occupied by the plaintiff. The staircase leading to the plaintiff's rooms was the same as that which existed in 1914, and no door or partition separated his rooms from the other rooms in the building. To secure his premises the tenant would have to padlock each room. At night he could not bolt the front outside door, as occupiers of the business premises might require to come in by it. In 1922 he made an application to the county court for an apportionment of the rent under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (3), and the registrar held that apportionment was possible. The county court judge referred the matter back to the registrar to ascertain the facts, and an agreed statement of facts was then filed which set forth the facts above stated. On these facts the county court judge found that the identity of the whole house had been altered; that the shop on the ground floor was a separate tenement from the original house, being, in fact, business premises; that the offices on the first floor were also separate tenements, having become business premises; and that the rooms on the second and third floors constituted, in fact and in law, a separate and self-contained flat by reason of the alterations that had been made in them, and by the fact that so soon as the second floor was reached they were entirely cut off from the rest of the building. He held that the standard rent of the last-mentioned floors was the rent at which they were first let after the alterations, and that accordingly apportionment was not possible. The tenant appealed.

By the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (3)

> "Where, for the purpose of determining [the standard rent] or rateable value of any dwelling-house to which this Act applies, it is necessary to apportion [the rent at the date in relation to which the standard rent is to be fixed, or] the rateable value of the property in which that dwelling-house is comprised, the county court may, on application by either party, make such apportionment as seems just . . ."

(The words in square brackets were repealed by the Rent Act, 1957.)

By s. 12 (9):

> "This Act shall not apply to a dwelling-house erected after or in course of erection on April 2, 1919, or to any dwelling-house which has been since that date or was at that time being bona fide reconstructed by way of conversion into two or more separate and self-contained flats or tenements. . . ."

C. L. J. Holt for the tenant.

Edmund Rowson for the landlords.

LUSH, J.—The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, by s. 12 (1) and (3), provides, in effect, that where a house was let as a whole on Aug. 3, 1914, and part of it has been separately let since that date, the county court may, on the application of either the landlord or the tenant, make an apportionment of the rent with a view to ascertaining what part of the original rent applied to the part of the house separately let.

In the present case the specific facts have been agreed. From these facts the county court judge has inferred that since Aug. 3, 1914, the identity of the house as a whole has been substantially altered, and that the ground floor, the first floor, the second floor, and the third floor, which comprised the premises in question, have all become separate tenements, and he has held that the rent cannot be apportioned. In my opinion, the inferences drawn by the judge from the agreed facts are themselves conclusions of fact and not of law, and if there was any evidence to support them no appeal would lie against them. This view appears to be supported by *How* v. *Martin* (1). That being so, the question is whether there was any evidence to support the inferences of fact drawn by the judge—that not only had the ground and first floors of the house been substantially altered, but that the second and third floors had been so greatly altered that they had ceased to be the same premises as the premises which existed in 1914.

What is the meaning of the principle that has been laid down that the substantial alteration of a house prevents the apportionment of the rent? The object of the Act is to restrain the landlord from increasing the rent of the dwelling-house. As I said in *Phillips* v. *Barnett* (2), and now say again, the landlord cannot be said to increase the rent of a house which has been so substantially altered that it is no longer the same subject-matter as it was in 1914. Where the house has been so greatly altered, there cannot be an apportionment of the original rent. The principle that the rent cannot be apportioned in such a case is thus involved in the Act itself. There was here abundant evidence to enable the county court judge to say that there had been a substantial alteration in the dwelling-house. The landlord had expended a considerable sum in altering the house as a whole, and in converting the upper floors in question into a complete residence. To compel him to bear the whole cost of the alterations, and then to let the new residential flat at the same rent as had previously been paid for the isolated bedrooms, seems to me to be the height of injustice. The question being one of fact, the findings of the county court judge cannot be disturbed.

On behalf of the tenant reliance has, however, been placed upon s. 12 (9) which provides that the Act shall not apply to a dwelling-house which since the specified date has been "bona fide reconstructed by way of conversion into two or more separate and self-contained flats or tenements." That is a curious provision, and I have some difficulty in seeing why it has been put into the Act. I can only suppose that, when the Bill was passing through Parliament, the particular case dealt with in the subsection occurred to someone, and it was thought desirable to ensure that in that case the landlord might charge the higher rent. The subsection is not really necessary, for, if the things to which it relates were done, they would amount to a substantial alteration of the premises, and the landlord could charge the higher rent without the assistance of that subsection. It is said, however, that the flats into which the upper part of the house in the present case had been converted are not "self-contained" flats, inasmuch as they are not completely cut off from the other flats in the building. If that is the true meaning of the expression, it is singular that the legislature meant that a small house should be converted into flats similar to expensive residential flats in London having their own outer doors. I agree with the view of ROCHE, J., in *Smith* v. *Prime* (3)*. In my view, the expression "self-contained," as applied to a flat, means that it is a complete residence, containing all that is reasonably necessary for the persons who reside there. It is not necessary that all the rooms should be within one outer

* See post p. 495.

door, or cut off from other parts of the house. The mere presence or absence of a partition is not the test. If sub-s. (9) has here to be considered, there was evidence on which the county court judge could find that the rooms in question formed a self-contained flat. The appeal should be dismissed.

McCARDIE, J.—I agree that the appeal should be dismissed, though for reasons that may be somewhat different.

The specific facts have been agreed between the parties, but, in my opinion, the inferences from the facts, for the purpose of the application to them of the Act, are matters, not of pure fact, but of mixed fact and law. For this opinion I think that support is to be found in several cases, including *Phillips* v. *Barnett* (2). I, therefore, feel entitled to review the decision of the county court judge. On reviewing it, however, I am satisfied that it is right, and that the judge has properly held that the identity of the premises has gone, and that the rent cannot be apportioned under s. 12 (3). It is to be observed that the word "identity" does not occur in the Act, but is a judicial innovation. In substance, however, it simply means the absence of any substantial alteration as prevents the premises from being the same as in 1914. If there has been such an alteration, then the original subject-matter no longer exists, and an apportionment of the rent cannot be made: *Phillips* v. *Barnett* (2) and *Sinclair* v. *Powell* (4).

Another point has arisen under s. 12 (9). This subsection might apply to cases in which the basis of the house has not been entirely destroyed by a complete re-building, but where there has been a measure of reconstruction only. The county court judge would seem to have found that the facts of this case were such as to bring it within this subsection, but, even if he has not so found, then I find that they are. The judge was right in his view of the subsection. There would be little doubt as to its meaning, except for the word "self-contained." I would point out that the actual words are "two or more separate and self-contained flats or tenements," and that "tenement" is a word of wide meaning, as appears from Stroud's Judicial Dictionary. I think that there has been a reconstruction of the premises in question here into two or more separate flats or tenements. I do not think that the question whether a flat is "self-contained" depends upon its having an outer door or bar. That expression means "self-sufficient." It implies that the flat contains within itself provision for the living and sleeping of a man and his family. That meaning has, I think, been adopted by the courts. It is the substance of the decision of Roche, J., in *Smith* v. *Prime* (3), infra, where he expressly held that the word did not involve the erection of a barrier against other parts of the house; and I think the same view was taken by the Court of Appeal in *How* v. *Martin* (1). Agreeing, as I do, with Lush, J., I have only delivered a judgment because I find that the cases under the Act are so confused that it is desirable that each member of the court should state his view of the working of the Act and the effect of the decisions.

Appeal dismissed.

Solicitors: *H. Butcher*, Blackpool; *Haslewood, Hare & Co.*, for *A. Kidd Whitaker*, Blackpool.

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

SMITH *v.* PRIME

[King's Bench Division (Roche, J.) April 17, 1923]

[Reported 129 L.T. 441; 39 T.L.R. 403; 67 Sol. Jo. 557; 21 L.G.R. 368]

ROCHE, J.—This case raises points under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which are not easy to determine and which, so far as I know, are not covered by authority.

The dwelling-house which is the subject-matter of the present action, would, before 1920 and 1921, undoubtedly have been one to which the Rent Restriction Act applied, unless the work done to it by the defendant in the latter part of 1920 and the early part of 1921 constitutes a bona fide reconstruction of it by way of conversion into two separate and self-contained flats or tenements within the meaning of s. 12 (9) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. In 1914 the dwelling-house was let at a rent of about £40 a year. It had been unoccupied for some period, and had fallen into a state of considerable disrepair when purchased by the defendant for £600. The defendant then, really by arrangement with the plaintiff and with a view to a tenancy by the plaintiff at a rent of £120 per annum, reconstructed the premises and converted the house into two flats, which, ever since the early part of the year 1921, have been inhabited by two separate and distinct families. The main point taken by the plaintiff was that, although there might be two flats, they were not separate and self-contained flats or tenements within the meaning of the section.

I find, as a fact, that reconstruction by the defendant of the house into two flats or tenements had taken place. In illustration of this reconstruction I may say that two separate kitchens were formed, and gas and hot water were installed, not merely on the lower floor, but also in the upper flat. Separate bells were put in, but the important matters are that facilities for cooking and lighting and heating were installed twice over in the building instead of once. There was no provision of any physical means of separation between the two flats. The two flats are, and are meant to be, kept separate so that, except in so far as the people who live in the upper flat pass over the staircase, which is also used by the occupants of the lower flat, there was no common user of the two flats. In saying this, I am excepting any question of lavatory accommodation, which I will deal with presently.

The first question is whether, by reason of the absence of a partition, the flats fall short of being "separate"; and the second question is whether they are "self-contained" flats or tenements. The argument against their being self-contained flats or tenements mainly rests on the fact that the top-floor flat was not provided within its ambit with any lavatory or bathroom accommodation. The fact is, as I understand it, that, as part of the reconstruction of the premises, in addition to some sanitary accommodation which existed only for the benefit of the occupants of the lower flat on the ground floor, there has been provided on the half-landing between the ground and first floors a new or re-arranged accommodation consisting of a closet and bathroom divided from one another by a partition. That sanitary and bathroom accommodation is enjoyed equally and in common by the occupants of both the lower and upper flats. On these facts, I have come to the conclusion that the absence of a partition is not fatal to the claim that these flats are separate. In my judgment, "separate" means not separated physically or partitioned off but rather "distinct," and just as the presence of a partition would not, by itself, constitute a bona fide reconstruction by way of conversion into separate flats, so as to bring the case within the subsection, so, on the other hand, the absence of a partition where a bona fide reconstruction has taken place resulting in the flats being distinct from one another, so as to be capable of being held as separate and distinct dwelling-houses does not, in my view, prevent them from coming within the subsection so far as the word "separate" is concerned.

The next question is whether the flats are self-contained. The argument of counsel for the plaintiff on this point may be paraphrased thus: A flat or tenement is not self-contained unless it contains within its own ambit all the elements or all the accommodation necessary to make it a separate dwelling-house so that it could be dwelt in according to the requirements of the ordinary standard of convenience appropriate to such a dwelling-house. That is certainly a plausible view, but I do not think it is the right one. I am satisfied that, in the ordinary meaning of the language of sub-s. (9), a flat may properly be described as self-contained although its coal cellar and servants' quarters are outside the ambit of

A the flat itself. I am, accordingly, driven to find some other meaning for the language. If "self-contained" means, as presumably it does, something more than separate, I think a meaning, which would satisfy the section, could be given to it by saying that a flat or tenement to be self-contained must be within a circle or ambit and must not be scattered, and that no one could make a dwelling-house into self-contained flats by making provision for two occupiers to use rooms
B scattered about the house, which, although they might be separate from each other, do not constitute self-contained flats in the sense that each of them was confined within its own area.

For these reasons, my decision in the present case must be that the defendant was protected by s. 12 (9) of the Act of 1920, and that he is entitled to judgment on the claim with costs. There will also be judgment for the defendant on the
C counterclaim for £48 with costs.

D

E

Re COURCIER AND HARROLD'S CONTRACT

[CHANCERY DIVISION (Sargant, J.), March 9, 1923]

[Reported [1923] 1 Ch. 565; 92 L.J.Ch. 498; 129 L.T. 457; 39 T.L.R. 283; 67 Sol. Jo. 484]

F *Sale of Land—Contract—Conditions—Misdescription—Restriction affecting property sold not fully set out—"Error, mis-statement or omission" not to annul sale—Sufficiency of disclosure.*

By a contract dated Sept. 28, 1922, the vendor agreed to sell and the purchaser to purchase a freehold residence subject to the conditions of sale under which the property had previously been offered for sale by auction.
G Those conditions of sale consisted of special conditions and of the London Conditions of Sale. By condition 7 of the special conditions the property was subject to the following restrictions and stipulations: "That neither the land or any existing or future building thereon should be used for carrying on any trade or business nor as a school, hospital, nursing home, public workshop or otherwise than as a private dwelling-house, but not precluding the practice of
H a profession thereon." By mistake a part of the restrictions had been omitted. Instead of the words "public workshop," the restrictions should have read "or public institution or charity nor for the holding of public meetings nor for public worship." By condition 6 of the London Conditions of Sale: ". . . If any error, mis-statement or omission shall be discovered in the particulars, the same shall not annul the sale, nor shall any compensation be
I allowed by the vendor in respect thereof." The purchaser took the objection that the restrictions had not been sufficiently disclosed and required that the vendor should obtain a release of the property from the omitted restrictions.

Held: the conditions had sufficiently disclosed the restrictions to which the property was subject, but, even if they had not, the mistake was "an error, mis-statement or omission" within condition 6 of the London Conditions of Sale, and the purchaser was not entitled to require the release of the property from the omitted restrictions.

Flight v. *Booth* (1) (1834), 1 Bing.N.C. 370, applied.

Notes. As to conditions of sale in an agreement for the sale of land, see 29 HALSBURY'S LAWS (2nd Edn.) 276 et seq.; and for cases see 40 DIGEST (Repl.) 73 et seq.

Cases referred to:

(1) *Flight* v. *Booth* (1834), 1 Bing.N.C. 370; 1 Scott, 190; 4 L.J.C.P. 66; 131 E.R. 1160; 40 Digest (Repl.) 113, *870.*
(2) *Alexander* v. *Mills* (1870), 6 Ch. App. 124; 40 L.J.Ch. 73; 24 L.T. 206; 19 W.R. 310, L.JJ.; 40 Digest (Repl.) 770, *2541.*
(3) *Reeves* v. *Cattell* (1876), 24 W.R. 485; 31 Digest (Repl.) 167, *3019.*

Also referred to in argument:

Rolls v. *Miller* (1884), 27 Ch.D. 71; 53 L.J.Ch. 682; 50 L.T. 597; 32 W.R. 806, C.A.; 31 Digest (Repl.) 170, *3045.*
Phillips v. *Caldcleugh* (1868), L.R. 4 Q.B. 159; 9 B. & S. 967; 38 L.J.Q.B. 68; 20 L.T. 80; 17 W.R. 575; 40 Digest (Repl.) 150, *1148.*
Re Weston and Thomas's Contract, [1907] 1 Ch. 244; 76 L.J.Ch. 179; 96 L.T. 324; 40 Digest (Repl.) 98, *744.*
Re Higgins and Hitchman's Contract (1882), 21 Ch.D. 95; 51 L.J.Ch. 772; 46 J.P. 805; 30 W.R. 700; 40 Digest (Repl.) 234, *1947.*
Jacobs v. *Revell*, [1900] 2 Ch. 858; 69 L.J.Ch. 879; 83 L.T. 629; 49 W.R. 109; 40 Digest (Repl.) 113, *872.*

Vendor and Purchaser Summons.

By a contract dated Sept. 28, 1922, the vendor, Ronald L. Courcier, agreed to sell and the purchaser, J. Blake Harrold, to purchase a freehold detached residence known as Flint Cottage, Mount Ephraim Lane, Streatham, for the sum of £1,800, subject to the conditions contained in the particulars and conditions of sale under which the property had previously been offered for sale by auction. By condition 1, it was provided that the property was sold subject to the special conditions there set out and also to the London Conditions of Sale. Condition 7 of the special conditions was as follows:

> "The property is subject to the restrictions and stipulations following—namely: (b) That neither the land or any existing or future building thereon should be used for carrying on any trade or business nor as a school, hospital, nursing home, public workshop or otherwise than as a private dwelling-house, but not precluding the practice of a profession thereon."

This condition mis-stated the terms of the restrictions to which the property was subject. The property had been conveyed by an indenture of conveyance on sale dated May 8, 1913, and the then purchaser had entered into a covenant for the benefit of the adjoining part of an estate known as the Mortimer Estate to the following effect:

> "Neither the land hereby conveyed nor any existing or future building thereon shall be used for carrying on any trade or business nor as a school, hospital, nursing home or public institution or charity, nor for holding public meetings nor for public worship or otherwise than as a private dwelling-house, but this stipulation shall not preclude the practice of a profession thereon."

The purchaser in his requisitions on title took the objection that he had no notice when he entered into the contract that the property could not be used as an institution or charity nor for holding public meetings thereon, and he required the release of these covenants or that the property should be discharged from these obligations in accordance with the contract for sale. It was not possible

for the vendor to obtain a release of these restrictions otherwise than at great expense, if at all, inasmuch as other adjoining properties had been sold subsequently to the conveyance of May 8, 1913, by the common vendor subject to similar restrictions. Condition 6 of the London Conditions of Sale contained the following provision:

> ". . . The property is believed to be correctly described as to quantity and otherwise. If any error, mis-statement or omission shall be discovered in the particulars, the same shall not annul the sale, nor shall any compensation be allowed by the vendor in respect thereof."

This summons was taken out by the vendor asking for a declaration that the particulars and conditions of sale contained sufficient notice to the purchaser of the restrictions and stipulations relating to user to which the property agreed to be sold was subject, and that the vendor was not bound to comply with the purchaser's requisitions and obtain a release of the property from the restrictions or stipulations omitted from the conditions of sale.

Greene, K.C., and *R. J. A. Morrison* for the vendor.
Rolt, K.C., and *Alfred Adams* for the purchaser.

SARGANT, J.—This is a curious case, and arises on a vendor and purchaser summons brought by the vendor asking, in effect, for a declaration that he has sufficiently disclosed the nature of the restrictions and stipulations by way of covenant to which the land agreed to be sold is subject. He also asks for a declaration that a good title has been shown to the land. Two questions fall to be determined. The first is whether, notwithstanding the omission from condition 7 of some of the words of the restrictive covenant, it was sufficiently disclosed to the purchaser. The second is whether in any case the words omitted are not an "error, mis-statement or omission" within condition 6 of the London Conditions of Sale.

On the first question, the purchaser alleges that certain things which he or his successors in title might conceivably desire to do are prohibited by the covenant as it exists, although they are not prohibited, or at any rate not so clearly prohibited, by the covenant as stated in the conditions. Two or three examples have been given of this. It is said that the full covenant, though not the stipulations set out in the conditions, might be violated by holding on the premises a political meeting in aid of some political candidate, or a bazaar in aid of some charitable object, or a sale of furniture. The other possibility suggested is that the covenant as it exists might prevent a gift of the property to a public charity and its use as a residence by some beneficiary of the charity. In view of the principles laid down in *Alexander* v. *Mills* (2), it falls to me to construe the covenant, and as matter of construction I think that the word "public" in the expression "public institution or charity" must be treated as applying to "charity" as well as institution. The insertion of the word "or" before "charity" seems to indicate that; and this construction is rendered the more probable by the words that follow, "nor for holding public meetings nor for public worship," which go to show that this part of the covenant is directed exclusively to public activities. Now it seems to me that it would not be to use the property as a public charity for such a charity to own it and put some private person to reside there. If a number of persons were housed there with someone such as a matron to look after them, the position would be different, but such a user of the premises would, in my opinion, be repugnant to the covenant not only in its full form but as set out in the conditions. It would be a user "otherwise than as a private dwelling-house." I pass to the other examples suggested of a public meeting or auction. I am of opinion that the full covenant would not prevent the holding of a sale by auction in the house of furniture belonging to the house; and an auction of furniture brought into the house from outside for sale by auction there would, according to the view expressed

by Sir George Jessel in *Reeves* v. *Cattell* (3), be a breach of the covenant not to use premises "otherwise than as a private dwelling-house." Take again the case of a philanthropic bazaar. The question whether it would be a breach of covenant to hold it in the garden of this property is one entirely of degree. If a single bazaar were held—or, possibly, two in the course of a year—I do not think that could be said in any ordinary sense of the words to be a user of the premises for holding public meetings, while, on the other hand, if the owner of the property habitually used it for holding bazaars, that would be a breach of the covenant not to use it "otherwise than as a private dwelling-house." The same is the position with regard to political meetings. It would be very odd in the case of a dwelling-house of this kind that a meeting should be held there to which the public were admitted indiscriminately, but in this case, too, a single user for this purpose would not be a breach of the full covenant, and to make a practice of holding public meetings there would be a breach of the covenant not to use the property "otherwise than as a private dwelling-house." On the first question, therefore, I have come to the conclusion that there is in practice no difference between the covenant in its full form and the covenant as stated in the conditions of sale. I cannot imagine any really practical case in which their application would differ. I decide, therefore, in favour of the vendor. But I have also to consider whether, even if there was some difference between the covenant as it stands and the covenant as stated in the conditions, the vendor is not protected by the provision in the sixth of the London Conditions of Sale that:

> "If any error, mis-statement or omission shall be discovered in the particulars, the same shall not annul the sale, nor shall any compensation be allowed by the vendor in respect thereof."

It is true that the imperfect statement of the stipulations affecting the property is not contained in the particulars but in the conditions of sale; but counsel for the purchaser have not placed any reliance on that, and, I think, wisely. I do not think there is anything in that. This general condition cannot be construed so narrowly as to exclude from its purview omissions in the part of the document under which the sale was effected, divided off, and headed "Conditions of Sale." The chief question on this part of the case is whether the "error, mis-statement or omission" that is alone contemplated is some physical misdescription of the property. As the argument proceeded, I came more and more to the conclusion that so to hold would be to take too narrow a view; and I am glad to find that in Williams on Vendor and Purchaser (3rd Edn.), p. 682, the law is stated in this way:

> "The common form of this condition provides for allowing compensation if any error, mis-statement or omission be discovered in the particulars of sale; and it appears that these words are applicable (with the limitations above-mentioned) [that is, the limitation that the property must not be an entirely different property from that agreed to be sold] to an error or mis-statement made in the particulars with regard to a matter of right as well as of physical content."

Assuming, then, that there was in the present case an error, mis-statement or omission as to the fetter on the user of the property, this passage shows that the condition is wide enough to cover it; and the only remaining question is whether, as a result of the error, mis-statement or omission in the conditions, the purchaser believed himself to be purchasing a property so different from what it really is that he can refuse to complete. I use the words "refuse to complete" for this reason. What the purchaser is asking is that the covenant should be modified so as to be in accordance with the statement of it contained in the conditions. But it appears from the affidavit of the vendor's solicitor that: "It is not possible for the vendor to obtain a release of the particular restrictions and stipulations in question otherwise than at a great expense, if at all, inasmuch as other properties in Mount Ephraim Road have been sold subsequently to the said conveyance of the 8th day

of May, 1913, by the common vendor subject to restrictions and stipulations similar to those imposed by that conveyance." It seems to me that, from a practical point of view, the statement of the vendor's solicitor is, if anything, an understatement. I should say that, in the circumstances described, it is practically impossible to obtain the modification of the covenant suggested, so that the real question involved is whether the purchaser can refuse to complete.

Will the contract of sale really be modified to the detriment of the purchaser if he has to take the property subject to the full restrictions? Is there such a discrepancy between the restrictions in their full form and the restrictions as set out in the conditions that the general condition as to any error, mis-statement or omission ought not to be applied? In *Flight* v. *Booth* (1) there was a provision that any error or mis-statement should not vitiate the sale but that compensation should be paid. It was held that the restrictions on the user of the property being sold as stated in the particulars of sale were so different from the actual restrictions that to force the property on the purchaser would be to force on him something substantially different from the property he had agreed to buy. The condition giving compensation only for misdirection was held not to apply, and it would be an a fortiori case where, as in the present case, there was a provision that no compensation was to be paid. TINDAL, C.J., said (1 Bing.N.C. at p. 376):

> "The question, therefore, is narrowed to the single point, whether the misdescription in the printed particulars of sale of the premises to be sold was such as to entitle the purchaser to rescind the contract altogether; or whether it was such as was contemplated by the sixth condition of the printed particulars of sale . . . It is extremely difficult to lay down, from the decided cases, any certain definite rule which shall determine what mis-statement or misdescription in the particulars shall justify a rescinding of the contract, and what shall be the ground of compensation only. All the cases concur in this, that where the mis-statement is wilful or designed, it amounts to fraud; and such fraud, upon general principles of law, avoids the contract altogether. But with respect to mis-statements which stand clear of fraud, it is impossible to reconcile all the cases."

He then referred to the conflicting authorities, and continued (ibid. at p. 377):

> "In this state of discrepancy between the decided cases, we think it is, at all events, a safe rule to adopt, that where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed, that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation."

In that case, the leasehold premises had been described so as to lead to the conclusion that there was nothing to prevent any trade being carried on on the premises except those which were of an offensive nature. There were, in fact, provisions preventing the use of the premises for a large number of different businesses. It was held that there was such a material discrepancy between the particulars and the lease as to entitle the purchaser to rescind the contract. The rule suggested in that case seems to afford a reasonably satisfactory business test at any rate as applied to a case like the present, which seems to me to be very far from the dividing line. Could it be said that any person proposing to buy this house would have been dissuaded from doing so if, instead of the shorter form of restrictions set out in the conditions of sale, the full restrictions had been set out? In my judgment, in any possible view as to the discrepancy between the restrictions as there stated and the restrictions as they in truth exist, it is impossible to suppose that a purchaser willing to buy subject to the conditions of sale would have been unwilling to buy if the restrictions had been fully set out. The discrepancy is of a trifling description and would at the most have been a subject for compensation, had the conditions provided for compensation for

misdescription as in *Flight* v. *Booth* (1). Here the provision that no compensation is to be paid applies, and I must hold that a good title has been shown in this respect. I have carefully considered the question of costs, and, as the trouble arose through the carelessness of the vendor and the purchaser had some ground for being dissatisfied, I will make no order against the purchaser for costs.

Solicitors: *Shelton & Co.*; *Leslie Williams & Alder.*

[*Reported by* L. Morgan May, Esq., *Barrister-at-Law.*]

WILLS *v.* MAY

[Chancery Division (P. O. Lawrence, J.), February 8, 9, 14, 1923]

[Reported [1923] 1 Ch. 317; 92 L.J.Ch. 253; 128 L.T. 826; 67 Sol. Jo. 350]

Easement—Light—Obstruction—Measure of damages—Future development of dominant property.

The plaintiff was the owner of two houses, No. 117 and No. 119 adjoining No. 117. The defendant was the owner of No. 115, to the north of and adjoining No. 117. On the north side of No. 117, the windows were ancient lights. The plaintiff had bought Nos. 117 and 119 as an investment for their development into commercial or industrial property, and the character of the district was changing from residential to commercial. No. 119 was, however, subject to a lease which would not expire for some fourteen years. The defendant converted No. 115 into shop premises, thereby obstructing the ancient lights on the north side of No. 117, and it was proved that this obstruction had rendered the sites of the plaintiff's houses less valuable for building purposes. In an action by the plaintiff for damages caused by the obstruction,

Held: the plaintiff was entitled to damages not only for the immediate damage to No. 117, but also for the damage to the combined sites of Nos. 117 and 119 as a site to be developed for commercial purposes although such development must be delayed, there being no difference in principle between granting damages in respect of a site immediately ripe for development and of a site which, though not immediately ripe for development, a prudent owner would develop on the first opportunity, provided the prospect of development was not too remote.

Griffith v. *Richard Clay & Sons, Ltd.* (1), [1912] Ch. 291, applied.

Notes. As to the nature of right to light, see 12 Halsbury's Laws (3rd Edn.) 582 et seq.; and for cases see 19 Digest 123 et seq.

Case referred to:

(1) *Griffith* v. *Richard Clay & Sons, Ltd.*, [1912] 2 Ch. 291; 81 L.J.Ch. 809; 106 L.T. 963, C.A.; 19 Digest 194, *1471.*

Also referred to in argument:

Re London, Tilbury and Southend Rail. Co. and Gower's Walk School Trustees (1889), 24 Q.B.D. 326; 62 L.T. 306; 38 W.R. 343; sub nom. *Re Gower's Walk Schools Trustees and London, Tilbury and Southend Rail. Co.*, 59 L.J.Q.B. 162; 6 T.L.R. 120, C.A.; 19 Digest 194, *1470.*

Horton v. *Colwyn Bay and Colwyn U.D.C.*, [1908] 1 K.B. 327; 77 L.J.K.B. 215; 98 L.T. 547; 72 J.P. 57; 24 T.L.R. 220; 52 Sol. Jo. 158; 6 L.G.R. 211, C.A.; 11 Digest (Repl.) 144, *238.*

Witness Action.

The plaintiff, Clara Ada Wills, was the owner of a house known as No. 117, Church Street, Croydon, and also of another house adjoining No. 117 on the south side, known as No. 119, Church Street. The defendant was the owner of No. 115, Church Street, adjoining No. 117, but separated by a passage. The plaintiff claimed an injunction to compel the defendant, John May, to pull down and remove any building or erection on the defendant's premises, which had been built or erected so as to be a nuisance or illegal obstruction to the ancient lights and windows of the plaintiff as the same existed at the time of the commencement of the building operations, or damages in lieu of an injunction.

No. 117, Church Street, was separated on its north side from the defendant's premises by a passage, and prior to 1918 it had enjoyed access of light through a large window on the north side of the plaintiff's premises overlooking the defendant's property. In 1918 the defendant built a wall which blocked up the lower part of the passage window and left the upper part of the window to the extent of 18 ft. in length and 2 ft. in height unobstructed. Besides this passage window there were two small windows which were ancient lights, the first being 2 ft. 6 in. in height and 9 in. in width on the ground floor, opening into the passage and situate in a small closet used as a larder. The second was a still smaller window on the first floor landing. In July, 1922, the defendant commenced to erect new buildings the south wall of which was erected on the boundary of the plaintiff's property. The wall which was then about 8 ft. in height was incorporated into the south wall of the defendant's new building. On Aug. 9, 1922, the defendant asked leave of plaintiff's tenant to go into his passage for some purpose connected with the building operations. At that time the defendant's south wall was raised to such a height as materially to interfere with the plaintiff's window looking into the passage depriving that window of some of its light. Then it was for the first time that the plaintiff became aware of what the defendant was doing, and on Aug. 14, 1922, she, through her solicitors, wrote to the defendant complaining of what was being done by him. By that time the south wall had been built to within 18 in. of the plate level, Rafters had been placed in position, and the injury had been substantially done. On Aug. 31, 1922, the writ in this action was issued, and by that day the building was finished, but there was no evidence that the building operations were hurried up so as to gain an undue advantage. In May, 1922, the defendant met the plaintiff and told her he was intending to develop his property, but could not proceed with such development unless the lavatory accommodation in his yard could be moved, and he offered to purchase No. 117 from the plaintiff. The plaintiff refused the offer, saying that, if she were to sell No. 117, it would spoil her site for future development. Nothing was then said as regards obstruction of light. It was made clear to the plaintiff on the occasion of this meeting that the defendant was not going to build unless he could move his lavatory accommodation and block the passage light. The defendant must have known then, having purchased his property in 1904, that the passage had enjoyed light for twenty years or more though he thought that the plaintiff never set much store on the light. The passage was in a dilapidated condition, and was in such a state of disrepair that no one would be led to suppose that much value was set on the light coming to it. The window was formerly glazed, but at that time the frames were gone, and the supports for the glass were wanting. The passage was never kept properly repaired, and the window in the passage, which was formerly all glazed, was broken, and iron sheeting had been put up to keep out the draught. The defendant was not consciously, in any sense, acting in an unneighbourly way when he put up his building. The plaintiff saw the building operations, but did not realise that what the defendant was doing would affect the passage window until Aug. 9, 1922. The plaintiff's house, No. 117, Church Street, was a small two-storey dwelling-house with a sitting-room on the ground floor, and also a kitchen and scullery, and three bedrooms on the first floor. The defendant's building had not in any way affected the light coming

to any of these rooms which were all well lighted by windows in front of the house. The staircase window was situated over against the south wall of the defendant's building. The staircase and landing derived their light mainly through that window, though some light was derived from the back door close to the foot of the staircase, and the landing also derived some light when the bedroom door was open. The passage when the defendant erected his building was used for the display of vegetables, and was lighted by the passage windows. The larder was lighted by the larder window opening on to the passage. The effect of the defendant's building was to deprive the passage and larder of the light which they had hitherto enjoyed, and the staircase and landing were sensibly less fit for their purposes than they were before the defendant erected his building. On the evidence given, the necessary structural alterations so as to afford a proper light could be carried out at a cost of £50. That did not represent, however, the whole damage suffered by the plaintiff. The site was one which lent itself to development in the same manner as the defendant had developed his site for a shop of the same height and kind. The neighbourhood was one which had changed, and was still changing, from residential to shop property. The plaintiff as owner of these premises, having on them a house eighty years old, was entitled to take into consideration that, at some future time not too far distant, it would be as well to convert into a shop. There was no dispute that, on the evidence, if it was right to take into consideration the future possible or probable development of this property, then the obstruction of light had rendered damage to shop property of £50. The plaintiff had purchased Nos. 117 and 119, Church Street, at auction in February, 1921. They were put up as one lot, the particulars of sale describing them as an excellent site for shop premises, and she bought the houses as an investment for their development into commercial or industrial property. It was plain that the plaintiff intended to keep that site for that purpose, and that the defendant was aware of this before he commenced building. It was not possible for her to do this until after the expiration of the lease of No. 119, subject to which lease she purchased, and that lease would not expire for some fourteen years. It had been proved that the site as a building site had been rendered less valuable by the deprivation of this light.

Jenkins, K.C., and *J. Norman Daynes* for the plaintiff.
Owen Thompson, K.C., and *H. S. G. Buckmaster* for the defendant.

P. O. LAWRENCE, J., stated the facts, and continued: The duty of the court before granting a mandatory injunction in vindication of a right is to weigh the comparative injury to be caused to the defendant, and the advantage to be gained by the plaintiff by a mandatory injunction, and, having taken into consideration all the facts in this case, in my judgment, no mandatory injunction ought to be granted. The damage can be compensated by a money payment, and subject to questions of principle there is no difficulty in estimating the damages. It would, moreover, be oppressive to order the defendant to pull down his building.

[His Lordship, after assessing the damages in respect of the obstruction of light to the plaintiff's windows at the sum of £50, and after stating that these damages did not represent the whole of the damages to which the plaintiff was entitled and referring to the special incidents, mentioned above, relating to the prospect of the future development of the site of the plaintiff's properties as a building site for commercial purposes, and the purchase thereof by the plaintiff as an investment, continued:] In these circumstances, the question is whether the plaintiff is entitled to have the damages in respect of the obstruction of the light on the north side of the site of No. 117, Church Street, estimated on the footing that the two plots on which the houses Nos. 117 and 119 are erected may be treated as a single site suitable for the erection of a factory or warehouse, or some other building to be used for commercial purposes. It has been proved that these plots have been rendered less valuable for the erection of buildings of a commercial character owing to that obstruction of the light. In my judgment, this question of

damages is covered in principle by the decision in *Griffith* v. *Richard Clay & Sons, Ltd.* (1), according to which I think that I am entitled to take into account the special incidents to which I have referred. It is true, as counsel for the defendant has pointed out, that the facts here are not on all fours with the facts in that case. There the buildings were small, old, dilapidated dwelling-houses which would soon have to be demolished and the site was then ripe for development. In those circumstances, it was held that the damages ought not to be limited to the depreciation in value of the houses on the site as they then stood, but might be extended to the diminution in value of the whole of the premises considered as one building site. In this case the facts are somewhat different, since No. 117 is still in good condition and likely to last several years longer, whilst, as regards No. 119, the development of the site must be delayed for about fourteen years, until the expiration of the lease, unless in the meantime a surrender can be obtained. In principle, however, there seems to me to be no difference between granting damages in respect of a site immediately ripe for development and of a site which, though not immediately ripe for development, a prudent owner would develop on the first possible opportunity, provided, of course, that the prospect of development be not too remote.

Having regard to these circumstances, and following the decision in *Griffith* v. *Richard Clay & Sons, Ltd.* (1), I assess the damages to the combined sites of Nos. 117 and 119, Church Street, at £100. In order, however, to avoid a new trial in the event of this case being taken to the Court of Appeal, and of that court holding that, although damages might be awarded in respect of the diminution in value of the plaintiff's land as a site for the erection of commercial buildings, yet that such damages ought to be confined to the site of No. 117, and should not extend to the combined sites of Nos. 117 and 119, I assess the damage which the plaintiff has sustained in respect of No. 117 as a site to be developed for commercial purposes by itself at the sum of £50. This sum of £50 is in addition to the £50 already awarded by me for the immediate damage to the house now standing on the site of No. 117, but under my judgment will not become payable because it merges in the £100 awarded by me in respect of the combined sites of Nos. 117 and 119.

In the result, therefore, I assess the total damages to which the plaintiff is entitled at the sum of £50, made up of £50 in respect of the immediate damage to No. 117, and £100 in respect of the permanent damage to the combined sites of Nos. 117 and 119.

Solicitors: *Mills, Lockyer, Church & Evill*; *Ranger, Burton & Frost.*

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

A

CHELLEW *v.* BROWN

[Court of Appeal (Bankes and Younger, L.JJ.), June 27, 1923]

[Reported [1923] 2 K.B. 844; 93 L.J.K.B. 1; 129 L.T. 805; 67 Sol. Jo. 808]

B

Practice—Security for costs—Misdescription of plaintiff's address on writ—Innocent misdescription—Temporary absence of plaintiff from England.

A plaintiff will not be ordered to give security for costs on the ground of misdescription of his address on the writ if the misdescription is innocent and made without any intention to deceive, nor will such an order be made merely because the plaintiff is temporarily resident abroad.

C

Notes. As to security for costs in interlocutory proceedings, see 30 Halsbury's Laws (3rd Edn.) 378 et seq.; and for cases see Digest (Practice) 906 et seq.

Cases referred to:

(1) *Fraser* v. *Palmer* (1841), 4 Y. & C.Ex. 515; 160 E.R. 1111; 43 Digest 117, *1140.*

(2) *Cambottie* v. *Inngate* (1853), 1 W.R. 533.

D

(3) *Willis* v. *Garbutt* (1827), 1 Y. & J. 511.

(4) *Redondo* v. *Chaytor* (1879), 4 Q.B.D. 453; 48 L.J.Q.B. 697; 40 L.T. 797; 27 W.R. 701, C.A.; Digest Practice 910, *4509.*

(5) *Swanzy* v. *Swanzy* (1858), 4 K. & J. 237; 27 L.J.Ch. 419; 4 Jur.N.S. 1013; 6 W.R. 414.

(6) *Re Sturgis* (*British*) *Motor Power Syndicate* (1885), 53 L.T. 715; 34 W.R. 163; Digest Practice 913, *4563.*

E

Appeal by the plaintiff from an order of Horridge, J., in chambers.

The facts appear in the judgment of Bankes, L.J.

Dove for the plaintiff.

Pritt for the defendants.

F

BANKES, L.J.—In my opinion, this order of the learned judge ought not to be allowed to stand. The plaintiff is a master mariner, and he was engaged by the defendants on a responsible job—that is, to take out some tugs to Australia. On the way he called at Southampton, and was there dismissed for some reason unknown to us; it is immaterial to consider whether he was rightfully or wrongfully dismissed, but as a consequence he was out of employment. He brought an G action against the defendants, claiming damages for wrongful dismissal. The writ was issued on Sept. 28, 1922, and stated that it was issued by Messrs. Speechly, Mumford & Craig, of 10, New Square, Lincoln's Inn, in the county of London. Their address for service was "10, New Square, aforesaid, agents for E. R. Ensor, of Southampton, solicitor, for the said plaintiff, who resides at 87, Westbourne Terrace, London." The plaintiff apparently got other employment, and in April, H 1923, as he expected to be going abroad for a short time in charge of some vessel which was to go to South America, he asked to be examined on commission, I presume, on the ground that he might be absent from this country when his case came on for trial. An order was made, and he was examined on commission, and it then appeared that he expected that he would only be absent from this country for a period of two or three months dating from April 6. I do not know how it I came about that the order for his examination was made in those circumstances, but the fact that he was likely to be absent from the jurisdiction for that short period does not seem to me to be any ground for ordering security for costs.

But it is said that there is another more important ground on which the order could be made—namely, that the plaintiff had misdescribed his residence on the writ—and that on that ground the learned judge made an order for security for costs. As far as I have been able to look into the authorities, misdescription of the address of a plaintiff may be a good ground for ordering security for costs.

A The court, however, has a discretion whether it will make such an order; but at present I have not been able to find any case in which the court has made an order for security on the ground of misdescription of the plaintiff's address if the misdescription was either innocent or unavoidable, or where there was no intention to deceive or to evade any possible consequences of the litigation. Let us see what the plaintiff's position was, and what the material was on which the learned judge B acted. In his examination the plaintiff was asked his present address, and he said, "7, Chepstow Villas, London." Then he was cross-examined, and no indication or intimation was given to anyone that his answers were intended to be used to found an application for security, though it may well be that he might have amplified his answers or given some information with regard to where his wife was to be found, but he merely answered the questions put to him in cross-examination. C These were the questions: "Why is your evidence being given in commission?—(A.) Because I expect to be going away very shortly. (Q.) Where are you going to?—(A.) South America. (Q.) For how long?—(A.) It may be for two months or for three months. (Q.) Then you are coming back?—(A.) Yes. (Q.) Perhaps in June?—(A.) Yes. (Q.) But you have no permanent home in England?—(A.) No." The plaintiff is a master mariner. One does not know anything about what his D ordinary occupation is, that is, whether he specialises in taking charge of tugs and other vessels to take to places abroad, or whether he is regularly engaged on liners, or what his work is. All we know is that he is a master mariner, and he says at the time that he made this answer that he had no permanent home in England. Then he was asked: "What is this address at 7, Chepstow Villas?—(A.) Only rooms. (Q.) And you are giving those up?—(A.) Well, I do not know; when I go E away my wife will be stopping there I expect. (Q.) What was the address you had at 87, Westbourne Terrace?—(A.) That was my sister's house. (Q.) Did you ever live there?—(A.) No, I stayed there for about a fortnight or so in June of last year. (Q.) You were not living there in September, 1922?—(A.) No. (Q.) You had not any property there?—(A.) No." It may be that the address he gave on the writ was a misdescription in the sense that it was not his real residence, because he F had no residence at all. But I fail to see the slightest indication that that address was given with an intention to deceive. On the contrary, it seems to me to have been given because it was the most likely place and address to give where he could be found, or where his whereabouts could be ascertained, and in those circumstances I personally do not think it would be right for the court to exercise its discretion and compel the plaintiff to give security.

G The obligation to give an address on the writ is contained in Ord. 14, r. 1, which requires this:

> "The solicitor of a plaintiff suing by a solicitor shall endorse upon the writ and notice in lieu of service of a writ the address of the plaintiff. . . ."

Then if there is non-compliance with the rule, the ANNUAL PRACTICE points out H what course the defendant may take.

> "If the address is not truly or correctly stated, the plaintiff may be ordered to amend, by stating the correct address, or in default proceedings may be stayed, or, if there is reason to believe that the plaintiff resides out of the jurisdiction, security for costs may be ordered."

I I will refer to three or four cases to which we have been referred, in which it seems to me that the court has plainly indicated that, where security is applied for on the ground of misdescription of address, the court has made an order or refused to make an order according as there is the element of an intention to deceive the court and to evade the consequences of the litigation. *Fraser* v. *Palmer* (1) was referred to by counsel for the plaintiff. There ALDERSON, B., said (3 Y. & C.Ex. at p. 280):

> "It is a different thing if he gives a false statement of his residence, he is then guilty of a fraud on the court, and on that ground is made to give security

for costs. It cannot be contended that a person is to give that security on the mere ground that he is in the habit of moving from place to place." A

In *Cambottie* v. *Inngate* (2) an application was made before WOOD, V.-C., for security in these circumstances. The plaintiff was a Greek merchant temporarily staying in London, and it was not denied that he intended to return to his native country. WOOD, V.-C., said (1 W.R. at p. 533): B

"In *Willis* v. *Garbutt* (3) ALEXANDER, L.C.B., said:

'No one can have security for costs until his opponent has quitted the country; we can only enforce our order by staying the proceedings until the security is given, and that may be done just as well after the plaintiff has quitted the country as before.'

His Honour also referred to *Fraser* v. *Palmer* (1) (3 Y. & C.Ex. at p. 280). C He did not think the plaintiff could be called on to give security. No attempt had been made to say that the plaintiff was endeavouring to commit a kind of fraud on the court, and to avoid giving security by coming over to this country for that special purpose."

Then in *Redondo* v. *Chaytor* (4), BAGGALLAY, L.J., giving judgment in reference to the application for security on the ground of misdescription, said (4 Q.B.D. at p. 458): D

"If the plaintiff did not correctly state his name and residence in his bill or petition, it was enough to enable the court to order him to give security for costs. In *Swanzy* v. *Swanzy* (5) residence was incorrectly stated. The plaintiff had taken lodgings at one place under one name and at another place E under another name. This was enough to make her liable to give security for costs, independently of any question of residence abroad. The principle always acted on in the Court of Chancery was that laid down by WOOD, V.-C., in *Cambottie* v. *Inngate* (2)."

Clearly there BAGGALLAY, L.J., is giving examples of unsatisfactory cases in which he considered there was something in the nature of an intention to deceive. F Another case is *Re Sturgis* (*British*) *Motor Power Syndicate* (6) before CHITTY, J., where an application was made for security in a winding-up matter, on the ground that the address given by the petitioner in his petition was a false one. The petitioner could not be found at the address given, and his solicitor was unable to give the petitioner's private address. CHITTY, J., in giving judgment, said (53 L.T. at p. 715): "This seems to me to be a clear case for ordering the petitioner to G give security for costs."

Those cases are only instances of probably many that might be found in the books in which the court has exercised its discretion where there is something in the nature of an intention to deceive. Here the facts which were laid before the court are very bare, if I may use that expression, because there is no affidavit by anyone excepting an affidavit verifying the plaintiff's answers in cross-examination. H Those answers were not elicited from a man who knew that they might possibly be used for quite a different purpose from what was in his mind at the time he was giving the information, and I fail to see the slightest indication here that his address was not given perfectly bona fide in order that the defendants and everybody concerned in this litigation on the defendants' behalf should have the best possible information of the plaintiff's whereabouts, and where he was to be I found. He was not a pedlar, nor a wanderer, nor a man lodging at one address under one name and at another address under another name, but he was occupying a responsible position in circumstances which necessarily took him a great deal from this country, and he was a man who had a wife residing in this country, and with no permanent home. Without further information, it seems to be going far beyond what the justice of the case requires to order security for costs. I think, therefore, in those circumstances the appeal must be allowed, and the order of the master restored. The costs of the appeal must be the plaintiff's in any event.

YOUNGER, L.J.—I am entirely of the same opinion. It appears that this plaintiff had not at any relevant time any permanent address in this country, and, having regard to his evidence taken on commission as to the place where he was then residing, it is apparent that the plaintiff would not have regarded the address of 7, Chepstow Villas, where at the time of his examination he was actually living, as an address so good for the purposes of the defendants as the address of his sister at 87, Westbourne Terrace, which is set forth on the writ as his place of residence. Like my lord, I can see no indication at all that, in giving that address on the writ, he, in the circumstances in which he was placed, did not give to the defendants the best address which for their purposes it was possible for them to have. Accordingly, I think that there was here no intention to mislead, and, so far as the misdescription on the writ is concerned, it appears to me unnecessary that the defendants should have made a suggestion to that effect. With regard to his residence abroad the cases appear to me clearly to show that temporary residence abroad is no reason for ordering a plaintiff to give security for costs, and when you find that the plaintiff is a seafaring man, whose business takes him from time to time out of the jurisdiction, I think that that rule should be remembered and enforced in his favour. It would, I think, be a cruel thing if it were to be supposed that a sailor, merely because he was out of the jurisdiction from time to time when he went on a voyage to foreign parts, could be ordered to give security for costs on the ground that he resided out of the jurisdiction. That part of the case, to my mind, entirely fails, and it is, in my opinion, insufficient to support the finding of the learned judge.

Appeal allowed.

Solicitors: *Speechley, Mumford & Co.*; *Ince, Colt & Roscoe.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

SHUFFLEBOTHAM *v.* SHUFFLEBOTHAM

[COURT OF APPEAL (Lord Sterndale, M.R., Warrington and Younger, L.JJ.), Jan. 29, 1923]

[Reported 128 L.T. 642; 67 Sol. Jo. 297; 39 T.L.R. 206]

Divorce—Costs—Security for wife's costs—Appeal by husband against decree nisi granted to wife—Ex parte application by wife for stay of appeal pending payment of, or security for, costs of trial and of appeal—Mode of making application.

An application by a wife to the Court of Appeal to stay an appeal by her husband against a decree nisi pending payment of, or security by him for, further costs of the wife at the trial, and also her costs of the appeal, should be made by being set down in the list as an original motion and not on an ex parte application.

Notes. Referred to: *Fletcher* v. *Fletcher*, [1927] All E.R.Rep. 664; *Re Thomsett*, *Thomsett* v. *Thomsett*, [1936] 3 All E.R. 649; *King* v. *King*, [1943] 2 All E.R. 253; *Roman* v. *Roman*, [1947] 1 All E.R. 434.

As to security for a wife's costs of appeal, see 12 HALSBURY'S LAWS (3rd Edn.) 426, 427; and for cases see 27 DIGEST (Repl.) 592.

Application.

In December, 1922, the wife obtained a decree nisi with costs against her husband. At the date of the petition being set down for hearing, the husband had

paid £50, being the taxed costs of the wife, and in July, 1922, the husband was ordered to give security for a further sum of £150 for costs of the wife. Subsequently, an order for extended security was made against the husband. The husband gave notice of appeal from the decree nisi which had been made against him. The wife's costs of the trial had not been taxed, and no amount had been fixed under the order made against the husband to give extended security, but it was estimated that the costs of the wife of the trial in the court below and her probable costs of the appeal from that trial would, together, amount to £1,000. The wife now made this application ex parte for a stay of appeal pending the payment of, or giving of security by the husband for, the further costs of the wife at the trial, and also for her costs of the appeal.

Bayford, K.C., and *H. D. Grazebrook* for the wife.
Cotes Preedy for the husband.

LORD STERNDALE, M.R.—In the first place, I wish to say that this application is wholly irregular. It is an ordinary application for security for costs and, consequently, it should have been set down in the list for hearing in the ordinary way, and not brought before this court as an ex parte application. But in any case the application should be refused. With reference to the security asked for, for the wife's costs of the appeal, none of the usual grounds have been given in support of the application with regard to these costs. There is no allegation that the husband would probably be unable to pay those costs. As regards the application generally, it is said that the Court of Appeal should give a wife security for her costs on the same principles as are applied in the Divorce Division, but counsel has been unable to produce any authority to support that view. It is a question which might have arisen at any time since the passing of the Matrimonial Causes Act, 1857, and, in my judgment, in the absence of any authority during all that long period, the court ought not to make any such order.

WARRINGTON and **YOUNGER, L.JJ.**, agreed.

Solicitors: *M. A. Orgill*, for *Alcock & Abberly*, Burslem; *Lewis & Lewis*.

[*Reported by* Geoffrey P. Langworthy, Esq., *Barrister-at-Law*.]

Re HYAMS. Ex parte LINDSAY *v.* HYAMS

[Court of Appeal (Sir Ernest Pollock, M.R., Warrington and Sargant, L.JJ.), October 9, 1923]

[Reported 93 L.J.Ch. 184; 130 L.T. 237; [1923] B. & C.R. 173]

Bankruptcy—Disclaimer—Disclaimer of lease—Subsequent acceptance of rent by landlord—Annulment of adjudication—Right of landlord to possession—Bankruptcy Act, 1914 (4 *& 5 Geo.* 5, *c.* 59), *s.* 54 (2), (6).

A landlord who, after disclaimer of a lease by the trustee in the bankruptcy of the tenant under the Bankruptcy Act, 1914, s. 54 (2), accepts rent tendered by the bankrupt in respect of a period prior to the disclaimer, is not, notwithstanding the annulment of the bankruptcy at a date subsequent to the disclaimer and to the acceptance of the rent, deprived of the right to possession of the premises under s. 54 (6) resulting from the disclaimer.

Notes. As to disclaimer and vesting orders in bankruptcy, see 2 Halsbury's Laws (3rd Edn.) 457 et seq.; and for cases see 5 Digest (Repl.) 1006 et seq. For the Bankruptcy Act, 1914, s. 54, see 2 Halsbury's Statutes (2nd Edn.) 389.

Case referred to:

(1) *Re Finley, Ex parte Clothworkers' Co.* (1888), 21 Q.B.D. 475; 57 L.J.Q.B. 626; 60 L.T. 134; 37 W.R. 6; 4 T.L.R. 745; sub nom. *Re Finley, Ex parte Hanbury*, 5 Morr. 248, C.A.; 5 Digest (Repl.) 1017, *8228*.

Appeal from a decision of a registrar in bankruptcy.

On Dec. 14, 1922, a debtor, who was at that time in occupation of certain leasehold premises where he lived and carried on business, was adjudicated bankrupt. The rent paid by him for the premises was £70 per annum. On April 17, 1923, the official receiver, as trustee, disclaimed the lease. On April 19 the bankrupt tendered to the landlord the rent due for the quarter ending Mar. 25, and this was accepted by the landlord. On April 20, as the result of an application to the court by the debtor, a composition of 5s. in the pound was approved. No vesting order under the Bankruptcy Act, 1914, s. 54, having been made, the landlord applied for an order vesting the premises in him and for delivery of possession. The registrar refused to make an order on the ground that, as the landlord had, after the date of the disclaimer, received the rent for the March quarter, he had recognised the tenancy as still existing and was consequently not entitled to use the machinery of the Bankruptcy Court for the purpose of recovering possession. The landlord appealed.

G. F. Kingham for the landlord.
E. Duke for the bankrupt.

SIR ERNEST POLLOCK, M.R.—In this case a point arises of some importance. There was an act of bankruptcy in respect of which an adjudication was made on Dec. 14, 1922. The bankrupt was at that time tenant of certain premises, and rent became due from him on Mar. 25, 1923. On April 17, 1923, the official receiver, who was the trustee, gave notice that he disclaimed his interest in the lease, with the result that by virtue of s. 54 (2) of the Bankruptcy Act, 1914, the disclaimer determined the interest and liabilities of the bankrupt in the property. The effect was that the landlord held the property free from the lease. On April 20, the bankrupt applied to the court to approve a composition. The court approved it and the bankruptcy was annulled. The effect of that was that the rights of the bankrupt came under s. 21 of the Bankruptcy Act, 1914. The court annulled the bankruptcy but made no vesting order; but the landlord by the disclaimer became freed from the interest of the tenant. On April 19, 1923, the day before the bankruptcy was annulled, the tenant tendered the rent due for the March quarter, and it was accepted. It is said that the result of the acceptance of the rent was to affirm the existence of the tenancy. That is not so; it is clear that payment of rent must be attributed to the date at which it became due, but no later. The receipt of rent did not affirm any tenancy as existing on April 19, only up to Lady Day. It is quite impossible to say that the payment of rent on April 19 affected the position. Counsel for the landlord says that, as there was a disclaimer on April 17, it operated before the annulment and was safeguarded by the effect of the section. In my opinion, the order made by the registrar was wrong. The tenant's interest had determined and cannot be rehabilitated by the annulment of the bankruptcy. The landlord, who made an application for a vesting order and for possession, is entitled to possession. There may be some doubt, however, whether it is necessary to make a vesting order. The order made must be reversed, a vesting order should be made so far as it may be necessary to do so and a consequent order for possession.

WARRINGTON, L.J.—I am of the same opinion. In *Re Finley, Ex parte Clothworkers' Co.* (1), Lindley, L.J., said (21 Q.B.D. at p. 485):

"Now the operation of those clauses in the simple case of a lease is not very difficult to ascertain. If there is nothing more than a lease, and the lessee becomes bankrupt, the disclaimer determines his interest in the lease under sub-s. (2). He gets rid of all his liabilities, and he loses all his rights by virtue

of the disclaimer. There is no need of any provision for vesting the property in the landlord, but the natural and legal effect of sub-s. (2) is that the reversion will become accelerated. There is nothing that I can see to be vested in the landlord. But he may require delivery of possession, and, if so, he can get it under sub-s. (6)."

On April 19, because he knew that an offer of a composition was likely to be accepted, the bankrupt tendered the rent for the quarter which expired before the disclaimer, and it was accepted by the landlord. In my opinion, that payment, being of rent already due, had not the effect of creating any new term in the tenant. The bankruptcy was annulled under s. 21 of the Bankruptcy Act, 1914, and not under s. 29. The position under the two sections is somewhat different. In nine hundred and ninety-nine cases out of a thousand a composition is made so as to vest the property of a bankrupt in a trustee, but no such order was made in the present case, only an annulment. The act of the trustee must remain in force until it is superseded, although the bankruptcy has been annulled. It would obviously be unjust to refuse the landlord the relief to which he was entitled. The registrar ought to have made the order asked for by the landlord.

SARGANT, L.J.—I also think the appeal should be allowed. It may be that the payment of the old rent in full was an improper payment, and if the court had been aware of the payment it might not have approved the composition. But I cannot think that the payment of the rent due for a period before the disclaimer should have the large effect attributed to it by the registrar. There is no reason why the landlord should be put in a worse position than he otherwise would be by having accepted this rent.

Solicitors: *A. Nisbet*; *R. H. Hargreaves.*

[*Reported by* J. L. Denison, Esq., *Barrister-at-Law.*]

PRATT *v.* PATRICK AND OTHERS

[King's Bench Division (Acton, J.), December 14, 21, 1923]

[Reported [1924] 1 K.B. 488; 93 L.J.K.B. 174; 130 L.T. 735; 40 T.L.R. 227; 68 Sol. Jo. 387; 22 L.G.R. 185]

Carriage of Passengers—Gratuitous carriage—Duty to take reasonable care.

Fatal Accident—Liability for act of agent—Car driven negligently by person other than owner—Owner present in car—Retention of right and duty to control car.

The defendant owned a motor car, and while in the car with two friends who were there by his invitation, he permitted one of them to drive it. In consequence of the latter's negligent driving a collision took place between the car and a lorry with the result that the other friend in the car, a gratuitous passenger, was killed. In an action for damages brought by the widow under the Fatal Accidents Act, 1846,

Held: (i) a person who undertook to carry another person gratuitously must exercise reasonable care, and in the present case the driver had not exercised such care; (ii) although the defendant had entrusted the physical management and mechanical control of the car to another person whose negligence had caused the accident, by being in the car he had retained the right and duty to control it, and, therefore, he was liable for the negligence of the driver.

Samson v. *Aitchison* (1), [1912] A.C. 844, applied.

Notes. Considered: *Chowdhary* v. *Gillot*, [1947] 2 All E.R. 541.

As to liability of principal for negligence on highways of servant and agent, see 28 HALSBURY'S LAWS (3rd Edn.) 71, 72; and for cases see 36 DIGEST (Repl.) 103 et seq.

Cases referred to:

(1) *Samson* v. *Aitchison*, [1912] A.C. 844; 82 L.J.P.C. 1; 107 L.T. 106; 28 T.L.R. 559, P.C.; 36 Digest (Repl.) 161, *852*.

(2) *Harris* v. *Perry & Co.*, [1903] 2 K.B. 219; 72 L.J.K.B. 725; 89 L.T. 174; 19 T.L.R. 537, C.A.; 8 Digest (Repl.) 11, *51*.

(3) *Southcote's Case* (1601), 4 Co. Rep. 83 b.; 76 E.R. 1061; sub nom. *Southcot* v. *Bennett*, Cro. Eliz. 815; 8 Digest (Repl.) 20, *105*.

(4) *Coggs* v. *Bernard* (1703), 1 Salk. 26; 1 Com. 133; Holt, K.B. 13; 2 Ld. Raym. 909; 3 Salk. 11; 91 E.R. 25; 36 Digest (Repl.) 32, *144*.

(5) *Lygo* v. *Newbold* (1854), 9 Exch. 302; 2 C.L.R. 449; 23 L.J.Ex. 108; 22 L.T.O.S. 226; 2 W.R. 158; 156 E.R. 130; 36 Digest (Repl.) 70, *376*.

(6) *Austin* v. *Great Western Rail. Co.* (1867), L.R. 2 Q.B. 442; 8 B. & S. 327; 36 L.J.Q.B. 201; 16 L.T. 320; 31 J.P. 533; 15 W.R. 863; 8 Digest (Repl.) 103, *676*.

(7) *Marshall* v. *York, Newcastle and Berwick Rail. Co.* (1851), 11 C.B. 655; 21 L.J.C.P. 34; 18 L.T.O.S. 94; 16 Jur. 124; 138 E.R. 632; 8 Digest (Repl.) 132, *849*.

(8) *Foulkes* v. *Metropolitan District Rail. Co.* (1880), 5 C.P.D. 157; 49 L.J.Q.B. 361; 42 L.T. 345; 44 J.P. 568; 28 W.R. 526, C.A.; 8 Digest (Repl.) 118, *757*.

(9) *Du Cros* v. *Lambourne*, [1907] 1 K.B. 40; 76 L.J.K.B. 50; 95 L.T. 782; 70 J.P. 525; 23 T.L.R. 3; 21 Cox, C.C. 311; 5 L.G.R. 120, D.C.; 14 Digest (Repl.) 99, *633*.

(10) *Booth* v. *Mister* (1835), 7 C. & P. 66, N.P.; 34 Digest 142, *1115*.

(11) *Chandler* v. *Broughton* (1832), 1 Cr. & M. 29; 3 Tyr. 220; 2 L.J.Ex. 25; 149 E.R. 301; 34 Digest 139, *1086*.

(12) *Wheatley* v. *Patrick* (1837), 2 M. & W. 650; Murp. & H. 183; 6 L.J.Ex. 193; 150 E.R. 917; 36 Digest (Repl.) 104, *519*.

(13) *R.* v. *Joncs* (1870), 22 L.T. 217; 11 Cox, C.C. 544; 36 Digest (Repl.) 189, *1001*.

(14) *Reichardt* v. *Shard* (1914), 31 T.L.R. 24, C.A.; 36 Digest (Repl.) 104, *523*.

Further Consideration of an action tried by ACTON, J., sitting without a jury at the Birmingham Assizes.

The action was brought by Emma Pratt under Lord Campbell's Act (the Fatal Accidents Act, 1846) on behalf of herself and her four infant children to recover damages resulting from the death of her husband caused by the alleged negligence of the defendant, his servant or agent in the following circumstances. On May 17, 1923, the defendant, James Patrick, who was the owner of a motor car, was being driven in his car by a friend of the name of Essex. The defendant and his friend were seated in the front of the car and they took with them Arthur James Pratt as a gratuitous passenger who was seated in the rear of the car. The defendant himself was not in the habit of driving and Essex had occasionally driven the car before. At a cross road near Tewkesbury a collision occurred between the car and a motor lorry owned by the firm of Sessions & Co., Ltd. As the result of the collision Pratt sustained injuries which caused his death.

J. G. Hurst, K.C., and *John Wylie* for the plaintiff.

Lauriston Batten, K.C., and *J. F. Eales* for the defendant.

Cur. adv. vult.

ACTON, J.—On May 17, 1923, the defendant, James Patrick, a person interested in horse-racing and describing himself as an owner of racehorses, set out from Birmingham in a six-cylinder 23-h.p. four seater Moon motor car, which was his property. He was accompanied by one Arthur James Pratt, who was husband of the plaintiff, and by a man named Essex. These two persons drove in Patrick's

car by his invitation as his friends or acquaintances. Essex was conversant with motor cars and was in the motor trade. Patrick was not in the habit of regularly driving his own car, though he had done so on four or five occasions, and Essex, when he was able to get a day off from his business, used to accompany Patrick in his motor car and drive it for him. On the occasion in question Essex drove the car, which had a right-hand drive, and Patrick sat next to Essex in the front seat on his left hand. Pratt was in the back seat. In the course of the journey the car, so driven along the road from Birmingham to Cheltenham, approached a point at which this road crossed the road from Tewkesbury to Stow-in-the-Wold. The characteristics of the crossing are as follows. As regards traffic moving from Birmingham and from Tewkesbury respectively, the crossing is a remarkably open road. This appears from the plan and photographs which were put in evidence. A driver of a vehicle from Birmingham would have a view of vehicles coming from Tewkesbury to the crossing of about 200 yards, and vice versa. There was a hedge some little distance short of the crossing to the west of it and on the north side of the road from Tewkesbury to Stow; but this was a thin hedge, and I am satisfied that its presence had no part in causing the accident which ensued. This took place as follows. A five-ton lorry with a load of timber rising to a height of 8 ft. or 9 ft. from the road level was proceeding at about 1.15 p.m. along its near side on the road from Tewkesbury to Stow. It was proceeding at a slow speed, about ten miles an hour, and it continued to move steadily along up to the time of the collision. When it had almost cleared the opening of the Birmingham–Cheltenham road into the crossing, and when there was abundant room (at least 14 ft.) for any vehicle coming down the road to pass behind the motor lorry, the defendant Patrick's car came very violently into collision with it. So far as anything can be ascertained as to how this came about, marks upon the surface of the Birmingham–Cheltenham Road showed plainly that the motor car had for a distance of 23 yards before the collision happened skidded along the road in the direction of the motion of the motor lorry. The result was that the hind part of the motor car collided with the near hind part of the motor lorry, in consequence of the motor car having swung round by that time so far from right to left as to admit of that being possible. The impact was a very violent one indeed. This is demonstrated by the fact that the motor car, after striking the lorry, sprang or was thrown on the rebound from the impact a distance of some yards on to a grass verge which was at the corner where the two cross roads made their junction. There were no marks on the roadway or on the grass between the point of impact and the point where the motor car ultimately came to rest, and at this latter point the wheels of the motor car were deeply sunk in the grass. It is apparent, therefore, that the motor car had sprung or been thrown from the point of impact to the point of rest by a recoil from the collision, without the maintenance of any contact between the wheels and the surface of the roadway or grass verge in the passage from the one point to the other. Moreover, the motor car came to rest in such a position that its bonnet was swung round so as to be pointing substantially in the direction from which it had originally come down the Birmingham–Cheltenham Road. There had been a slight shower of sleet shortly before the accident, but the evidence satisfied me that there was nothing in this to account for the collision. Both roads were wide, with good surfaces for motor traffic. As to the speed at which the motor car was travelling the evidence was scant and unsatisfactory. The defendant Patrick was called as a witness for the plaintiff, and estimated the speed at about twenty miles an hour. He, however, admitted very fairly that he was not taking much notice, and stated that he first saw the motor lorry when it was only 10 yards away, and he could then see that his car was on the point of coming into collision with the motor lorry. I regard his evidence as to speed as wholly unsatisfactory, though I do not suggest that he was in any way attempting wilfully to mislead the court, but rather that it was apparent that he had been quite inattentive to what was going on until almost the very instant of the collision. A most important feature of this case, however, was that Essex, the driver of the car, though his evidence was admittedly available,

was not called as a witness. There was, therefore, from him no account whatever of the speed at which he was travelling, nor as to what led up to the collision and how the collision actually happened. Some evidence was given by Patrick as to Essex having sounded his horn several times when approaching the crossing. In view of his other evidence already referred to, I was not satisfied about this having been done, but in any event, in my opinion, it was, in the circumstances, a matter of small importance. On these facts I was of opinion that there was no evidence of negligence against the driver of the motor lorry, and, if I am in error as to this, I find without hesitation, as a fact, that there was no negligence on his part which caused or contributed to the accident. The defendants, Sessions & Co., Ltd., are accordingly entitled to judgment in this action, with costs.

The rest of my task upon the facts was lightened by the following admissions: It was admitted that the plaintiff had acted reasonably in joining both defendants. It was also admitted by counsel for the defendant Patrick, that there was a primâ facie case of negligence against Essex as the driver of the defendant Patrick's motor car. It was further admitted that, as the result of the collision, the deceased, Pratt, sustained injuries which unfortunately caused his death. Notwithstanding the arguments of counsel for the defendant Patrick, I can find nothing in the evidence to displace the conclusion at which I have arrived that the collision was caused solely by the negligence of Essex. He had abundant opportunity of observing the slow-moving lorry, proceeding along the road from Tewkesbury on its near side, long before it reached the cross roads. The motor lorry had almost cleared the crossing before it was struck at the hinder end of its near side; and there was abundant room for the motor car, if driven with any reasonable vigilance and care, to have passed behind it. In the absence of any sort of explanation from Essex, I find that the collision was due solely to the negligence and recklessness of the driver of the defendant Patrick's motor car. So much for the facts.

The legal questions for decision upon the facts are as follows: (i) What was the duty, if any, owed by the defendant Patrick to the deceased, Pratt, in the circumstances of this case? (ii) Was the collision and, by consequence, the death of Pratt caused by the breach or neglect of any such duty committed by Patrick or for which Patrick was responsible? The answer to the first question appears to be supplied by *Harris* v. *Perry & Co.* (2), where COLLINS, M.R., said:

> "I think it was competent for the jury to find, as they must be taken to have found, a failure of that ordinary care which is due from a person who undertakes the carriage of another gratuitously. The principle in all cases of this class is that the care exercised must be reasonable; and the standard of reasonableness naturally must vary according to the circumstances of the case, the trust reposed, and the skill and appliances at the disposal of the person to whom another confides a duty. There is an obvious difference between the measure of confidence reposed and responsibility accepted in the case of a person who merely receives permission to traverse the premises of another, and in the case where a person or his property is received into the custody of another for transportation: see in the case of goods, *Southcote's Case* (3), cited in *Coggs* v. *Bernard* (4). In the case of persons received for carriage, PARKE, B., says in *Lygo* v. *Newbold* (5):
>
> > 'A person who undertakes to provide for the conveyance of another, although he does so gratuitously, is bound to exercise due and reasonable care.'
>
> In *Austin* v. *Great Western Rail. Co.* (6) (L.R. 2 Q.B. at p. 445), BLACKBURN, J., says:
>
> > 'I think that what was said in the case of *Marshall* v. *York, Newcastle, and Berwick Rail. Co.* (7) was quite correct. It was there laid down that the right which a passenger by railway has to be carried safely does not depend on his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely.'

It seems to me that these authorities imply a larger obligation than that of merely not setting a trap: see also per BAGGALLAY, L.J., in *Foulkes* v. *Metropolitan District Rail. Co.* (8)."

In the present case, however, the car was being driven, not by the defendant Patrick, nor by any servant of his in the ordinary acceptation of that term, but with the knowledge and consent of Patrick by Essex, who was in the car, just as the deceased Pratt was, to be gratuitously carried in it as a mere licensee by the invitation or permission of Patrick. Can it then be said that Patrick is responsible for the grave negligence in the driving and management of the car of which Essex was guilty? The answer to this question is, in my opinion, to be found in *Samson* v. *Aitchison* (1). The head-note to that case is as follows:

"Where the owner of a motor vehicle, being himself in possession and occupation of it, requests or allows another person to drive, this will not of itself exclude his right and duty of control; and therefore, in the absence of further proof that he has abandoned that right by contract or otherwise, the owner is liable as principal for damage caused by the negligence of the person actually driving."

Upon these facts the following passage in the report appears to throw light upon the principle applicable:

"On the other hand, CHAPMAN, J., and DENNISTON, J., were of opinion that where an owner of a vehicle is found to have handed over the actual physical management of it to another person while himself remaining in the vehicle, there is evidence for the jury that the owner is liable for the negligence of the driver; that to get rid of his liability it is essential that the owner should show that he has parted with the control of the vehicle in the sense of putting himself out of control; and that the defendant had failed to show that he had so parted with the control; DENNISTON, J., concluding his judgment by saying:

'I think there is no evidence to displace . . . the inference to be drawn from the fact that at the time of the accident, the appellant was in the car and that Collins was then driving the car with the appellant's consent.'"

And further on LORD ATKINSON said:

"The learned judge in the course of his judgment laid down the law upon this question, the only question now for decision, with, as it appears to their Lordships, perfect accuracy, in the following passage:

'I think that where the owner of an equipage, whether a carriage and horses or a motor, is riding in it while it is being driven and has thus not only the right to possession, but the actual possession of it, he necessarily retains the power and the right of controlling the manner in which it is to be driven, unless he has in some way contracted himself out of his right, or is shown by conclusive evidence to have in some way abandoned his right. If any injury happen to the equipage while it is being driven, the owner is the sufferer. In order to protect his own property, if, in his opinion, the necessity arises, he must be able to say to the driver, "Do this" or "Don't do that." The driver would have to obey, and if he did not, the owner in possession would compel him to give up the reins or the steering wheel. The owner, indeed, has a duty to control the driver. If the driver is driving at a speed known to the owner to be dangerous and the owner does not interfere to prevent him, the owner may become responsible criminally: *Du Cros* v. *Lambourne* (9). The duty to control postulates the existence of the right to control. If there was no right to control there could be no duty to control. No doubt if the actual possession of the equipage has been given by the owner to a third person—that is to say, if there has been a bailment by the owner to a third person—the owner has given up his right to control.'"

In my opinion, these authorities show that, in the circumstances of the present case, counsel for the plaintiff is right in saying that the principles deducible are: (i) that, if the defendant Patrick had been driving and had driven as Essex drove, he would have been liable to Pratt in an action for damages for injuries sustained by Pratt in the collision; and (ii) that, as the defendant Patrick was in the car and in control of it, he is no less liable by reason of what has been termed a "casual delegation"—namely, that he had entrusted the actual physical management of the car and its mechanical control to Essex, whose negligence was what caused the collision. In addition to *Samson* v. *Aitchison* (1) a number of other cases have been cited by counsel for the plaintiff as illustrations of the principle applied in that case. They were: *Booth* v. *Mister* (10), *Chandler* v. *Broughton* (11), *Wheatley* v. *Patrick* (12), *R.* v. *Jones* (13), and *Reichardt* v. *Chard* (14). In my view my judgment must be for the plaintiff against the defendant Patrick.

As to the damages the evidence was somewhat scanty and vague, and I am, of course, bound to take into consideration the irregular and precarious character of the deceased man's occupation. Giving the matter the best attention I can, I assess the damages at £800—£300 to the widow and £125 to each of the young children. There will be judgment accordingly for the plaintiff against the defendant Patrick for £800 and costs, to which costs there is no question that there are to be added those costs which the plaintiff will become liable to pay to the defendant Patrick's successful co-defendants Sessions & Co., Ltd. I direct that the moneys allocated to the children be paid into court to be dealt with as directed by the Senior District Registrar of the Birmingham District Registry.

Judgment for plaintiff.

Solicitors: *J. W. Barton*, for *Frank B. Darling & Son*, Birmingham; *Nash, Field & Co.*, for *Blewitt & Co.*, Birmingham.

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

PITCHERS *v.* SURREY COUNTY COUNCIL

[COURT OF APPEAL (Lord Sterndale, M.R., Warrington and Atkin, L.JJ.), February 27, 1923]

[Reported [1923] 2 K.B. 57; 92 L.J.K.B. 415; 128 L.T. 746; 87 J.P. 113; 39 T.L.R. 233; 67 Sol. Jo. 402; 21 L.G.R. 264]

Riot—Damage—Compensation—Riot by soldiers in military camp—Damage to adjacent property—Liability of police authority to pay compensation—Riot Damages Act, 1886 (49 & 50 *Vict.*, *c.* 38), *s.* 2.

During the war of 1914–18 the military authorities, acting under statutory powers, acquired land on which they built a camp to accommodate soldiers in training. Substantially the whole of the policing of the camp was done by the military police. The area on which the camp was built had previously been under the jurisdiction of the defendants, the police authority for the district; a main road passed through the camp, and after the camp was built the defendants continued to exercise control over this road. The plaintiff had been given permission by the military authorities to erect and open a shop along the road, and in 1919 a disturbance caused by soldiers took place at the camp, and led to the plaintiff's shop being damaged and the contents stolen. In an action by the plaintiff for compensation under s. 2 of the Riot (Damages) Act, 1886, which provided for the payment of compensation out of the police rate

to persons whose property in any police district had been damaged by persons riotously and tumultuously assembled together,

Held: the disturbance at the camp contained all the elements of a riot, and it did not cease to be a riot because it had been committed by soldiers in a private place; the camp was geographically within the police district, and the fact that the police had difficulty in exercising their rights did not affect their legal position; the conduct of the plaintiff in erecting the shop in the camp was not conduct in any way disentitling her from compensation; and, therefore, she was entitled to succeed.

Decision of SWIFT, J., [1923] 2 K.B. 57, affirmed.

Notes. As to compensation for damage by riot, see 25 HALSBURY'S LAWS (2nd Edn.) 359–361; and for cases see 37 DIGEST 190–192. For the Riot (Damages) Act, 1886, see 18 HALSBURY'S STATUTES (2nd Edn.) 96.

Appeal from an order of SWIFT, J.

The plaintiff claimed compensation from the defendants under the Riot (Damages) Act, 1886, for damage sustained by the plaintiff in having her shop destroyed and the contents stolen during a riot of Canadian soldiers encamped on Witley Common, Surrey, in February, 1919. The defendants, who were the police authority for the district in which the camp was situated, denied liability on the ground that the plaintiff's shop was in an area which was under military control and not under the control of the defendants as the police authority; further, that the riot was caused by Canadian soldiers over whom the defendants had no control, and that the plaintiff occupied the shop by leave of the military authorities on the express condition that the occupation was at her own risk.

Witley camp was on the main road from London to Portsmouth. This road was patrolled by the county police. In the centre of the camp there were a number of shops, including that of the plaintiff. In July, 1915, the plaintiff entered into an agreement with the Secretary of State for War whereby she rented a piece of land at £30 a year. On this land she erected a building to carry on business as a tailor and hosier. The plaintiff was rated in respect of the shop and premises, and the assessment included a payment for the maintenance of the county police. After the armistice, Witley camp was occupied by Canadian soldiers waiting to be sent home to Canada. Friction arose between the soldiers and the military authorities, and on the night of Feb. 9 and 10, 1919, there was a riot in the camp. The plaintiff's shop was damaged and the contents were stolen. SWIFT, J., held that the damage done to the shop in question was caused by a riot, and must be paid for out of the police fund; and that there must be judgment for the plaintiff. From this decision the defendants appealed.

Upjohn, K.C., and *Sir Richard B. Muir* for the defendants.
J. G. Hurst, K.C., and *J. B. Melville* for the plaintiff.

LORD STERNDALE, M.R.—I do not think there are any grounds for this appeal. It may be hard upon the inhabitants of the district, that is, the county of Surrey, but the only question before us is whether the plaintiff is entitled to compensation under the provisions of the Riot (Damages) Act, 1886.

The matter arises out of a disturbance—I use a neutral term—which took place in the camp at Witley, where some Canadian troops were at that time stationed for the purpose of demobilisation. There had been a disturbance on Armistice Day; there were a good many disturbances which were not, as a rule, very serious, but they arose more out of exuberance of spirits than anything else, but damage was done. This disturbance, according to the learned judge, which took place in February after Armistice Day, began by the soldiers rescuing some men who had been arrested and confined—arrested not by the civil police but by the military police. Then, after that, it proceeded to a disturbance in which the officers' quarters were wrecked, the canteen was looted and all the drink stolen or a considerable portion of it was stolen, and then an attack was made upon these shops

belonging to the plaintiff and others, which were called Tin Town because of the construction of corrugated iron of the shops. Does that come within the words of the Act of 1886? The Act begins:

> "Whereas by law the inhabitants of the hundred or other area in which property is damaged by persons riotously and tumultuously assembled together are liable in certain cases to pay compensation for such damage, and it is expedient to make other provisions respecting such compensation and the mode of recovering the same: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows."

Then s. 2 provides:

> "Where a house, shop or building in any police district has been injured or destroyed, or the property therein has been injured, stolen or destroyed, by any persons riotously and tumultuously assembled together, such compensation as hereinafter mentioned shall be paid out of the police rate of such district to any person who has sustained loss by such injury, stealing, or destruction; but in fixing the amount of such compensation regard shall be had to the conduct of the said person, whether as represents the precautions taken by him or as respects his being a party or accessory to such riotous or tumultuous assembly, or as regards any provocation offered to the persons assembled or otherwise."

Then "police district" is defined in the first schedule to the Act, and for the purposes of this case it is a definition that fits it. "Any county, riding, parts, division, or liberty of a county maintaining a separate police force." Therefore, primâ facie, the whole of the county of Surrey, which contains its own police force, is within the police district, but the locus in quo of this disturbance is said not to be within the police district, and in order to deal with that argument it is necessary to look at what this locus is.

It is the camp at Witley on Witley Common, which is on each side of the main Portsmouth Road not very far from Godalming, between Godalming and Hindhead. They say that through that camp there runs the main Portsmouth Road; there also runs a public road from Haslemere to Guildford and, I suppose, the adjoining parishes—I do not know—and there are other public roads which cross the common and cross the site of the camp. The use of that camp and that common, we are told, was taken under reg. 4, which was made under the powers of the Act, and it is to this effect—I do not think I need read it all. The side note is: "Power to use land for training," and it gives power to the competent naval or military authority by order to authorise the use of certain land for the purpose of training His Majesty's naval or military forces, and to provide a temporary suspension of footpaths or things or that kind, and to prevent access to persons whom the military authorities do not wish to be in the camp. We were also referred to reg. 29, which, to my mind, really has nothing to do with this. It merely is a power to prohibit anybody from approaching a camp or military work nearer than seemed good to the military authority, and by reg. 29b the same power preventing access to certain places is given in the case of what is called a special military area, although it is not a camp. This camp had been originally a training camp, but at the time of this matter arising it was a demobilisation camp.

The first thing that is clear is that geographically this is within the police district, and of that there can be no doubt at all, but it is said that, although geographically within this district, it is taken out of it for the purposes of this Act. It is first said to be taken out of it absolutely, but if not absolutely, it is taken out of it for the purposes of this Act. When I asked how it was taken out in law, I had no answer. There is no statute that takes it out; there is no regulation that takes it out. The regulations I have read do not take it out of the police district at all; they do not interfere with the rights that existed at the time that those regulations were made, except so far as was necessary for military purposes. But although

learned counsel can point to no provision either of the statute or regulation or anything else which takes this area out of the police district, and although it is the fact that the civilian police did exercise jurisdiction within it because they patrol the Portsmouth road, and on one occasion a civilian sergeant arrested a man for burglary, and on another occasion a civilian sergeant took steps with regard to lights that were in shops, and also the lights that there were in the camp actually in charge of the military authorities—although that is so, it is said that this by nature of things ceased to be within the police district. The nature of things is this, that this camp was inhabited by soldiers who were under military discipline and who were also provided with military police, and that according to the evidence of some of the officers, taken on commission in Canada, the greater part and substantially the whole of the policing of the camp, so far as relating to looking after the soldiers themselves, was done by the military police, and naturally it would be. It was very much more convenient and very much better and very much wiser that the soldiers, especially if they happened to be Dominion soldiers, should be looked after by their own police than by the civilian police of the district. Soldiers always have an objection to being interfered with by civilians. If I remember rightly, Sir Walter Scott told us that the Scottish archers of Louis XI protested vehemently against being hanged by anybody but the military hangman. I have no doubt that objection still subsists, and it is very much wiser, as long as one can, not to employ civilian police in dealing with soldiers in a military camp. But that is far from saying that the camp and the soldiers are taken out of the jurisdiction, if I may call it so, of the civilian police and that the civilian police are in law deprived of their rights that they would otherwise have within that part of the police district. There is no foundation, in my opinion, for saying anything of the sort. For convenience the officers employ pickets and policemen to look after the soldiers, and it is very wise that that should be, and for convenience the civilian police do not interfere, as a rule, but they maintain their rights in that part of the police district just the same as they do in other parts of the police district. There may be difficulties in their way in exercising those rights because of the necessarily superior power that the military powers take in time of war, but that does not affect their legal position in the least, therefore it seems to me quite clear that this was within the police district, and the first requisite to bring the matter within the Act is satisfied. "A house, shop or building in any police district has been injured or destroyed and property injured, stolen or destroyed." Has it been so injured or destroyed by the persons riotously or tumultuously assembled together? It seems to me only necessary to state the question to answer it.

Counsel for the defendants put a case that might possibly raise some difficulty, namely, where soldiers are on the march from one point to another and in passing through some town they create a riot. What a gross injustice it would be if the inhabitants of that police district had to pay. That is a case that can be dealt with when it arises. It is not this case. These people were not marching under military discipline; they collected from various parts of the camp, not under military discipline at all, but breaking military discipline in order that they might assemble tumultuously and riotously, and they did it. As I have said, after releasing one of their comrades who was in confinement, they looted the officers' quarters; they broke into the canteen and stole the drink, they then turned on the civilians' houses and destroyed them to a great extent, at any rate they broke into them and stole goods. The learned judge, SWIFT, J., has stated the requisites that exist in order to constitute a riot ([1923] 2 K.B. at pp. 60, 61), and I agree with him. He has said the assemblage of these men satisfies all those five requisites; and I agree with him. I cannot understand the argument that because this may be mutiny therefore it is not a riot. The two words "mutiny" and "riot" do not seem to me to be mutually exclusive. I do not say that all mutiny is riot, and I do not say that all riot is mutiny, but I do say it is impossible to say that mutiny can never be riot, and unless the police can put the argument to that height, the argument is of no use to them at all. I believe some of these people were dealt

with as mutineers. It does not make them any the less persons riotously and tumultuously assembling together within the meaning of the Act.

That really disposes of the whole case except this, that it is said that the plaintiff brought this upon herself and that her conduct, whether as regards precautions taken by her or otherwise, disentitles her to receive compensation. Before the learned judge that seems to have been based in a great measure upon her not having left somebody in charge of the house and her not having removed the goods from the house or shop—it is a lock-up shop—in the evening when she went away. That has not been pressed before us, so, obviously, if there had been anybody there it would not have made any difference, and, equally obviously, it would have been unreasonable to have required that these things should be carried backwards and forwards every morning and every evening. But it has been put on much broader grounds before us. It is said that her conduct in going there at all disentitles her to recover compensation, and at any rate even if her going there does not disentitle her to receive compensation, her staying there after there had been a riot in Armistice Day and after there had been threats to some shopkeepers in Tin Town disentitles her to receive compensation. I do not think that is so. I can see nothing in her conduct in going there and opening a shop for the purposes of dealing with the soldiers in the camp that disentitles her to recover compensation or constitutes such conduct as to prevent her receiving compensation when her property is destroyed. If I remember the evidence aright, some of the officers who were examined on commission thought it a great convenience to the men in the camp to have had these shops there, and I notice this also, that when these shopkeepers asked the chief constable, in December I think it was, to have some further protection, he referred the matter to the military authorities, but as far as I can see, he never gave any warning "This is a very dangerous place and you had better go." It seems to me, in face of that, it is impossible to say that the plaintiff's conduct in any way disentitles her to receive compensation which I think she is entitled to under the Act, and, therefore, I think the appeal should be dismissed with costs.

WARRINGTON, L.J.—I am of the same opinion. The first contention raised by the appellants in support of the appeal was that the plaintiff's shop was not at the time it was injured or destroyed in a police district within the meaning of the Act. In a concrete form the question is whether at that time the area of Witley Camp was within the police district of the county of Surrey. It is quite clear, and counsel for the defendants was driven to admit, that up till the autumn of 1914 when the War Office determined to use the land which is the area of Witley Common for the purpose of a training camp, that area formed part of the Police District of Surrey, and of that there is no question. Now, that being so, it seems to me that, in order to support the contention which they have put forward, the defendants must demonstrate that by some means or other the area has by law been taken out of that police district. There is no statutory provision, whether by Act of Parliament or by regulation or by law having the force of an Act of Parliament which has that effect. Then it is said that one must so construe the Act, whether by rule of common sense or otherwise, as to exclude for the purpose of the Act from the expression "police district" any district in which a body, not the ordinary civilian police, is by law charged with the maintenance of law and order and is itself empowered to maintain a police force, and it is said that this area was such a district because the military authorities were charged with the maintenance of law and order, I suppose so far as those who were under their jurisdiction were concerned, and were empowered to maintain a police force. In my opinion that proposition is quite unsustainable; there is no authority for it, nor can I in reason see any ground for contending that, because the particular individuals who formed the military body are subject to military discipline, the area in which they live should be withdrawn from the ordinary police protection of the rest of the county. That proposition, therefore, seems to me to fail. Then it is said that the persons

by whom the shop was injured and the plaintiff's property was stolen, were not persons riotously and tumultuously assembled together. That they were riotously and tumultuously assembled together, and that injury and loss was occasioned while they were so assembled, and by their riotous and tumultuous acts there can be no question. But it is said that because they were soldiers and because their offence had the added gravity of being a mutiny, that therefore they were not in civil law riotously and tumultuously assembled together. I fail to follow that. The Act of Parliament makes no exception at all—it provides simply that if injury is done by any persons riotously and tumultuously assembled together, then compensation is to be paid by the police authority in whose district that riot takes place. It may be perfectly true that certain hard cases may arise, some of which were referred to by counsel for the defendants, but however those cases may be dealt with, I agree with the Master of the Rolls that they are not this case. This case was the ordinary case of a riot, but because the rioters happened to be also under military discipline and guilty of mutiny as well as riot, it seems to me not to take them out of the Act of Parliament. With reference to the defence founded on the conduct of the plaintiff I have nothing to add to what has been said by the Master of the Rolls, and in my opinion this appeal fails.

ATKIN, L.J.—I agree. This riot or alleged riot took place in an area which was Witley Common and which was taken possession of by the military authorities during the war of 1914–18, under the Defence of the Realm Act, 1914, and the regulations made thereunder, and, of course, powers given to military authorities under the Military Lands Acts, 1892–1903, and it comprised an area through which the London and Portsmouth road runs, an area of about a mile and a half in length and varying from about a mile and a quarter to a mile and a half in width, and it was used for the purpose of locating Canadian soldiers there during the war. It is part of the county of Surrey, but it is said that by virtue of the powers which the military authorities possess, having taken possession of it as I have mentioned, that area ceased to be part of the Police District as defined by the Riot (Damages) Act, 1886, and was taken out of it. That appears to me to be a complete misapprehension of the facts. Those premises were and still are within the Police District though they are occupied and exclusively occupied by soldiers, and there seems to me to be no reason at all for suggesting that the ordinary barracks in any county occupied by the forces of the Crown and owned by the Crown are not within the police district. No authority has been suggested for that proposition, and to my mind it is quite unfounded. Military barracks are not an Alsatia. The law runs there. Everybody in barracks is subject to the criminal law and to the civil law, and the police authorities have got the ordinary rights to enforce process there, subject to such limitations as may be imposed by the fact that the premises are premises of the Crown. I think that this area quite plainly was within the police district; in fact the authority of the military over it was less than that which would be conferred upon them if the property had been exclusively the property of the Crown. As it appears to me, the rights of the public over the common were only excluded so far as was made necessary by the regulations. I have no doubt at all that this district continued to be part of the police district.

The only further question that arises is: Was this disturbance a riot? That it would be a riot if it had been committed by persons other than soldiers there can be no doubt, on the findings of the learned judge. The only question is whether it ceases to be a riot because it was committed by soldiers in an area which, as I have said, was occupied by the military authorities for the time as a military camp. I think there is no foundation for the suggestion that it is not a riot. It is to be remembered that every person subject to military law in this realm is still subject to the criminal law, and a criminal offence committed by a soldier would be just as much an offence against the criminal law as if it were committed by a civilian, and it is also to be remembered that by s. 41 (b) of the Army Act, 1881, a person subject to military law when within His Majesty's Dominions may be tried by any

A competent civil court for any offence with which he would be chargeable if he were not subject to military law. I think there can be no doubt whatever but that these persons could be indicted in a criminal court in this country for riot, and if they were convicted, they would have been liable to punishment. I think that as it was a riot and an offence against the criminal law, so in the same way under the Act of 1886 it is such an assembly as is meant to be covered by that Act. The argu-
B ment to the contrary consisted of a combination of two circumstances, namely, that they were both soldiers and acting within the area of the camp. It can hardly be doubted that if they were soldiers, that is to say, subject to military law, and this offence were committed outside the camp, it would be within the Act. I can see no reason why it should not be. The possibility of a disturbance by three or four soldiers, which is enough to constitute a riot, must have been well within the
C contemplation of the legislature at the time they made this provision, and if in fact a riot took place within a camp or within barracks, and damage was done, I see no reason why a person so damaged should not recover compensation. In an ordinary case, if damage is done in barracks, the damage for the most part would be done to Crown property. I am far from saying that the Crown would not be entitled under those circumstances to recover compensation. Of course, questions
D would arise which, under the Act with regard to damage, would make it difficult in some cases, at any rate, to recover compensation. Therefore, it appears to me, the case is made out.

Then it was suggested that the compensation ought to be diminished or entirely withheld, regard being had to the conduct of the plaintiff, and when the complaint is investigated, it is said the conduct of the plaintiff which disentitles her to com-
E pensation is that she by a rash and hazardous speculation entrusted her property and her liberty to the control of military authorities in Witley Camp. That, to my mind, is an absolutely preposterous proposition, and I venture to say that under ordinary circumstances if there is one place where a British subject is entitled to have reason to expect that his property and his liberty should be respected, it is when he or she is subject to the control of British soldiers. Unfortunately, in this
F case, in the very special circumstances, the expectation was not fulfilled, and damage was done. But, as has been stated in argument, the very absence of any such case as this—charges of riot brought under similar circumstances—shows how well-founded the expectation of safety would ordinarily be. To my mind, it was a misuse of terms to suggest that there was anything unreasonable or rash or hazardous in the tradespeople in this case entrusting themselves in the vicinity of these
G soldiers. I think the learned judge was perfectly correct in the view he took of the case in that respect. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Wyatt & Co.*; *W. E. Craigen.*

[*Reported by* J. L. DENISON, ESQ., *Barrister-at-Law.*]

A

Re HACKNEY PAVILION, LTD.

[CHANCERY DIVISION (Astbury, J.), December 7, 1923]

[Reported [1924] 1 Ch. 276; 93 L.J.Ch. 193; 130 L.T. 658]

Company—Director—Discretionary power—Right to refuse registration of share —Need for positive exercise of discretion—Disagreement by directors—Right to registration.

B

The articles of a private company, of which there were three directors, provided that the executors of a deceased member had the right to be registered as members of the company, subject to the directors' discretionary right to refuse registration without giving reasons. On the death of one of the directors his executrix, after proving the will and registering the probate with the company, applied to the company to have the transfer to her of his shares registered. At a meeting of the two remaining directors to consider the application no resolution was passed as the directors were equally divided and there was no casting vote. The secretary of the company whereupon informed the executrix that the directors had declined to register the proposed transfer.

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Held: a discretion given to directors by the articles of association to decline to register a transfer of shares must be actively exercised by a resolution passed at a meeting of the directors; no such resolution had been passed in the present case; and, therefore, the applicant was entitled to have the register rectified by the insertion of her name.

E

Notes. Applied: *Moodie* v. *W. and J. Shepherd* (*Bookbinders*), *Ltd.*, [1949] 2 All E.R. 1044.

As to refusal of directors to register transfer of shares, see 6 HALSBURY'S LAWS (3rd Edn.) 253, 254; and for cases see 9 DIGEST (Repl.) 388 et seq.

Case referred to in argument:

Re T. H. Saunders & Co., Ltd., [1908] 1 Ch. 415; 77 L.J.Ch. 289; 98 L.T. 533; 24 T.L.R. 263; 52 Sol. Jo. 225; 15 Mans. 142; 9 Digest (Repl.) 213, *1347*.

F

Originating Motion for rectification of the register of a company.

The Hackney Pavilion, Ltd., was a company registered in 1913 as a private company for the purpose of carrying on the business of cinematographic exhibition at the Hackney Pavilion, Mare Street, Hackney. The capital was £10,000 divided into 10,000 shares of £1 each, of which shares 3,333 were allotted for cash to each of the following three persons, Judah Soneshein, Moses Kramer, and John Rose, who were appointed by the articles of association the first directors. The material articles were the following:

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"Article 24. The directors may at any time, in their absolute and uncontrolled discretion and without assigning any reason, decline to register any proposed transfer of shares. . . . Article 25. On the death of any member (not being one of several joint holders of a share) the executors and administrators of such deceased member shall be the only persons recognised by the company as having any title to such share. Article 26. Any person becoming entitled to a share in consequence of the death or bankruptcy of any member shall, upon such evidence being produced as may from time to time be required by the directors, have the right either to be himself registered as a member in respect of the share, or, instead of being registered himself, to make such transfer as the deceased or bankrupt person could have made; but the directors shall in either case have the same right to decline or suspend registration as they would have had in the case of a transfer of a share by the deceased or bankrupt person before the death or bankruptcy."

H

I

By art. 67 the number of the directors was to be not less than three nor more than five. By art. 86 the directors might determine the quorum necessary for the transaction of the business of the company. Two directors were to constitute a quorum at meetings of the directors, until otherwise determined; and questions arising at

any meeting were to be decided by a majority of votes. The chairman was not to have a second or casting vote.

Judah Soneshein (who had changed his name to Sunshine) died on Feb. 3, 1922, possessed of 3,333 shares in the company, and being still a director. By his will, dated Jan. 29, 1922, he appointed his wife, Mrs. Flora Sunshine, his sole executrix, and she proved the will on Jan. 3, 1923. She registered the probate of the will with the company, and thenceforth received the dividends payable under art. 27. By a special resolution passed at an extraordinary general meeting of the company held on May 31, 1923, and confirmed at an extraordinary general meeting held on June 15, 1923, art. 67 was altered by substituting the word "two" for the word "three" as regards the minimum number of directors, and Moses Kramer and John Rose remained the only two directors. Mrs. Flora Sunshine executed a transfer of the 3,333 shares from herself as executor to herself in her individual capacity, and on Nov. 7, 1923, her solicitors wrote to the company enclosing the transfer, the certificates of the shares, and the transfer fee, and requested that the transfer should be registered. Not receiving any reply they wrote again on Nov. 14 asking for an acknowledgment and a new certificate in the name of Mrs. Sunshine. The secretary called a meeting of the directors for Nov. 20, at which both Kramer and Rose were present, Kramer being in the chair by rotation. Kramer stated that a question arose regarding the application of Mrs. Sunshine to be registered in her own name, and Rose moved that the shares should be so registered in accordance with her request. Kramer said: "I object in accordance with the articles of association." As the chairman had no casting vote, nothing more was done. The minutes of the meeting as regards this matter were as follows:

> "A letter dated Nov. 7, 1923, from Baddeleys & Co. to the company enclosing transfer and thirteen certificates, and another letter dated Nov. 14, 1923, were read. Mr. Rose proposed that the transfer be accepted and registered, and that a new certificate be issued to Mrs. Sunshine for the shares mentioned therein. The proposal was not carried, and the secretary was instructed to write Messrs. Baddeleys & Co. accordingly and to return all the documents."

These minutes were duly confirmed at the next meeting of the directors on Nov. 26, and were signed by Rose who was then in the chair. On Nov. 20 the secretary wrote to Baddeleys & Co. a letter in which he stated that the directors under their powers contained in the articles of association declined to register the proposed transfer, and returned the transfer, certificates, and fee. Mrs. Sunshine then issued this originating motion served on the company, asking that the register of members of the company should be rectified by inserting her name as the holder of the 3,333 shares in substitution for the name of her deceased husband.

Bischoff for the applicant.

Luxmoore, K.C., and *G. G. Solomon* for the company.

ASTBURY, J., stated the facts, and continued: The question is whether the directors have declined registration under art. 26, for, if they have not declined, the applicant is expressly given a right to be registered as a member by that article. The right of the directors to decline must be actively exercised by a vote of the board ad hoc and a resolution to that effect must be passed. At the board meeting in question there was a proper quorum, but, as the board was equally divided, and the chairman had no casting vote, it did not and could not exercise its right to decline. Nothing was or could be done in the matter. The mere failure to pass the resolution for registration which was proposed by Rose and opposed by Kramer was not an active formal exercise of the right to decline to register within art. 26. The secretary was in error, and exceeded his instructions, in stating that the directors under their powers had declined to register. The applicant's absolute right under art. 26 to registration remains in force, and the register must be rectified by inserting her name. The company must pay the costs.

Solicitors: *Baddeleys & Co.*; *Arthur S. Joseph.*

[*Reported by* E. K. CORRIE, ESQ., *Barrister-at-Law.*]

A

DEY *v.* RUBBER AND MERCANTILE CORPORATION, LTD.

[CHANCERY DIVISION (Russell, J.), July 3, 4, 1923]

[Reported [1923] 2 Ch. 528; 93 L.J.Ch. 27; 130 L.T. 93; 39 T.L.R. 615; 67 Sol. Jo. 768]

B

Company—Debenture—Holder—Holder in equity—Right to debentures—Allotment and registration—Debentures not sealed or delivered.

A person who is entitled to have debentures issued to him, who is bound to accept them, to whom they have been allotted, and whose name is on the register of debenture holders, is a debenture holder in equity, and as such entitled to the rights of a debenture holder, even though the debentures have been neither sealed nor delivered to him.

C

Notes. As to agreements to issue debentures, see 6 HALSBURY'S LAWS (3rd Edn.) 478; and for cases see 10 DIGEST (Repl.) 785.

Cases referred to:

(1) *Levy* v. *Abercorris Slate and Slab Co.* (1887), 37 Ch.D. 260; 57 L.J.Ch. 202; 58 L.T. 218; 36 W.R. 411; 4 T.L.R. 34; 10 Digest (Repl.) 763, *4949*.

D

(2) *Re Perth Electric Tramways, Ltd., Lyons* v. *Tramways Syndicate, Ltd., and Perth Electric Tramways, Ltd.*, [1906] 2 Ch. 216; 75 L.J.Ch. 534; 94 L.T. 815; 54 W.R. 535; 22 T.L.R. 533; 13 Mans. 195; 10 Digest (Repl.) 762, *4945*.

Also referred to in argument:

E

Re Queensland Land and Coal Co., Davis v. *Martin*, [1894] 3 Ch. 181; 63 L.J.Ch. 810; 71 L.T. 115; 42 W.R. 600; 10 T.L.R. 550; 38 Sol. Jo. 579; 1 Mans. 355; 8 R. 476; 10 Digest (Repl.) 762, *4944*.

Debenture Holders' Action for an account and ancillary relief.

A scheme of arrangement sanctioned by the court under s. 120 of the Companies (Consolidation) Act, 1908 [now s. 206 of the Companies Act, 1948], and declared to be binding on the company and all its creditors, provided that the company should issue 2,000 debentures which all fully secured creditors of the company should accept in return for their securities. Condition 13 of the conditions, which was indorsed on the debentures, provided:

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"A meeting of the debenture holders shall have power by extraordinary resolution to sanction any modification or compromise of the rights of the holders of debentures of this series against the company or against its property including power to accept . . . instead of these debentures . . . any shares in this company, and an agreement so sanctioned shall be binding on all the holders of debentures of this series and notice thereof shall be given to each holder, who shall be bound to produce his debentures to the company."

G

Condition 14 provided that the directors might convene a general meeting of debenture holders whenever they thought fit, the quorum to be two-thirds of the issued debentures. The company being six months in default in the payment of interest, the plaintiff, the holder of 127 debentures and a fully secured creditor of the company, commenced a debenture holder's action claiming an account and ancillary relief. As a result the directors convened a general meeting of debenture holders at which extraordinary resolutions were passed by which it was agreed that the payment of interest accrued due should be postponed and that the debenture holders should accept shares in the company in exchange for their debentures. When the votes on the resolutions were taken the plaintiff was the only dissentient. At that date he was the only person to whom the debentures had been issued. The names of the other persons who had voted had been placed on the register of debenture holders and letters of allotment had been sent to them, but no debentures had been issued to them. The plaintiff contended that the resolutions passed at the meeting were invalid as he was in law the only debenture holder voting.

H

I

Bennett, K.C., for the plaintiff.
Preston, K.C., and *Hecksher* for the defendants.

RUSSELL, J.—If the resolutions passed at the debenture holders' meeting of Nov. 29, 1922, were valid, the plaintiff is bound by them, and he is not entitled to the relief for which he asks. It was said on his behalf that he was the only debenture holder within the meaning of condition 13 who was present at the meeting, because he was the only person to whom debentures, sealed by the company, had been issued, and that, therefore, no resolution approving of an agreement to modify the rights of the debenture holders has been passed. When the court made the order sanctioning the scheme it declared the scheme to be binding both on the creditors of the company and on the company. The company duly allotted the debentures required to satisfy its creditors, notices of the allotment were sent to the allottees, and their names were inserted in the register of debenture holders. As soon as the order of the court sanctioning the scheme was made there was an obligation on the company to deliver the sealed debentures, and an obligation on the individual creditor to receive them. A person, who is entitled to call for debentures and is bound to accept them, to whom they have been allotted, and whose name is on the register of debenture holders, is a debenture holder within condition 13. The issue of the letters of allotment and the existence of the obligation to hand over the debentures, coupled with the obligation to receive them, constitute, in my opinion, the issue of the debentures within the meaning of the conditions attached to them. Although the sealing of the debentures was delayed, the rights of the allottees are the same as if the debentures had been actually handed over; they are debenture holders in equity and, as such, entitled to the rights of debenture holders. The case is analogous to *Levy* v. *Abercorris Slate and Slab Co.* (1), where CHITTY, J., held that any document which either created a debt or acknowledged it was a debenture, and that accordingly a document containing a contract to give a charge on the goods, chattels, and effects of a company, which in equity was a charge, was a debenture, and pointed out that the word "issue" was a mercantile and not a technical term. The same view was taken by SWINFEN EADY, J., in *Re Perth Electric Tramways, Ltd.* (2). The resolutions were therefore validly passed, and were binding on the plaintiff, and the action must be dismissed with costs.

Solicitors: *Bono & Nimmo*; *Jenkins, Baker & Co.*

[*Reported by* J. L. DENISON, ESQ., *Barrister-at-Law.*]

A

RYALL *v.* HOARE
RYALL *v.* HONEYWILL

[King's Bench Division (Rowlatt, J.), April 25, 30, 1923]

[Reported [1923] 2 K.B. 447; 92 L.J.K.B. 1010; 129 L.T. 505; 39 T.L.R. 475; 67 Sol. Jo. 750; 8 Tax Cas. 521] B

Income Tax—Profits—Annual profits or gains—Single payment in consideration of guarantee of overdraft—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sched. D, Case VI.*

The respondents, directors of a company, guaranteed for one year that the company would repay the amount of an overdraft to the company's bankers, in consideration of which the company agreed to pay, and did in fact pay, to each of them a sum of money as "commission." In the following year the guarantee was renewed and a further sum of money was paid to each of the respondents by the company as further commission. The inspector of taxes assessed the respondents in respect of this commission under Case VI of Sched. D of the Income Tax Act, 1918, on the footing that the payments were "annual profits or gains." On appeal, the special commissioners discharged the assessment and at the request of the inspector stated a Case for the opinion of the court. C D

Held: the word "annual" meant in its context "in any year," and the payments were in the nature of casual profits properly taxed under Case VI. E

Notes. The Income Tax Act, 1918, Sched. D, Case VI, was replaced by the Income Tax Act, 1952, s. 123.

Considered: *Graham* v. *Green*, [1925] 2 K.B. 37. Followed: *Lyons* v. *Cowcher* (1926), 10 Tax Cas. 438. Approved: *Martin* v. *Lowry*, *Martin* v. *I.R.Comrs.*, [1927] A.C. 312; *Leeming* v. *Jones*, [1930] 1 K.B. 279. Considered: *Jones* v. *Leeming*, [1930] All E.R.Rep. 584. Followed: *Sherwin* v. *Barnes* (1931), 16 Tax Cas. 278. Considered: *Shipway* v. *Skidmore* (1932), 16 Tax Cas. 748; *Trenchard* v. *Bennet* (1933), 49 T.L.R. 226; *Lowry* v. *Field*, *Lowry* v. *Williams*, *Titcomb* v. *Clancy*, *De Burgh Whyte* v. *Clancy*, [1936] 2 All E.R. 735; *Wilson* v. *Mannooch*, [1937] 3 All E.R. 120. Considered: *Hobbs* v. *Hussey*, [1942] 1 All E.R. 445; *Leader* v. *Counsel*, *Benson* v. *Counsel*, [1942] 1 All E.R. 435. Referred to: *Beare* v. *Carter* (1940), 56 T.L.R. 762; *Haig's Trustees* v. *I.R.Comrs.* (1939), 22 Tax Cas. 725; *Ascot Gas Water Heaters, Ltd.* v. *Duff*, *Duff* v. *Ascot Gas Water Heaters, Ltd.* (1942), 24 Tax Cas. 171; *Gold Coast Selection Trust, Ltd.* v. *Humphrey*, [1948] 2 All E.R. 379; *Littman* v. *Barron*, [1951] 2 All E.R. 393; *Barron* v. *Littman*, [1952] 2 All E.R. 548; *Edwards* (*H.M. Inspector of Taxes*) v. *Bairstow and Harrison* (1955), 36 Tax Cas. 207. F G

As to casual profits of a revenue nature, see 20 Halsbury's Laws (3rd Edn.) 288 et seq.; and for cases see 28 Digest (Repl.) 216 et seq. H

Cases referred to in argument:

Scottish Provident Institution v. *Inland Revenue*, 1912 S.C. 452; 6 Tax Cas. 34; 28 Digest (Repl.) 206, **540.*

A.-G. v. *Black* (1871), L.R. 6 Exch. 78; 40 L.J.Ex. 89; 24 L.T. 370; 19 W.R. 416; affirmed L.R. 6 Exch. 308; 40 L.J.Ex. 194; 25 L.T. 207; 19 W.R. 1114; 1 Tax Cas. 54, Ex. Ch.; 28 Digest (Repl.) 47, *174.* I

Wylie v. *Inland Revenue*, 1913 S.C. 16; 50 Sc.L.R. 26; 6 Tax Cas. 128; 28 Digest (Repl.) 105, **282.*

Assets Co., Ltd. v. *Forbes* (*Surveyor of Taxes*) (1897), 61 J.P. 616; 3 Tax Cas. 542; 28 Digest (Repl.) 39, **37.*

Goslings and Sharpe v. *Blake* (1889), 23 Q.B.D. 324; 58 L.J.Q.B. 446; 61 L.T. 311; 37 W.R. 774; 5 T.L.R. 605; 2 Tax Cas. 450, C.A.; 28 Digest (Repl.) 183, *749.*

Cases Stated by the Special Commissioners of Income Tax for the opinion of the court. The facts stated in each Case were essentially identical and are sufficiently set forth in the judgment.

The Solicitor-General (*Sir T. W. H. Inskip, K.C.*) (*R. P. Hills* with him) for the Crown.

Sir W. Finlay, K.C. (*A. M. B. Bremner* with him), for the taxpayers.

ROWLATT, J.—In each case the question is whether a director of a company, who received a commission for guaranteeing the company's overdraft with a bank, is liable to be assessed to income tax under Case VI of Sched. D, in respect of that commission. The Special Commissioners have discharged the assessment, and I have to determine whether that is right or wrong.

The facts can be very shortly stated. The company was for the moment in want of money, and the company asked two directors, after some other arrangement had been suggested, to guarantee an overdraft. The directors, like most prudent people in that position, were unwilling to do so, but ultimately they consented. It was not in the line of business of either of them to give a guarantee, and one of them, who is a solicitor, had never done it before and probably will never do it again. Although the circumstance that a company is concerned, and the circumstance that the gentlemen concerned are men of affairs, lend a colour of business to the transaction, it seems to me that on the view of the facts taken by the Special Commissioners, by which I am bound, I must treat this case as on the same footing as if a person not connected with business received a commission from another person, also not connected with business, for doing him the favour of guaranteeing his account at a bank.

In those circumstances is this commission an "annual profit or gain" within the meaning of Case VI? One may rule out two classes of emoluments from this description. In the first place it is quite clear that anything in the nature of a capital accretion is outside the words "profits or gains" as used in these Acts; that follows from the scope of the Act, and it is sanctified by the usage now of a century. That rules out the well-known case of a casual profit made on an isolated buying and selling of some article; that is a capital accretion, and unless it is merged with other similar transactions in the carrying on of a trade, and the trade is taxed, no tax is exigible in respect of that transaction. "Profits or gains" mean something which is in the nature of interest or fruit, as opposed to principal or tree. The other class of case that one can rule out is that of gifts. A person may have an emolument by reason of a gift inter vivos or testamentary, or he may acquire an emolument by finding an article of value or money, or he may acquire it by winning a bet. It seems to me that all that class of cases must be ruled out, because they are not profits or gains at all. Without pretending to give an exhaustive definition, one may take it as clear that where an emolument accrues by virtue of some service rendered by way of action or permission, or both, at any rate that is included within the words "profits or gains"; but the question is whether in this case it is an "annual profit or gain." What is the meaning of the word "annual"? It may mean, and perhaps its most obvious meaning is "annually recurring," like the seasons; or, if not recurring in perpetuity like the seasons as a matter of nature, annually recurring in the ordinary way for a considerable space of time. Or it may conceivably mean "lasting only for a year," as you speak of an annual plant, although it may be that when one speaks of an annual plant one has in mind the necessity of annual sowing. The plant is not annual; it is the sowing that is "annual." Thirdly, it might mean "calculated with reference to a year," e.g., interest of so much per annum. If there is anything in the suggestion that "annual" means or includes "lasting for a year" I must point out that this guarantee did last for a year, and it was renewed for another year; but there is nothing in that, because it was renewed de novo and did not run on; it was a transaction for a year twice repeated. Those are three possible meanings of the

word "annual"; but I do not think any of them is applicable in this particular case dealing with income tax. A

One is not left entirely without guidance. Take the case of letting a furnished house. It is inveterate now that the letting of a furnished house for a few weeks in one year will attract income tax under Case VI on the profit made by the letting. That is the inveterate practice, and although it has never been ruled on in principle by the courts, it has been tacitly assumed by the courts in Scotland, and it seems to me out of the question that a court of first instance could possibly say that it is wrong. That is not recurring yearly, and it does not last for a year and it is not calculated with reference to a year, because it is calculated with reference to the amenities of a few particular weeks. Again, take the case of a person who is appointed to perform some services, which might possibly be by way of an office; a person appointed not carrying on any trade or business, but who happens to be appointed, as a retired judge was appointed some years ago to hold a very important arbitration in connection with the London water—with a lump sum remuneration to do a particular piece of work; or, to take a humbler instance, which is more familiar perhaps to us here—the case of a judge's marshal, who gets an appointment for a week or two; he suffers a deduction of income tax when his modest emolument is paid to him. It may be that he would be the holder of an office, but both those cases are cases of offices and they do not help the matter, because the tax on an office is laid on the annual amount of the profits. B C D

Recognising that position, it seems to me that "annual" here can only mean "in any year," and that the "annual profits or gains" means "annual profits or gains in any year as the succession of the years comes round." That being the position, this litigation seems to me to raise the whole question of casual profits. I have already referred to the furnished house illustration. Another is the case of casual authorship. A man may carry on no business and no profession; he may not be a journalist; he may not be an author; but he may be called on to write an article for a paper for reward. He may find that there would be a demand for a single book from his pen as a traveller, a soldier, a sailor or a statesman or what not. It seems to me that all cases of that kind, like this case of these gentlemen who gave this guarantee, are instances of casual profits which cannot in any way be distinguished from the profit which is obtained by a man who lets his house furnished. E F

In these circumstances I think these appeals must be allowed, and judgment entered for the Crown with costs.

Appeals allowed. G

Solicitors: *Solicitor of Inland Revenue*; *Lewis & Sons.*

[*Reported by* J. S. Scrimgeour, Esq., *Barrister-at-Law.*]

A

THE COLORADO

[Court of Appeal (Bankes, Scrutton and Atkin, L.JJ.), January 29, 30, February 13, 1923]

B [Reported [1923] P. 102; 92 L.J.P. 100; 128 L.T. 759; 16 Asp.M.L.C. 145]

Contract—Foreign contract—Construction—Determination by lex loci contractus—Priority as against another contract—Determination by lex fori.

Ship—Mortgage—Foreign mortgage—Priority over claim for necessaries—Determination by English law.

C The law of the place where a contract is made is, generally speaking, the law of the contract, i.e., the law by which the contract is expounded. But the right of priority of a contract as against another contract forms no part of the contract. It is extrinsic and depends on the law of the place where the property lies and where the court sits to decide the case.

D Where, therefore, a foreign mortgagee obtains judgment in the Admiralty Court on a mortgage made according to foreign law which gives to the mortgagee such rights as would in English law rank on a question of priorities in the same class as a maritime lien, or the right created by an English mortgage, his claim will be preferred to that of necessaries men, notwithstanding that by the law of the place where the mortgage was made it would have been postponed to a necessaries claim.

E **Notes.** Distinguished: *The Zigurds (No. 1)* (1932), 48 T.L.R. 556. Referred to: *Republica de Guatemala* v. *Nunez*, [1927] 1 K.B. 669.

As to matters governed by the lex fori, see 7 Halsbury's Laws (3rd Edn.) 166–170, and ibid. (2nd Edn.) 960, 961. For cases see 11 Digest (Repl.) 541, 542; 41 Digest 945 et seq.

F Cases referred to:

(1) *Harrison* v. *Sterry* (1809), 5 Cranch. 289 (U.S.A.).

(2) *The Two Ellens* (1871), L.R. 3 A. & E. 345; 40 L.J.Adm. 11; 24 L.T. 592; 19 W.R. 983; 1 Asp.M.L.C. 40; 19 W.R. 983; affirmed (1872), L.R. 4 P.C. 161; 8 Moo.P.C.C.N.S. 398; 41 L.J.Adm. 33; 26 L.T. 1; 20 W.R. 592; 1 Asp.M.L.C. 208; 17 E.R. 361, P.C.; 41 Digest 195, *342*.

G (3) *Don* v. *Lipmann* (1837), 5 Cl. & Fin. 1; 7 E.R. 303, H.L.; 11 Digest (Repl.) 536, *1464*.

(4) *The Milford* (1858), Sw. 362; 6 L.T. 661; 4 Jur.N.S. 417; 6 W.R. 554; 11 Digest (Repl.) 431, *770*.

(5) *The Tagus*, [1903] P. 44; 72 L.J.P. 4; 87 L.T. 598; 19 T.L.R. 82; 9 Asp.M.L.C. 371; 11 Digest (Repl.) 439, *817*.

H (6) *American Surety Co. of New York* v. *Wrightson* (1910), 103 L.T. 663; 27 T.L.R. 91; 16 Com. Cas. 37; 11 Digest (Repl.) 437, *800*.

(7) *The Ripon City*, [1897] P. 226; 66 L.J.P. 110; 77 L.T. 98; 13 T.L.R. 378; 8 Asp.M.L.C. 304; 41 Digest 938, *8298*.

(8) *The Tervaete*, [1922] P. 259; 91 L.J.P. 213; 128 L.T. 176; 38 T.L.R. 825; 67 Sol. Jo. 98; 16 Asp.M.L.C. 48, C.A.; 41 Digest 929, *8189*.

I Cases referred to in argument:

Simpson v. *Fogo* (1863), 1 Hem. & M. 195; 1 New Rep. 422; 32 L.J.Ch. 249; 8 L.T. 61; 9 Jur.N.S. 403; 11 W.R. 418; 1 Mar.L.C. 312; 71 E.R. 85; 11 Digest (Repl.) 386, *465*.

The Manar, [1903] P. 95; 72 L.J.P. 41; 89 L.T. 26; 51 W.R. 687; 9 Asp.M.L.C. 420; 11 Digest (Repl.) 552, *1592*.

Clark v. *Bowring & Co.*, 1908 S.C. 1168; 45 Sc.L.R. 879; 16 S.L.T. 326; 41 Digest 952, *e*.

The Union (1860), 1 Lush. 128; 30 L.J.P.M. & A. 17; 3 L.T. 280; 11 Digest (Repl.) 541, *1504*. A

The André Théodore (1904), 93 L.T. 184; 21 T.L.R. 158; 10 Asp.M.L.C. 94; 41 Digest 262, *1063*.

Appeal from an order of HILL, J., on a motion to determine priorities as between claimants against the proceeds of the French vessel *Colorado*. B

The claimants were Hill's Dry Docks and Engineering Co., Ltd., who had obtained judgment on Nov. 14, 1921, for £5,964 3s. 10d. for necessaries against the *Colorado*, and the Crédit Maritime Fluvial as mortgagees under a French deed of mortgage on the *Colorado* who had obtained, on May 8, 1922, judgment on their mortgage, and pronouncing for the validity of the mortgage, against the *Colorado* for £40,797. By art. 7 of the mortgage deed, which was executed in France and duly registered according to French law, it was provided: C

"As a guarantee for the payment of all sums which might become due to the Crédit Maritime et Fluvial de Belgique by virtue of the present credit by way of principal, interest, &c., Mr. Dorange in the name of the Société Française d'Armement et d'Importation mortgages for the benefit of the Crédit Maritime et Fluvial de Belgique and which is accepted by Mr. Joseph Eugene Neve as such a ship described as follows: [There followed a description of the *Colorado*] on which ship the borrower agrees that there should be taken and renewed from time to time at the expense of the Société Française d'Armement et d'Importation all necessary entries of registration." D

Article 17 of the mortgage deed provided: E

"All costs duties and charges of the present document and those which may be due hereafter, together with all charges and costs of renewing the mortgage inscriptions if it is necessary, and the charges of all necessary documents concerning the lending company which might have to be furnished at all customs offices and elsewhere by reason of the registration which has to be taken on the mortgaged ship by virtue of these presents, or for all other causes, will be borne by the borrower, and the Crédit Maritime et Fluvial de Belgique is authorised to make such advances by means of realisation." F

The French law governing mortgages on ships was contained in arts. 190 and 191 of the Code de Commerce, as amended by the law of July 10, 1885. If any question arose which could not be wholly determined by reference to those articles, reference was to be made to the Code Civil, the relevant articles of which were arts. 2114 and 2115, by which mortgages other than mortgages on ships were governed. By art. 190 of the Code de Commerce: G

"Ships and other sea going vessels are movables. Nevertheless, they are subject to the debts of the seller and especially to those which by law are entitled to priority."

By art. 191 of the Code de Commerce, as amended by the law of July 10, 1885: H

"The debts set out herein are entitled to priority and rank for payment in the following order: 1. Court fees and other expenses incurred in with reference to the sale and in the distribution of the price. 2. The fees for pilotage, towage, tonnage dues, &c. 3. The wages of the watchman and expenses of looking after the vessel from the time of her entry into port to the time of sale. 4. The rent of the warehouses in which are deposited the rigging and gear. 5. The costs of maintenance of the vessel, her rigging and gear from the time of her last voyage and her entry into port. 6. The wages and salary of the captain and other members of the crew employed on the last voyage. 7. Monies lent to the captain for the needs of the vessel during the last voyage and the return of the price of the cargo sold by him with the same object. 8. Monies due to the vendor, to the necessaries men and workmen employed in the building of the ship, if the ship has not yet made a voyage, and the monies due to the creditors for stores supplied, for work and labour done, for repairing, I

for victuals, for fitting out and equipment of the vessel before sailing, if the ship has already made a voyage. 9. (Repealed through the operation of the Law of 1885.) 10. The amount of insurance premiums of policies affected on the hull, keel, rigging and gear fitting and equipment of the vessel for the last voyage of the vessel. 11. Damages due to the cargo owners for failure to deliver the merchandise they have put on board, or for the making good of damage suffered by the said merchandise through the fault of the crew."

By the law of July 10, 1885:

"The creditors comprised in each of the sections of this article will take equally and pari passu in case of insufficiency of the price. The mortgagees (créanciers hypothécaires) rank in the order of their registration after the above priority creditors."

Article 2114 of the Code Civil provided:

"Mortgage is a jus in rem (droit réel) over the immovables appropriated for the purpose of acquitting an obligation. It is in its nature indivisible, and exists as a whole over all the immovables charged therewith and over each portion thereof, and allows such immovables, no matter through whose hands they pass."

Article 2115 provided:

"Mortgage only exists where the law gives such a right, or when made according to the forms authorised by law."

Article 2116 provided:

"A mortgage may either be a 'law mortgage,' 'a judgment mortgage,' or 'a contract mortgage.'"

HILL, J., held that he was bound to apply the English law of priorities, and, applying it, that the holder of the French registered mortgage had priority over the necessaries men. Messrs. Hill appealed.

R. A. Wright, *K.C.*, and *Balloch* for the appellants.
Dunlop, *K.C.*, and *Dumas* for the French claimants.

Cur. adv. vult.

Feb. 13. The following judgments were read.

BANKES, L.J.—This is an appeal from an order of HILL, J., deciding the question as to priorities in respect of the payment out of the net proceeds of the sale of the steamship *Colorado* as between the Hill's Dry Docks and Engineering Co., claimants for necessaries, and a French bank, claiming as mortgagees under a French deed of mortgage. The learned judge decided the question in favour of the French bank. There is, I think, no doubt as to the rule of law applicable to the case. The difficulty arises in the application of the law to the facts, and in giving the true interpretation to the French law.

Messrs. Hill had no possessory lien; they commenced an action to recover the amount due to them for repairs, and the vessel was arrested in their action. They recovered judgment on Nov. 14, 1921. The French bank also commenced an action, but they did not recover judgment until May of the following year. Reliance has been placed upon the form of this judgment. It is said that because in their judgment the bank's security is described as a mortgage deed, it must, therefore, for all purposes of priority, be treated without further inquiry as an English mortgage, and given priority as such. I do not agree with this suggestion. The judgment is expressed to be without prejudice to other claims against the vessel, and all questions of priorities are reserved. This, in my opinion, leaves the question quite open as to what the rights created by the so-called mortgage deed are. This question must be determined according to French law, as the contract was made in France, though the question of priority must be decided by English law. The reason for this rule is, I think, well and clearly stated in a passage in

the judgment of MARSHALL, C.J., in *Harrison* v. *Sterry* (1), where he says (5 Cranch. at p. 298):

> "The law of the place where contract is made is, generally speaking, the law of the contract, i.e., it is the law by which the contract is expounded. But the right of priority forms no part of the contract. It is extrinsic, and rather a personal privilege dependent on the law of the place where the property lies, and where the court sits which is to decide the case."

The argument for Messrs. Hill in this court, as I understand it, raised one question which is not referred to in the judgment of the learned judge. It was to the effect that the right created by a French mortgage, as the result of the amendment of art. 191 of the Code de Commerce by art. 34 of the law of July 10, 1885, was a limited right only, and limited to a right to follow after the creditors given priority by art. 191, among whom are the creditors of the class of Messrs. Hill's Dry Docks Co. I do not think that this contention is well founded. Both article and amendment appear to me to deal with remedies as opposed to rights, and they cannot, therefore, be taken into consideration for the purpose of ascertaining what the rights of Messrs. Hill are under the document referred to in these proceedings as the French mortgage. If this is the correct view, the only remaining question is whether the learned judge put the true interpretation upon the documents, and upon the evidence of the French lawyer who was called to state what by French law Messrs. Hill's rights were under the mortgage deed. I do not think that the evidence left the question entirely free from doubt, but, in my opinion, the learned judge was quite justified upon the evidence in taking the view he did, namely, that the right created by the mortgage deed was a higher right than the mere right to proceed in rem, and though not capable of exact description in terms applicable to well-recognised English rights, it yet had attributes which entitled it to rank on a question of priorities in the same class as a maritime lien or the right created by an English mortgage. For these reasons the appeal, in my opinion, fails, and must be dismissed with costs.

SCRUTTON, L.J.—The French ship *Colorado* was arrested in a proceeding in rem in this country, and sold. The proceeds were claimed (i) by a Cardiff repairer claiming as necessaries man for repairs done to the ship at Cardiff; (ii) by a foreign bank claiming under a French hypothèque. By the law of England the necessaries man, who had no possessory lien, had only a right to proceed against the ship in rem for a debt of her owner at the time of the arrest, and he would rank in priority after a claimant who had by the law of England a maritime lien, that is to say, a right to proceed against the ship in rem in the hands of subsequent owners for a debt incurred by a previous owner—still more after an English mortgagee who had a right of property in the ship: see *The Two Ellens* (2). But in this case the necessaries man contended that by the law of France the hypothèque was postponed to the claim of a necessaries man, and should therefore also be postponed by the law of England.

It is clear law in England, as stated by LORD BROUGHAM in *Don* v. *Lipmann* (3), that

> "whatever relates to the remedy to be enforced must be determined by the lex fori, the law of the country to the tribunals of which appeal is made."

The nature of the right may have to be determined by some other law, but the nature of the remedy which enforces the right is a matter for the law of the tribunal which is asked to enforce the right. Thus in *The Milford* (4), where an American master of an American ship claimed in England a lien on the freight for his wages, DR. LUSHINGTON declined to consider whether by United States law he had no such lien, but applied the lex fori, saying: "The proceeding originated in this country; it is a question of remedy, not of contract at all." This was followed by PHILLIMORE, J., in *The Tagus* (5), where the learned judge excluded the law of the flag which gave the master a lien only for wages for his last voyage, and applied the

A lex fori, which gave him an unlimited lien. HAMILTON, J., in *American Surety Co. of New York* v. *Wrightson* (6) applied the same principle when he excluded evidence of the remedies given on an American contract by American law, saying that

> "as contribution between co-insurers depends not on contract, but on equity, the law governing the matter must be the law of the tribunal to which the party who is required to do equity is subject,"

B and not the law of the domicil or the law of the contract. It is clear that priorities of creditors in bankruptcy, or intestacy, are dealt with by the lex fori, and not by the law of the countries where the debts are contracted, except so far as such laws are necessary to establish that there are debts. The same result follows in the case where an English court divides among creditors the proceeds of a ship arrested C and sold in England.

The English court has a claim from an English necessaries man who has no possessory lien, but merely in England a right to arrest the ship in rem to satisfy its claim against the owner of the ship. It has also a claim by a person who has a "hypothec," and may legitimately consult the foreign law as to what a hypothèque is. It is proved to be, not a right of property in the ship, but a right to arrest the D ship in the hands of subsequent owners to satisfy a claim against a previous owner. But such a right is the same as a maritime lien as described by DR. LUSHINGTON in *The Two Ellens* (2), by GORELL BARNES, J., in *The Ripon City* (7), and by this court in *The Tervaete* (8). The English courts, administering their own law, would give a claim secured by a maritime lien priority over the claim of a necessaries E man, who cannot arrest the ship against a subsequent owner. The fallacy of Messrs. Hill's argument appears when they argue that because the French courts would give a French necessaries man, or a necessaries man suing in the courts of France, priority over the French claimants under a "hypothec," therefore, an English court should give an English necessaries man similar priority. The answer is that their client is not asking for French remedies, but English remedies; and F the English law postpones him to a person who has what is equivalent to a maritime lien. For these reasons I think the judge below came to a right conclusion in postponing the English necessaries man to the hypothécaire, and that the appeal should be dismissed.

ATKIN, L.J.—I have found considerable difficulty in this case, but with some hesitation have come to the conclusion that the appeal should be dismissed. The G relevant principles of law are not in dispute; their application is contested. Where parties are litigating in this country in respect of rights created elsewhere, to ascertain their rights we may look in appropriate cases to the law of the country where the contract was made, or the thing over which rights are claimed was situate, or the person claiming the right is domiciled, but to ascertain the remedies which the court will give to enforce the rights we have to look to the law of this H country, the lex fori.

When an action in rem has been brought in these courts in respect of a ship, the court by its decree controls the money which represents the res as the result of sale or bail, and directs payment to be made to such claimants as prove their claim in the order of priority directed by the court. To give the necessary directions the court may have to consider foreign law in order to ascertain whether the claimant I has any and what right in respect of the res at all. For instance, the claimant may claim a right of property in the ship granted to him abroad. The court must examine the lex loci contractus—I assume for argument's sake this to be relevant law—to see whether any right of property is so given, and the nature of it. A claimant claims as an English necessaries man; his right is only to have the court award him a particular remedy. He has no right to the ship or the proceeds independent of the remedy. A claimant claims as possessing a maritime lien. This might appear to be an intermediate case as a maritime lien does give a right against the ship, which continues notwithstanding a change of ownership. Never-

theless, in determining whether there exists a maritime lien, the court will apply the lex fori, and will give effect to the lien as it exists by English law: see *The Milford* (4); *The Tagus* (5). I think it follows that primâ facie when the court is ordering that payment should be made to claimants in particular order it is merely awarding a remedy, and, therefore, will apply the lex fori. But, as I have said, it must first ascertain whether there is any claim at all. When a claimant comes forward alleging that he holds a right given to him by agreement, which is something other than a maritime lien, he must prove what that right is by the law of the place of the contract. This raises the difficulty in this case. Messrs. Hill say that the respondents' right is to be determined by French law, and by that law it is not a right of property, but a right to have the ship seized and sold by judicial authority, and to be paid the proceeds—not absolutely, but after payment has been made to certain classes of creditors, including necessaries men. They say that such a right differs essentially from a right such as is given by an English mortgage; and admitting that the lex fori determines their own right, and would postpone it to a true mortgage, they say that the French claimants make no title at all to anything except to payment in the order prescribed by French law.

I think that the argument is attractive. It seems a narrow distinction to say that the right to be paid out of the proceeds is to be determined by the lex loci, but the right to be paid out of the proceeds in a prescribed succession by lex fori; and I hesitate to say what should be the result had the written document on the face of it contained an express limitation of a right to be paid only after a certain named classes of creditors. I think myself that the question is one of fact, viz., the nature of a "hypothèque" on a ship as created by French law. One has to deal with such questions remembering the presumption that unless there is proof to the contrary foreign law will be presumed to be the same as English. I do not think that the French law on the subject was very clearly elicited, and I am not prepared to differ from the finding of the learned judge who, I think, came to the conclusion that the only right given was the right to have the ship seized, and the proceeds applied to payment of the hypothèque, notwithstanding a change of ownership—a right closely resembling a maritime lien—and that the right of priorities was a provision as to the remedy that would be given by French law, and, therefore, would not be followed in an English court. It is plain that Messrs. Hill can only succeed by showing that the foreign claimants have no right to which the English court could award a prior remedy, and on the judge's finding they fail. Whether on some other occasion some other view of the French law could be maintained it is unnecessary to consider. In the present case I agree that the appeal should be dismissed.

Solicitors: *Ingledew, Sons & Brown*, for *Ingledew & Sons*, Cardiff; *Denton, Hall & Burgin.*

[*Reported by* Geoffrey Hutchinson, Esq., *Barrister-at-Law.*]

MELLOWS *v.* LOW

[King's Bench Division (Bailhache and McCardie, JJ.), January 18, 19, 1923]

[Reported [1923] 1 K.B. 522; 92 L.J.K.B. 363; 128 L.T. 667; 39 T.L.R. 190; 67 Sol. Jo. 261; 21 L.G.R. 180]

Landlord and Tenant—Weekly tenancy—Termination—Need of notice to quit—Death of tenant—No termination ipso facto.

A periodic tenancy, e.g., a weekly tenancy, does not automatically expire without notice at the end of the first or of each succeeding week or period of the tenancy. Accordingly, on the death of a tenant to whom no notice to quit has been given the tenancy does not ipso facto lapse, but vests in the executor or administrator of the tenant.

Per **Curiam**: This principle also applies where the premises come within the provisions of the Rent Restrictions Acts.

Notes. The minimum length of notice to quit a dwelling-house is now four weeks under s. 16 of the Rent Act, 1957 (37 Halsbury's Statutes (2nd Edn.) 567), and six months in the case of business premises under s. 25 (2) of the Landlord and Tenant Act, 1954 (34 Halsbury's Statutes (2nd Edn.) 410).

Applied: *Queen's Club Gardens Estates* v. *Bignell*, [1924] 1 K.B. 117. Distinguished: *J. Lovibond & Sons* v. *Vincent*, [1929] All E.R.Rep. 59. Considered: *Thyme* v. *Salmon*, [1948] 1 All E.R. 49. Referred to: *Keeves* v. *Dean*, *Nunn* v. *Pellegrini*, ante, p. 12; *Roe* v. *Russell*, [1928] All E.R.Rep. 262; *Skinner* v. *Geary*, [1931] All E.R.Rep. 302.

As to determination of periodic tenancies, see 23 Halsbury's Laws (3rd Edn.) 530; and for cases see 31 Digest (Repl.) 484–485.

Cases referred to:

(1) *Bowen* v. *Anderson*, [1894] 1 Q.B. 164; 58 J.P. 213; 42 W.R. 236; 38 Sol. Jo. 131; 10 R. 47, D.C.; 31 Digest (Repl.) 382, *5100*.

(2) *Gandy* v. *Jubber* (1865), 5 B. & S. 485; 9 B. & S. 15; 29 J.P. 645; 13 W.R. 1022; 122 E.R. 911, Ex. Ch.; 31 Digest (Repl.) 382, *5098*.

(3) *Collis* v. *Flower*, [1921] 1 K.B. 409; 90 L.J.K.B. 282; 124 L.T. 510; 19 L.G.R. 193, D.C.; 31 Digest (Repl.) 662, *7627*.

(4) *Dilworth* v. *Stamp Comr.*, *Dilworth* v. *Land and Income Tax Comr.*, [1899] A.C. 99; 79 L.T. 473; 47 W.R. 337; 15 T.L.R. 61, P.C.; sub nom. *Dilworth* v. *New Zealand Stamp Comr.*, 68 L.J.P.C. 1; 19 Digest 586, *182*.

(5) *Reeves* v. *Davies*, [1921] 2 K.B. 486; 90 L.J.K.B. 675; 125 L.T. 354; 37 T.L.R. 431, C.A.; 31 Digest (Repl.) 697, *7886*.

(6) *Parkinson* v. *Noel*, [1923] 1 K.B. 117; 92 L.J.K.B. 361; 128 L.T. 538; 67 Sol. Jo. 184; 21 L.G.R. 130; 31 Digest (Repl.) 697, *7887*.

Appeal from Croydon County Court in an action for possession.

The dwelling-house, a flat, had been let to a Miss Biggs on a weekly tenancy at a rent of 14s. per week. For many years Miss Biggs lived there alone. In January, 1922, she met with an accident, which necessitated her removal to a hospital. She requested a niece, Miss Low, one of the defendants, to let her flat furnished during her stay in the hospital. Accordingly, in February, 1922, Miss Low let the flat, furnished, to the defendant, Slimming. On Mar. 19, 1922, Mrs. Biggs died in hospital, intestate, and in August, 1922, Miss Biggs' sister, Mrs. Low, mother of Miss Low, obtained a grant of letters of administration of Miss Biggs' estate. The plaintiff claimed that on the death of Miss Biggs the tenancy had lapsed, and he was entitled to recover possession. He wrote to Mrs. Low, the administratrix, and Slimming, the sub-tenant, enclosing a provisional notice to quit. No notice to quit had ever been given to Miss Biggs. In October, 1922, the plaintiff commenced this action against Mrs. Low, Miss Low, and Slimming to recover possession of the flat. Neither Mrs. Low nor Miss Low had ever been in physical

occupation of the flat. The county court judge held that none of the defendants came within s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. He, therefore, gave judgment for the plaintiff for possession, and the defendants appealed.

By the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1):

". . . (f) The expressions 'landlord,' 'tenant,' 'mortgagee,' and 'mortgagor' include any person from time to time deriving title under the original landlord, tenant, mortgagee, or mortgagor; (g) . . . the expression 'tenant' includes the widow of a tenant . . . who was residing with him at the time of his death, or, where a tenant leaves no widow or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the county court. . . ."

T. E. Haydon for the defendants.

A. H. M. Wedderburn for the plaintiff.

McCARDIE, J.—My Lord has asked me to deliver judgment first. Was the decision of the county court judge right? The first question which arises is as to the position of weekly tenants. I take it that the legal status of a weekly tenant is that indicated in *Bowen* v. *Anderson* (1). It is vital to remember that the letting to a weekly tenant does not expire at the end of the first and each succeeding week. In the ordinary course—as in the present case—it is a letting for a period of time determinable by due notice, which is generally regarded as being one week. In *Gandy* v. *Jubber* (2) the Exchequer Chamber pointed out that a tenancy from year to year is not a re-letting at the commencement of every year, but a springing interest which arises and is only determined by a notice to quit. The importance of *Bowen* v. *Anderson* (1) is that there the Divisional Court applied the same principle to a weekly tenancy. The result, therefore, is that at common law on the death of Miss Biggs her tenancy did not ipso facto determine. Before the appointment of the administratrix the tenancy must be deemed to have vested in the President of the Probate Division by virtue of s. 19 of the Court of Probate Act, 1858, but, on letters of administration being obtained by Mrs. Low, her title related back to the date of Miss Biggs' death, and primâ facie she acquired the continuing interest of Miss Biggs in this tenancy in the absence of any notice to quit. I only desire to repeat what I said in *Collis* v. *Flower* (3)—that all tenancies, whether long or short, primâ facie vest in the executor or administrator, as the case may be, on the death of the tenant.

If that was so at common law, what is the position under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920? It is difficult to believe that that Act substantially destroyed the common law position. The argument on behalf of the defendant has been largely directed to s. 12 (1) (f) and (g) of the Act of 1920. Primâ facie I should have thought the words of para. (f) are wide enough to cover the case of an executor or an administrator who succeeds to the deceased tenant. It has been contended that para. (g) ousts the common law rule. Counsel for the defendant pointed to the word "includes," and referred to the dictum of Lord Watson in *Dilworth* v. *Stamp Comr.* (4) ([1899] A.C. at p. 105). In my view, the word "includes" here is not a term of limitation or precise definition; it means what it says—that it includes the matters thereafter mentioned. In other words, it is a term rather of enlargement. I am unable to say that the language of para. (g) cuts down that of para. (f). Take the case of a woman living in a villa in the metropolitan police district, rented at £100 a year, who dies intestate leaving valuable personal property in the house and an administrator (who resides elsewhere) takes out letters of administration. It cannot be said that, from the moment of the woman's death, the landlord, by para. (g), acquires a right to possession and the administrator has no right to enter on the property to realise the goods. In my view, para. (g) must be taken only as applying to cases where there is no executor or administrator—in other words, cases which do not fall within para. (f).

Reference has been made to *Collis* v. *Flower* (3). I quite agree that that was a decision under the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, but the words in s. 2 (1) (d) of that Act were identical with those in para. (f) of s. 12 (1) of the Act of 1920. I repeat without hesitation the observations of Rowlatt, J., and myself regarding the position of an executor in the case of a tenancy under the Rent Restrictions Acts. There can be no distinction in principle between an executor under a will or an administrator who takes out letters of administration. In this case the tenancy, since no notice to quit was ever given to Miss Biggs, was not a statutory tenancy. If, however, it had been a statutory tenancy, the same principle would have applied, and the words referred to by counsel for the defendant in s. 15 of the Act of 1920 would not affect the judgment which I am now delivering. I think that the argument that the same rule applies whether the tenancy is statutory or otherwise is supported by *Reeves* v. *Davies* (5) and directly by the decision of Greer, J., in *Parkinson* v. *Noel* (6). For these reasons this appeal must be allowed.

BAILHACHE, J.—I am of the same opinion. It seems to me that this case is really covered by *Collis* v. *Flower* (3) unless there is some difference for this purpose between the position of an executor and that of an administrator. In my opinion, apart from the fact that the administrator gets his title later than does the executor, there is no distinction in law between the positions of the two. The title of the administrator dates from the death of the intestate. Of course all sorts of difficulties may be suggested whatever view is taken of this case. That, however, is a comment which can be made in every case I have tried under this Act.

Appeal allowed.

Solicitors: *Hamlins, Grammer & Hamlin*; *Mellows & Mellows.*

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

ALLIANCE ECONOMIC INVESTMENT CO. *v.* BERTON

[Court of Appeal (Bankes, Scrutton and Younger, L.JJ.), March 1, 7, 8, 27, 1923]

[Reported 92 L.J.K.B. 750; 129 L.T. 76; 87 J.P. 85; 39 T.L.R. 393; 67 Sol. Jo. 498; 21 L.G.R. 403]

Housing—Conversion of house into tenements—"Changes in character of neighbourhood"—"Changes"—"Neighbourhood"—Housing, Town Planning, &c., Act, 1919 (9 & 10 *Geo.* 5, *c.* 35), *s.* 27.

By s. 27 of the Housing, Town Planning, &c., Act, 1919 [replaced by s. 165 of the Housing Act, 1957]: "Where it is proved to the satisfaction of the county court on an application by the local authority or any person interested in a house that, owing to changes in the character of the neighbourhood in which such house is situate, the house cannot readily be let as a single tenement but could readily be let for occupation if converted into two or more tenements, and that, by reason of the provisions of the lease or of any restrictive covenant affecting the house or otherwise, such conversion is prohibited or restricted, the court . . . may vary the terms of the lease or other instrument imposing the prohibition or restriction so as to enable the house to be so converted. . . ."

"Changes in the character of the neighbourhood," to come within the section, must have affected the character of the neighbourhood. A reduction in the

standard of living of the inhabitants of a neighbourhood owing to such a universal cause as an increase in taxation or other altered economic conditions, the while they continued to occupy the same houses, although at reduced rents, would not constitute a "change in the character" within the section, nor would such a change occur where houses in a neighbourhood consisting of large houses were converted into high class flats which were occupied by a class of person which did not differ sufficiently from that of the persons who had previously occupied the houses. Changes occurring in districts outside a neighbourhood may materially affect the character of the neighbourhood. What is a "neighbourhood" within the section must depend on the circumstances of each case, and the extent of a "neighbourhood" may differ widely in different localities. If a change of the character of one locality affects the letting qualities of houses in another, adjacent, locality, both may be included in the term "neighbourhood."

Notes. As to the power of the county court to authorise the conversion of houses, see 19 HALSBURY'S LAWS (3rd Edn.) 630, 631; and for cases see 31 DIGEST (Repl.) 188, 189.

Cases referred to:

(1) *Wellington Corpn.* v. *Lower Hutt Corpn.*, [1904] A.C. 773; 73 L.J.P.C. 80; 91 L.T. 539; 20 T.L.R. 712, P.C.; 44 Digest 148, *158*.

(2) *Duke of Bedford* v. *British Museum Trustees* (1822), 2 My. & K. 552; 1 Cro. temp. Cott. 90, n.; 2 L.J.Ch. 129; 39 E.R. 1055, L.C.; 40 Digest (Repl.) 360, *2887*.

(3) *Sayers* v. *Collyer* (1884), 28 Ch.D. 103; 54 L.J.Ch. 1; 51 L.T. 723; 49 J.P. 244; 33 W.R. 91; 1 T.L.R. 45, C.A.; 40 Digest (Repl.) 361, *2893*.

Appeal by the defendants, the estates governors of Alleyn's College, from a decision of the Divisional Court.

By their particulars of claim the Alliance Economic Investment Co., Ltd., stated that they were interested in a house situate in College Road, Dulwich, in the borough of Camberwell, in the county of London, known as Tollgate House, the nature of their interest being that since 1910 they had been assignees of a lease of the premises granted by the plaintiffs on Dec. 31, 1907. They further stated that owing to changes in the character of the neighbourhood in which the house was situate it could not readily be let as a single tenement but it could readily be let for occupation if converted into two or more tenements, but, by reason of the provisions of the lease, and/or of restrictive covenants affecting the house, such conversion was prohibited and/or restricted. They, therefore, applied to the court pursuant to s. 27 of the Housing, Town Planning, &c., Act, 1919, for an order varying the terms of the lease and/or other instrument or instruments imposing the prohibition and/or restriction so as to enable the house to be converted subject to such conditions and upon such terms as the court might think just. The lease contained a provision

"that the lessees shall not without the lessors' previous licence in writing use the said premises or any part thereof or permit the same to be used for any purpose whatsoever other than for the purpose of a private dwelling-house."

By s. 27 of the Housing, Town Planning, &c., Act, 1919 [now replaced by the Housing Act, 1957, s. 165: see 37 HALSBURY'S STATUTES (2nd Edn.) 445]:

"Where it is proved to the satisfaction of the county court on an application by the local authority or any person interested in a house that, owing to changes in the character of the neighbourhood in which such house is situate, the house cannot readily be let as a single tenement but could readily be let for occupation if converted into two or more tenements, and that, by reason of the provisions of the lease or of any restrictive covenant affecting the house or otherwise, such conversion is prohibited or restricted, the court . . . may vary the terms of the lease or other instrument imposing the prohibition or restric-

tion so as to enable the house to be so converted subject to such conditions and upon such terms as the court may think just."

The county court judge held that owing to changes in the character of the neighbourhood in which Tollgate House was situate, the house could not readily be let as a single tenement, but could readily be let for occupation if converted into two or more tenements, and that by reason of the provisions of the lease of the house such conversion was prohibited or restricted. He ordered that the lease of the house should be varied in a manner to be thereafter settled so as to enable the house to be converted into three or at the most four self-contained flats. This decision was affirmed, with considerable hesitation, by the Divisional Court (DARLING and SALTER, JJ.), and the defendants appealed.

Hawke, K.C., and *Bensley Wells* for the defendants.
Scholefield, K.C., and *S. E. Pocock* for the plaintiffs.
Croasdell for the Camberwell Borough Council.

Cur. adv. vult.

Mar. 27. The following judgments were read.

BANKES, L.J.—A county court judge who is called upon to give a decision upon an application made to him under s. 27 of the Housing, Town Planning, &c., Act, 1919, has a difficult and responsible duty to perform. His decision may materially affect a very wide area and a large amount of property, and he must arrive at a decision with a minimum of assistance from the language of the section as to the matters which he should take into consideration. Before making any order varying the terms of the lease or other instrument imposing the prohibition against converting a house into two or more tenements, the county court judge must be satisfied upon proof that owing to changes in the character of the neighbourhood in which the house is situate, the house cannot readily be let as a single tenement, but could more readily be let for occupation if converted into two or more tenements.

The section makes two points clear. First, that the onus of proof is upon the applicant; secondly, that the difficulty in letting as a single tenement must be proved to be owing to changes in the character of the neighbourhood. It is in these last words that the difficulty lies. What constitutes a change of character? Of what does a neighbourhood consist? It is easy to say, as was said by SIR ARTHUR WILSON in *Wellington Corpn.* v. *Lower Hutt Corpn.* (1) ([1904] A.C. at p. 775), that the question is entirely one of circumstances. That does not assist one in arriving at a conclusion as to what it is permissible to take into account in any particular case in arriving at what constitutes a change of character, or what area is comprised within a neighbourhood. It is easier to indicate what it is not permissible to take into account than to define the limits of what is permissible. For instance, changes in a neighbourhood must not be taken into account unless they are changes which have affected the character of the neighbourhood. Great changes may have taken place in the mode of life of all the inhabitants of a neighbourhood owing to heavy taxation and loss of income. Carriages and motor cars may have had to be given up, women servants substituted for men servants, all entertaining abolished, and though the inhabitants have entirely changed their mode of life, they continue to occupy the same houses, and I do not think that such a change as I have indicated constitutes a change of character of the neighbourhood within the meaning of the section. Again, I think that it is quite possible that in a neighbourhood consisting of large houses the bulk of the houses may be converted into high-class flats without altering the character of the neighbourhood. The class of people who occupy the flats may not differ sufficiently from the class who previously occupied the houses as to justify any finding that the character of the neighbourhood has changed. I gather from the judgment of the learned county court judge that such an alteration as I have last suggested would not, in his opinion, affect the amenities of a neighbourhood.

I pass now to consider what is indicated by the expression "neighbourhood." In this connection it is impossible to lay down any general rule. In country districts people are said to be neighbours, that is, to live in the same neighbourhood, who live many miles apart. The same cannot be said of dwellers in a town where a single street or a single square may constitute a neighbourhood within the meaning of the section. Again, physical conditions may determine the boundary or boundaries of a neighbourhood, as, for instance, a range of hills, a river, a railway, or the line which separates a high-class residential district from a district consisting only of artisans' or workmen's dwellings. Again, I think that the physical conditions of some particular area may entitle it to be considered as a matter of law as a neighbourhood within the meaning of the section. The circumstances must be exceptional, but I think that they may exist.

The first question for decision in the present appeal is whether they exist or not. The contention for the defendants is that they do. They say that the area bounded by the two railways and by Lordship Lane and Sydenham Hill is a neighbourhood within the meaning of the section, but that it is immaterial that changes may have occurred in the surrounding districts unless it is proved that those changes have produced changes in the character of the neighbourhood, that is to say, within the area comprised in the quadrilateral above referred to. It appears to have been contended below that it was not open to the learned judge to take into consideration any changes which may have occurred in the surrounding districts. I do not think that such a contention can possibly be supported. It seems obvious that changes occurring outside a neighbourhood may materially affect the character of the neighbourhood. For instance, a neighbourhood in a country district may become so surrounded by working-class dwellings, factories, tram lines, or omnibus routes as to drive all the inhabitants out of the neighbourhood and to render it uninhabitable by the class of persons who formerly inhabited it. If this occurs, the area of the neighbourhood in question may not have been increased by an acre, but a great change may have taken place in the character of the neighbourhood owing to an outside cause or causes. On the other hand, if, in spite of all outside changes, the same people or the same class of people are prepared to occupy the houses in the neighbourhood because of its special physical conditions, but are not prepared, because of the general fall in incomes, to pay the same rents for the houses as were formerly paid, I doubt whether it could be said that there had been any change in the character of the neighbourhood within the meaning of the section.

Applying these considerations to the present case and dealing first of all with the learned county court judge's judgment, I find passages which appear to me to indicate a sufficient misdirection to entitle the defendants to a new trial. For instance, the learned judge says:

> "I should say the Act of Parliament intends, where you find a derelict house like this, which cannot be let as a single tenement, that the court may sanction a proper scheme for putting it into such flats as could be used by a good class of tenants, a reasonable tenant who would not destroy the neighbourhood and injure the neighbours."

If this passage correctly conveys what was in the learned judge's mind, he was obviously allowing himself to decide the question upon the mere fact that the house had become difficult to let. In other parts of his judgment he appears to lay too great stress upon the desirability of increasing the housing accommodation in the district and upon general considerations, and too little upon the precise language of the section. It is to be noticed that in the passage I have quoted from his judgment the learned judge is obviously using the word neighbourhood in the sense contended for by the defendants.

I pass now to consider the evidence in relation to this contention. The quadrilateral area, bounded as I have already indicated, is the property of a body of trustees who hold the property for the purposes of a charity and a great educational scheme. Dulwich College is situate on the property and dominates it, in the sense

A that the property has been laid out and administered with a view to the interest of the college and the charity. What building has been allowed adjoining the college buildings has been of the high-class residential class. The house in respect of which the application is made is situate in a private road close to the college buildings. Looking at the estate map and bearing in mind the nature of the property, I think that the defendants are entitled to say that it is so distinct in its B physical conditions and so self-contained that it certainly requires evidence to show that any surrounding districts are to be treated for the purpose of this section as constituting part of the same neighbourhood. In my opinion, no such evidence was given, and I can only treat the case on appeal as I find it. The learned county court judge may have local knowledge which I do not possess, and which, if I did possess, I should not be entitled to act upon in the absence of any other evidence. C The learned county court judge was apparently of opinion that no sufficient change had taken place within the area contended for as to constitute a change in the character of that area. If, therefore, I am right in my view that on the evidence given the defendants were entitled to a finding that the area they were contending for constituted the neighbourhood within the meaning of the section, it follows that the appeal must be allowed, and the finding of the county court judge set aside.

D Assuming, however, that this is not a correct view of the law as applied to the facts of this case, I still think that the defendants are entitled to succeed upon the ground that there was no evidence that any increased difficulty in the letting of the house was due to changes in the character of the neighbourhood, including in that area the districts surrounding the Alleyn estate. The plaintiffs' witnesses speak of the changes in the neighbourhood on which they rely, the principal of which E dates back thirty years or more to the time when the neighbourhood ceased to be pure country and ceased to be popular as a place of residence for wealthy merchants. That the present difficulty, if it exists, in letting the house as a single tenement is not due to this change is, I think, demonstrated by the evidence of the plaintiffs' witnesses as to the rise in letting value of the house and of adjoining houses long after this particular change in the character of the neighbourhood took place.

F The plaintiffs are lessees of five houses in College Road. The evidence of Mr. Nisbett and Mr. Poyser is practically confined to these five houses. The house in question, Tollgate, was let on lease in 1911 at a rent of £110, and again in 1919 at an increased rent of £150. The rent of Fairlawn was recently increased from £120 to £140. Thornlea is occupied by an old tenant. Wych Elm was occupied until Christmas, 1921, and no evidence was given as to what has happened to it since. G The large house Gosforth, for which a rent of £200 is asked and which apparently is in a dilapidated condition, has been unlet since 1906. This evidence is not, in my opinion, any evidence of a difficulty in letting the house in question owing to this particular change in the character of the neighbourhood on which so much stress was laid. On this point the more general evidence of the witness Alderman Holt, who was called for the plaintiffs, is significant. He deposes to the fact that H in September, 1919, there were thirty-two large houses in the immediate neighbourhood of College Road vacant, but in 1922 only nineteen. In my opinion, there was no evidence laid before the county court connecting the alleged alteration in the character of the neighbourhood by the migration of the "merchant princes" which occurred thirty years or more ago with any difficulty in letting the house in question as a single tenement. I come to the same conclusion with reference to the other I alleged change in the neighbourhood owing to building which is said to have taken place twenty years or so ago. What the evidence, I think, does establish is that owing to economic causes which are affecting the whole kingdom equally the letting value of the class of house of which the house in question is one has fallen, at any rate for the time being. All the plaintiffs' witnesses really rest their case on this ground, and the witnesses for the Alleyn trustees took the same view. Economic causes affecting the whole kingdom may, no doubt, create changes in particular neighbourhoods just as completely as purely local causes may. It is not sufficient, in my opinion, however, to point to one, or two, or possibly half a dozen empty

houses out of a considerable number and say that is proof of a change in the character of a neighbourhood when the reason of the houses being empty is some economic cause operating over the whole kingdom equally. This is particularly so where, as in the present case, the owners of the empty houses would obviously prefer them to remain empty if the result of their remaining empty will be to relieve them of the restrictive covenant and enable them to secure much higher rents than the houses have ever commanded since they were built. In the result, therefore, in my opinion, the plaintiffs' application before the county court judge failed for want of any evidence either establishing that the neighbourhood which had to be considered extended beyond the quadrilateral contended for by the trustees, or establishing that any of the changes indicated in the larger area referred to in the evidence had been the cause of any increased difficulty in letting the house in question as a single tenement. I think, therefore, that the appeal succeeds, but as the other members of the court think that the proper order is that a new trial shall be had, that will be the order of the court.

SCRUTTON, L.J.—This appeal from a judgment of a Divisional Court, affirming with obvious reluctance a decision of a county court judge, brings before this court for the first time s. 27 of the Housing, Town Planning, &c., Act, 1919. Passed at a time when housing accommodation was not equal to demand and when restrictive covenants prevented large houses being converted into flats, the action gives power to a county court judge on certain conditions to sanction the breach of such restrictive covenants without compensation to the landlord. The judge must be satisfied (i) that the houses in question cannot readily be let as a single tenement, but can readily be let for occupation if converted into two or more tenements; (ii) that this condition of things is due to a change in the character of the neighbourhood in which the house is situate. If he finds these as facts, the decision of the county court judge is final, provided that there was evidence on which he might come to that conclusion and that he did not misdirect himself in coming to that conclusion. It follows that property of a rental value of thousands of pounds may be changed in character and seriously affected financially by the decision without appeal of a county court judge. It is the will of Parliament, but such a provision requires the most careful scrutiny of such decisions.

On the section itself, the word "neighbourhood" is vague, probably intentionally so, but I agree with the view taken by SALTER, J., that if the change of character of one locality does in fact affect the letting qualities of houses in another and adjacent locality, both may be included in the term "neighbourhood." An attractive and secluded private estate may be deteriorated in letting value by a change of character of the surrounding country, which may be considered the "neighbourhood," from fields to working-class dwellings, and it will be useless to urge that the private estate remains in itself, as it were, inhabited by the same class of people, if in fact the change in surrounding character has rendered it harder to let the estate houses as a whole than in flats. A more difficult expression to construe is "change of character." For instance, does a locality "change its character" because it is difficult to get servants all over England, and, therefore, people of the class inhabiting it desire to live in flats and small houses rather than large ones? This cause would undoubtedly render flats more lettable than whole houses. Does a locality change its character because all its inhabitants are poorer, and, therefore, reduce their standard of living in housing accommodation, which again would affect the comparative letting value of whole houses and flats? Must the cause of the change of character be one peculiar to the locality, or will a general cause affecting all localities suffice?

The case before us relates to Tollgate House, in College Road, on the Dulwich College estate, one of a number of large houses on a private road on a part of the estate which has been kept by the college governing body very open and free from building, on the northern slope of Sydenham Hill. The undisputed history of the house is this. It is a four-storey house with seventeen rooms and two-and-a-half

A acres of garden, built over forty years ago at a cost of about £3,000, and let on a long lease at a ground rent of £53, and at one time sublet at a rental of over £200. The plaintiffs, a company investing in houses, bought the long lease in 1910 for £200, spending some £400 in repairs. They let the house in 1911 to a German at a rent of £110. The tenant was interned in 1914 and the house apparently remained unoccupied for some years. In 1919 it was let to a Mr. Mackintosh at a B rent of £150, but he sublet to a number of undesirable tenants. The plaintiffs evicted him in 1920, and proceedings by the college governors to evict the plaintiffs for "permitting" Mackintosh's breaches of covenant failed in 1921, though the college were threatening in 1922 to appeal to the House of Lords. The plaintiffs could hardly try to let while these proceedings were pending, but in 1922 they did ask the county court judge for permission to convert the house into seven tenements C with some common sanitary, bathroom, and kitchen accommodation. The judge was not prepared to sanction this, but was prepared to sanction conversion into three or four flats on plans approved by the college and the local authority. On the facts so far, there is very slight evidence of the letting capabilities of the house either as a whole or in flats. Additional evidence was, however, given of other houses owned by the plaintiffs. In College Road they had five: (i) Tollgate, the D house in question; (ii) Fairlawn, let to a tenant of long standing at £140 a year; (iii) Thornlea, let to a tenant in and since 1899 at £140 a year (these two houses being smaller houses than Tollgate); (iv) Wych Elm, which had been let at £110, fell vacant at the end of 1921, and was unlet in June, 1922; and (v) Gosforth, a large house like Tollgate, once let for £250 in 1899, but vacant since 1906 though some £600 had been spent on it in repairs. It was now in a bad state of repair, E but the plaintiffs preferred not to repair it till a tenant offered to take it if repaired. They were asking £200 for it, and there was evidence that £150 was a fair rent to ask. The plaintiffs had also three houses in Alleyn Park, a similar road of somewhat smaller houses: (i) No. 28, which, after being empty for some years, is now used as an annex to a boys' school; (ii) No. 26, Imbermark, used as a nursing home; and (iii) Barmon, also unlet for some years. These are said to be in a bad F state of repair for the same reason as Gosforth.

I have expressed the evidence at some length because it is obvious that the county court judge has not accurately appreciated the details, but contented himself with a statement that "there are four or five of them wasting and have been for fifteen years. No one wants them," an obviously inaccurate statement. Opinions that Tollgate would let more readily as flats were expressed by Mr. G Nisbett; Mr. Poyser, chairman of the plaintiff company and a forty-years' resident in Sydenham; and Mr. Boyd, a local house agent. Mr. Cane, the secretary to the governors, proved that, except the plaintiffs' houses, they had only one house vacant on the estate, the letting of which they could control and were in treaty with a tenant for it, but that most of the houses were let on long leases, and he ascribed the failure to let the plaintiffs' houses to want of repair and the rent asked. H He thinks they would let at £150 without any trouble. The governors were willing to consider the conversion of houses into large flats and some of the Sydenham Hill houses had been so converted. He thought the reduction in rental value was due to the servant problem, and basement kitchens, and possibly the large gardens. Mr. Vigers said the letting value of the houses had depreciated considerably in recent years; if repaired they should fetch £150. Mr. Holt proved that in 1919 I there were thirty-two larger houses empty in the neighbourhood, eleven being in College Road, and at the end of 1921 nineteen similar houses vacant, four being in College Road. On this part of the case the county court judge appears to have found that the house as a whole could much more readily be let as flats than as a whole house, and I cannot say there is no evidence on which he could find this. Indeed, I should think it is obvious that, the smaller and cheaper the flat, the more readily it would be let.

The more difficult part of the case is, whether this state of things can be found to be due to "changes in the character of the neighbourhood," and the difficulty is

partly due to the fact that the judge below has not clearly appreciated what point he has to decide and applied his mind to the evidence on that point, but has filled the case with his early reminiscences of South London generally, not given on oath or subject to cross-examination. It is not clear that the learned judge's view is not that there is a change in the character of the neighbourhood, namely, that large houses cannot readily be let, and that change has caused large houses not to be readily let. Reduced to symbols: A has caused B, for A is B, and, therefore, must cause B. The learned judge is not prepared to find any change in the immediate locality of College Road, except that rents have dropped, but a change in the neighbourhood surrounding College Road. What exactly the change is, or what exact neighbourhood he is considering, he has not found with any precision. Mr. Nisbett rather suggested that it was that the district formerly surrounded by fields was now surrounded by houses; the county court judge seems to take the view that it is that the rich inhabitants who used to live there have moved to the Surrey Hills with the aid of their motor cars. If "there" means the surrounding neighbourhood, it was, according to Mr. Nisbett, fields; if it means College Road, the learned judge will not find any substantial change in College Road. A good deal of the evidence was that the lack of servants and incidence of taxation made the same people less willing to rent large houses than they used to be.

I think the learned judge was right in considering the district round the "oasis" of College Road as its neighbourhood, provided that the change of character of that surrounding district did have the effect of altering the letting values of houses in College Road.

On the question of "change of character," if the facts were that the change from rural to urban surroundings, or the change from a few large houses to a majority of small houses, did affect the letting values in College Road, the conclusion of the learned judge would be accurate. If the facts were that the change was in the standard of living in the inhabitants, owing to general fall of incomes, or difficulty in getting servants, or to change of fashion, without any material reason for the change, I regard it as a very difficult question whether this is covered by the words "owing to change of character." I am inclined to think that, where all large houses are difficult to let from, say, the cause of lack of servants, the fall of letting value is not due to change of character of the neighbourhood, but to change of mode of living of the inhabitants, and that while Parliament might well have included this as a ground for revision of restrictive covenants, they have not done so in this Act. But I cannot think that that part of the case has been satisfactorily tried, and I think a new trial should be had to ascertain with more precision what are the facts which are said to constitute a change of character and in what neighbourhood, and to have caused the change in letting values. I have indicated above some of the matters which should be considered. I think the new trial will be more satisfactorily conducted as in the High Court before another judge who may have less reminiscences of the surrounding locality, and therefore address his mind more clearly to the actual evidence given.

Whoever tried it has to answer these questions: (i) Is the house not readily lettable as a single tenement? If "No," (ii) Is it readily lettable converted into two or more tenements? If "Yes," (iii) Is the above result (i) and (ii) due to changes in the character of the neighbourhood, finding what exactly is the neighbourhood he considers, and what are the changes in its character?

The defendants should have the costs of appeal here and in the Divisional Court, and the costs of the first trial should abide the result of the second trial.

YOUNGER, L.J.—In view of the judgments which have been delivered, I can state my views with reference to two of the questions raised by this appeal very shortly.

Before the county court judge can make an order under this s. 27 of the Housing, Town Planning, &c., Act, 1919, he must be satisfied with three things: (i) that the house with reference to which the application is made cannot readily be let as a

A single tenement; (ii) that it could readily be let for occupation if converted into two or more tenements; (iii) that the fact that the house cannot readily be let as a single tenement is owing to changes in the character of the neighbourhood in which the house is situate. As to the first of these, I am of opinion that there was evidence here before the learned county court judge upon which he could properly find that this house cannot readily be let as a single tenement. As to the second, B I am of opinion also that there was ample evidence before him upon which he could properly find that the house could readily be let for occupation if converted into two or more tenements. Indeed, upon this point there was no real dispute. The Dulwich estate governors have recognised the propriety, if not the necessity, of permitting the conversion into flats of selected houses upon their estate, and have, as I understand, sanctioned such conversion in a substantial number of instances. C Even with regard to the Tollgate House, the objection of the governors to its conversion is not, as I understand, fundamental, in the sense that they would never assent to it except under compulsion. Their position is that this somewhat delicate process of compulsion should never be carried out otherwise than with their approval, for only by retaining control of it can they be certain that they will preserve the amenity of their estate and safeguard the interests of their other D tenants. That is their view. All this, however, really connotes that this house could readily be let for occupation if converted into two or more tenements. There was, as I have said, no substantial dispute upon this point.

The real difficulty in the case arises upon the third matter with reference to which the learned county court judge must be satisfied. Was there before him any evidence upon which he could properly find that the fact that this house cannot E readily be let as a single tenement is owing to changes in the character of the neighbourhood in which it is situated? What may properly be included among these changes? What is the extent or area of the "neighbourhood" in which these changes must manifest themselves? That is the question, and it is a difficult one. One thing is, however, I think, clear. The mischief must be due to these changes. The section takes no account of the mischief if it is due to anything else. Very F great care must, accordingly, clearly be taken by the judge to whom the jurisdiction is assigned to see, especially in a case in which what I have called the mischief is in fact pronounced, that it is due to that cause, and not to some other cause affecting, it may be, the whole community, that is, scarcity of money due to high taxation, bad trade, high prices, or what not. The danger of mistake on this point is great. I think that in this present case the learned county court judge may have G fallen into one. But it must be avoided if the section is to be followed. The section so far, difficult though its application may be, is clear enough. Further progress in its interpretation is not easy. Before attempting to make it, I will consider some of its more general features.

It would appear, first of all, that the primary purpose of the legislature in enacting it was to provide increased tenement accommodation for tenants by H permitting the conversion, under stated conditions, into flats, of houses which for the reason given in the section could not be readily let as single tenements. I see this indicated in the absence of any provision for compensation; in no special place in the section being reserved for the landlord or other person entitled to the benefit of the restrictive covenant is the initiative given to the local authority. The section, again, is in one direction singularly wide; in another, singularly narrow. I It is not, on the one hand, confined to cases where the restriction against conversion is contained in a lease; it extends equally to cases where the restriction is contained in a conveyance in fee simple, in a conveyance, for example, made in pursuance of a building scheme, the consideration for the burden of the restrictive covenant being the right enjoyed by the owner of the house subject to it to enforce a similar restriction on all the owners of all other houses governed by what has often been called the rule of the estate. In that respect the section is wide; in another it is singularly narrow. The court, as I have already said, is by it given no power to release the restriction, unless the fact that the house cannot readily be let is due

to "changes in the character of the neighbourhood." What the section might have said, but has not, will be found by reference to the Law of Property Act, 1922, s. 90, where power to modify restrictive covenants affecting land is conferred in carefully chosen terms [see now Law of Property Act, 1925, s. 84]. The section is also singular in other respects. It makes, as I have said, no provision for compensation to anybody, unless it is imposed by the court as a condition of its order that the tenant can, as against his landlord, retain all the profit which the removal of the restriction enables him to earn. No account, again, seems to be taken in the section of the fact that the removal of the restriction in the case of a house under a building scheme may result, certainly if it is indefinitely repeated, in the restrictive covenants ruling the estate becoming quite unenforceable in the case of all the other houses—a result which in most cases will be received with mixed feelings by the persons affected. Again, the landlord, in the case of a lease—the covenantees, in the case of a building estate—have no separate status on the application; they are included in the expression "any person interested" to whom the court is to give an opportunity of being heard if they so desire. Neighbours are apparently treated as having the same interest in the application as have the parties to the covenant which it is sought to have released. The restriction, again, may only be removed on proof inter alia that the house could readily be let for occupation if converted into two or more tenements, but there is no obligation imposed by it upon the owner so to let them after they are converted. He is, so far as the section is concerned, entitled to assign or convey them in fee simple according to the nature of his interest in the house, unless the county court judge thinks fit to prevent him from so doing by imposing that disability as a condition or term of his order removing the restriction.

The section, it will be seen, is thus in many respects very singular, and, may I say, impressionist, but I am not sure that the recording of these singularities assists much in furnishing any clue to the real difficulty—that of ascertaining what is meant by the expression "changes in the character of the neighbourhood in which such house is situate," which must, whatever the words mean, have taken place before the section becomes operative at all. The origin of the phrase is, I think, easily traceable. It comes from such cases as *Duke of Bedford* v. *British Museum Trustees* (2) and *Sayers* v. *Collyer* (3). Sometimes the word is "change," and not "changes," in the character of the neighbourhood, or alteration in the character of the neighbourhood, or "change of condition of the neighbourhood." "Neighbourhood," however, is a word common to all covenants. As so originally referred to, the "neighbourhood" was in effect the area entitled to the benefit of the restrictive covenant; the "change" an obvious one—the protected ground. At the date of the covenant open land had become land covered with buildings in the first case; in the second, protected private houses had become shops; houses, which under the covenant were to be occupied by one household, had been divided between two families, etc. These were the "changes" with reference to which the words in their origin were used. But the phrase as used in this section is, I think, as a matter of language, too wide to be so confined. The changes as there referred to may be operative for their purpose although less open to the eye than those that had in fact taken place in those early cases in which the phrase originated.

On this point one question was much discussed before us. Must the changes have taken place since the applicant became interested in the house in question, or is the date when the house was built the date since which the change must have taken place? I am not myself clear that either date is the correct date. Unless the house is of such a character that it could never at any time have been let as a single tenement—a "white elephant," in other words—I doubt whether the date when the changes took place is material. I cannot think, for instance, that houses in a particular road, practically identical in size and feature, are for the purposes of this section—the primary object of which I have already referred to—to be dealt with by reference to other than the same considerations. The conclusion would be more difficult if the section had given any special position to persons parties to the

A covenant, but it does not. I need not, however, pursue this matter further. In the present case it is enough to say that it will, I think, suffice if any changes relied on have taken place since the house was built. The date when the applicants became interested in it is, I think, for this purpose, merely an accident.

What, next, is the neighbourhood in which we are to look for the changes? Upon this I cannot think of a better test to apply than that suggested and adopted B by SALTER, J. I agree with it and I will re-state it in his words:

> "If in the district where the house is, there is a change of character which does in fact produce the result of rendering the particular house not readily lettable, then, if it is near enough to produce the result, it is near enough to be in the neighbourhood."

C But there is another aspect of this question which, to my mind, is much more difficult. Confine the word "neighbourhood," if you will, in the present case to the defendants' quadrilateral—I do not think you should, but so confine it if you will. What are the changes in its character for which you must look? Must they necessarily be objective? Is it or is it not enough that for one sufficient reason or another people who still live in houses of this size and class will no longer seek D them in this neighbourhood? They now go elsewhere for them. The neighbourhood has, for one subtle reason or another, become unattractive in the eyes of such people. They can now, with their motor cars, go further afield, and they do. This neighbourhood is no longer one for people taking houses of this class, not because such people no longer exist, but because the neighbourhood has ceased to be attractive to them. Here and now the only demand is for smaller houses; the E large are unlettable. Would such a state of things be a change in the character of the neighbourhood sufficient to make the section applicable? There would probably be few changes more potent to make large houses unlettable. But, would this be a change in the character of the neighbourhood within the meaning of these words in the statute? For myself, I desire to reserve that question until, if ever, it actually arises. It does not, I think, so far arise in this case, for the evidence to F establish it would have to be very convincing and to this point the evidence was not, I think, directed. This question of "change" must, however, I think, in this case be further investigated on the lines indicated by SALTER, J.'s test and by SCRUTTON, L.J. It has not so far, in my judgment, been sufficiently inquired into by the learned judge who has, I think, been influenced in reaching the conclusion, which upon it he did reach, by considerations beyond those permitted by the G section. For these reasons I think also that the case should go for a new trial.

New trial ordered.

Solicitors: *Druces & Attlee*; *Nisbet & Co.*; *Wedlake, Letts & Birds.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

TOURNIER *v.* NATIONAL PROVINCIAL AND UNION BANK OF ENGLAND, LTD.

[COURT OF APPEAL (Bankes, Scrutton and Atkin, L.JJ.), November 9, 12, December 17, 1923]

[Reported [1924] 1 K.B. 461; 93 L.J.K.B. 449; 130 L.T. 682; 40 T.L.R. 214; 68 Sol. Jo. 441; 29 Com. Cas. 129]

Bank—Duty to customer—Secrecy regarding account—Extent of duty—Information obtained from account of another customer.

The banker's duty of secrecy regarding a customer's account and matters relating to it is a legal duty arising out of contract, and is a qualified, not an absolute, duty. Disclosure is justified where it is under compulsion of law, as in the case of an order under the Bankers' Books Evidence Act, 1879; or when an official of the bank is called on in a proceeding in a court to give evidence relating to a customer's account or transactions, for there is no privilege protecting a banker on such an occasion; or where there is a duty to the public to disclose, as when disclosure is necessary to prevent frauds or crimes; or where the interests of the bank require disclosure, as where a bank issues a writ claiming payment of an overdraft the amount of which is stated on the writ; or where disclosure is necessary to carry on the business of the account, as in giving a reason for declining to honour cheques drawn or bills accepted by the customer; or when the disclosure is with the customer's consent, express or implied, as where he has requested the bank to give information about his account or has authorised a third party to refer to the banker for information. The duty does not cease the moment a customer closes his account; information obtained during the currency of the account remains confidential unless and until its release falls within one of the exceptions mentioned. The bank's duty is not confined to the actual state of the customer's account; it extends to information derived from the account and the customer's transactions which go through it and the securities, if any, given in respect of it, and also to information derived from an independent source if the occasion on which the information was obtained arose out of the banking relationship between the bank and the customer.

Per SCRUTTON, L.J.: It appears to me that we cannot imply an obligation to keep secret information about a customer derived, not from that customer or his account, but from the account of another customer.

Per ATKIN, L.J.: I do not desire to express any final opinion on the practice of bankers to give one another information as to the affairs of their respective customers except to say that it appears to me that, if it is justified, it must be upon the basis of an implied consent of the customer.

Libel—Slander—Defamatory words—Proof—Evidence of language substantially the same.

The strictness of the old rule with reference to variance between pleading and proof of the words complained of in actions of libel and slander has long ago disappeared. It is still necessary to plead the exact language complained of, but proof of language which is substantially the same as that pleaded, or of a material or defamatory part of it, should be left to the jury with a direction to the above effect.

Notes. Referred to: *Waterhouse* v. *Barker*, [1924] 2 K.B. 759.

As to a banker's obligation to secrecy, see 2 HALSBURY'S LAWS (3rd Edn.) 241, 242; and as to pleading and proof of defamatory words, see ibid., vol. 24, p. 90. For cases see 3 DIGEST 304, 305, and 32 DIGEST 70, 71.

Cases referred to:

(1) *Harris* v. *Warre* (1879), 4 C.P.D. 125; 48 L.J.Q.B. 310; 40 L.T. 429; 43 J.P. 544; 27 W.R. 461; 32 Digest 69, *971*.

(2) *Hardy* v. *Veasey* (1868), L.R. 3 Exch. 107; 37 L.J.Ex. 76; 17 L.T. 607; 3 Digest 304, *985.*

(3) *Weld-Blundell* v. *Stephens*, [1920] A.C. 956; 89 L.J.K.B. 705; 123 L.T. 593; 36 T.L.R. 640; 64 Sol. Jo. 529, H.L.; 36 Digest (Repl.) 201, *1064.*

(4) *Davies* v. *Waters* (1842), 1 Dowl.N.S. 651; 9 M. & W. 608; 11 L.J.Ex. 214; 152 E.R. 257; 22 Digest (Repl.) 212, *1996.*

(5) *Taylor* v. *Blacklow* (1836), 3 Bing.N.C. 235; 2 Hodg. 224; 3 Scott, 614; 6 L.J.P.C. 14; 132 E.R. 401; 42 Digest 112, *1092.*

(6) *Walters* v. *Mace* (1819), 2 B. & Ald. 756.

(7) *Dalgleish* v. *Lowther*, [1899] 2 Q.B. 590; 68 L.J.Q.B. 956; 81 L.T. 161; 48 W.R. 37; 43 Sol. Jo. 718, C.A.; 18 Digest (Repl.) 189, *1631.*

(8) *Loyd* v. *Freshfield and Kaye* (1826), 2 C. & P. 325, N.P.; 3 Digest 305, *987.*

(9) *Tassell* v. *Cooper* (1850), 9 C.B. 509; 14 L.T.O.S. 466; 137 E.R. 990; 3 Digest 188, *378.*

(10) *Foster* v. *Bank of London* (1862), 3 F. & F. 214; 3 Digest 305, *986.*

(11) *Re Comptoir Commercial Anversois and Power, Son & Co.*, [1920] 1 K.B. 868; 89 L.J.K.B. 849; 122 L.T. 567; 36 T.L.R. 101, C.A.; 12 Digest (Repl.) 449, *3389.*

(12) *Brown* v. *Foster* (1857), 1 H. & N. 736; 26 L.J.Ex. 249; 28 L.T.O.S. 274; 21 J.P. 214; 3 Jur.N.S. 245; 5 W.R. 292; 156 E.R. 1397; 22 Digest (Repl.) 400, *4291.*

(13) *Griffith* v. *Davies* (1833), 5 B. & Ad. 502; 110 E.R. 876; sub nom. *Ripon* v. *Davies*, 2 Nev. & M.K.B. 310; 22 Digest (Repl.) 408, *4385.*

(14) *Lewis* v. *Pennington* (1860), 29 L.J.Ch. 670; 2 L.T. 344; 6 Jur.N.S. 478; 8 W.R. 465; 22 Digest (Repl.) 411, *4417.*

(15) *Joachimson* v. *Swiss Bank Corpn.*, [1921] 3 K.B. 110; 90 L.J.K.B. 973; 125 L.T. 338; 37 T.L.R. 534; 65 Sol. Jo. 434; 26 Com. Cas. 196, C.A.; 21 Digest 639, *2188.*

(16) *Hamlyn & Co.* v. *Wood & Co.*, [1891] 2 Q.B. 488; 60 L.J.Q.B. 734; 65 L.T. 286; 40 W.R. 24; 7 T.L.R. 731, C.A.; 12 Digest (Repl.) 684, *5266.*

(17) *Dahl* v. *Nelson, Donkin & Co.* (1881), 6 App. Cas. 38; 50 L.J.Ch. 411; 44 L.T. 381; 29 W.R. 543; 4 Asp.M.L.C. 392, H.L.; 41 Digest 517, *3471.*

(18) *Adam* v. *Ward*, [1917] A.C. 309; 86 L.J.K.B. 849; 117 L.T. 34; 33 T.L.R. 277, H.L.; 32 Digest 129, *1608.*

Also referred to in argument:

Ecklin v. *Little* (1890), 6 T.L.R. 366, D.C.; 32 Digest 174, *2134.*

Application by the plaintiff, Edwin Frederick Tournier, for a new trial in an action for slander and breach of contract brought by him against the defendant bank and tried before AVORY, J., and a common jury.

The action was founded on statements alleged to have been made by the acting manager of a branch of the defendant bank to the plaintiff's employers. The facts appear in the judgments. The questions left to the jury and their answers were as follows: (i) Were the words complained of in fact spoken by [the acting manager]?—No. (ii) If they were, were they defamatory of the plaintiff?—No. (iii) Has the plaintiff suffered actual damage by the speaking of such words?—No. (iv) Was [the acting manager] actuated by malice in speaking the words, i.e., by an indirect motive other than a desire to do his duty?—No. (v) Was the communication about the plaintiff's account at the bank made to his employers on a reasonable and proper occasion?—Yes. (vi) Damages?—None. Judgment was accordingly entered for the defendants, and the plaintiff appealed.

Sir Harold Smith, K.C., and *Pitt* for the plaintiff.

J. G. Hurst, K.C., and *Morle* for the defendant bank.

Cur. adv. vult.

Dec. 17. The following judgments were read.

BANKES, L.J.—In this appeal the plaintiff ask for a new trial on the ground of misdirection by the learned judge. The action was founded on statements

alleged to have been made by an acting manager of a branch of the defendant bank. The plaintiff complained that the statements were slanderous and, further, that they constituted a breach of the duty owed by the bank to him.

The plaintiff was a customer of the Finsbury Pavement branch of the defendant bank. In April, 1922, his account was overdrawn to a small amount, and on April 8 the plaintiff signed a document agreeing to pay off the debt by weekly instalments of £1. At the time when this document was signed the plaintiff was about to enter the employment of a firm of Kenyon & Co., and on the document containing the agreement the plaintiff wrote their name and address. The plaintiff did not pay the weekly instalments as agreed. In July the acting manager of the branch, by name Fennell, got into telephone communication with Kenyon & Co. for the purpose of ascertaining the plaintiff's private address. The inquiry led to further conversation with two directors of the company, one of the name of Wells and the other of the name of Kenyon. The plaintiff's complaint in the action was that in the course of that conversation on the telephone Fennell told Kenyon that his (the plaintiff's) account was overdrawn, that various promises made by him to give the matter his attention had not been fulfilled, that cheques which passed through his account were for betting men, and that the bank thought that he was betting heavily. To Wells, Fennell was alleged to have said that he (Fennell) was afraid that the plaintiff was engaged with bookmakers, as the bank had been able to trace a cheque or cheques passing from the plaintiff's account to the bookmakers. The innuendo pleaded was that the words complained of meant and were understood to mean that the plaintiff was an undesirable person to be employed by Messrs. Kenyon, and a person not fit to conduct their business or to be entrusted with money. Wells and Kenyon were called as witnesses for the plaintiff, and they deposed to a conversation with Fennell in the terms alleged in the statement of claim. So far, therefore, as the plaintiff's evidence was concerned there was no necessity for the judge to ask the jury any question other than the one which he did ask them—namely, whether the words complained of were spoken by Fennell. In order to contradict the plaintiff's version of the conversation Fennell was called by the defendants. His account of the conversation was that he rang up Messrs. Kenyon in order to ascertain what the plaintiff's private address was, and whether he was working on salary or commission. He was asked why he made the inquiry, and he then explained that the plaintiff was indebted to the bank in a small amount, and that he had not replied to letters. He then went on to say that the plaintiff must be getting money from some source or other, that he (Fennell) had seen cheques coming through the bank payable to the plaintiff, and that he had made it his business to find out where one cheque had gone to, and that he had been informed that it had gone to the credit of a bookmaker's account, and that if that was the case he thought that the plaintiff ought to have paid off some of his debt to the bank. It was after, and in consequence of, this evidence by Fennell that the plaintiff's counsel pressed the learned judge to ask the jury whether the words complained of, or words to a like effect, had been proved, his object being obviously to obtain a verdict on Fennell's evidence if the jury accepted his version of the conversation in preference to that of Wells and Kenyon. The learned judge refused to adopt this course.

The question on this part of the case is whether he was right in so deciding. The strictness of the old rule in reference to variance between proof and pleading in actions of libel and slander has long ago disappeared. It is still necessary to plead the exact language complained of, but proof of language substantially the same as that pleaded is admissible and should be submitted to the jury. Lord Coleridge, C.J., states the present rule in *Harris* v. *Warre* (1) as follows (4 C.P.D. at p. 128):

> "In libel and slander everything may turn on the form of words, and in olden days plaintiffs constantly failed from small and even unimportant variance between the words of the libel or slander set out in the declaration and the

A proof of them. For a long time it has been held to be enough to prove the substance of the words alleged in the declaration, but if there was difference between both the form and substance of the words alleged, and of the words proved, the defendant was entitled to succeed. In libel and slander the very words complained of are the facts on which the action is grounded. It is not the fact of the defendant having used defamatory expressions, but the fact of B his having used *those* defamatory expressions alleged, which is the fact on which the case depends."

There can be no question as to the difference in form between the rival accounts of the conversation. Do they differ in substance? Every case must depend upon its own circumstances and no rule can be laid down as to what constitutes a substantial difference. C In my opinion, there was such a substantial difference between the rival accounts of the conversation that Fennell's version ought not to have been submitted to the jury as proof of the plaintiff's pleaded case without an amendment. Even if that view is not correct I do not think that the learned judge was wrong in refusing to add to his question "or words to the like effect." If Fennell's evidence was to be submitted to the jury at all in proof of the plaintiff's case it should have been done by a series of questions which would have D made it quite clear to the jury that when they had to consider whether the words were defamatory, they must consider that question in reference only to the version of the conversation which they accepted. I do not take the view that there was any material misdirection by the learned judge on this part of the case; though had the question depended upon whether the ancient definition of what constitutes E a slander is sufficiently wide for a case like the present I should have hesitated before saying that it is. As the other members of the court think that the order for a new trial should include both branches of the claim, I do not differ from them though I do adhere to my view that an amendment is necessary to enable the plaintiff to do what he attempted unsuccessfully to do at the trial.

The case with regard to the claim for damages for breach of duty raises a very F important question, and one on which the learned judge did not, in my opinion, sufficiently direct the jury. The case for the plaintiff, as alleged in the statement of claim, was that the bank were absolutely pledged to secrecy in regard to the plaintiff's account and business and all matters incidental thereto, and that it was an implied term of the contract between the plaintiff and the bank that they would not disclose to anyone any of the plaintiff's business with the bank, or G matters arising therefrom, or the nature or state of his account, or any transactions relating thereto. The learned judge very properly, in my opinion, ruled against the existence of any such absolute contract. The matter might have rested there. It did not do so, however, because, in his summing up, the learned judge did give a direction to the jury on the law on the point, and asked them a question with regard to it. The question was this:

H "Was the communication with regard to the plaintiff's account at the bank made on a reasonable and proper occasion?"

and his direction on this point was as follows:

"Fifthly, I shall have to ask, in view of the other claim for breach of contract, whether the communication of the state of the plaintiff's account at the I bank, which was made to his employers, was, in the circumstances, made on a reasonable and proper occasion—that is to say, whether there was a reasonable justification for his making that communication? I shall hold, as a matter of law, that there is no such absolute contract as Sir Harold Smith has contended for between a banker and his customer. He has contended that there is an absolute contract that the banker shall not, in any circumstances, disclose the state of a customer's account to another person. I hold, as a matter of law, that there is no such absolute contract. But if the banker has made that disclosure justifiably—that is to say, if, in the circumstances of the particular

case, it was reasonable and proper that he should make the communication— then there is no breach of contract on his part."

With all respect to the learned judge, this is not a sufficient explanation of what is a difficult and hitherto only very partially investigated branch of the law. The judge no doubt took the form of the question from *Hardy* v. *Veasey* (2), in which the judges raised, without deciding them, a number of questions in relation to the duty of banker towards customer not to disclose his affairs, and among others the question whether the duty was a legal or only a moral one, and, if legal, whether it arose out of contract or out of tort.

At the present day I think it may be asserted with confidence that the duty is a legal one arising out of contract, and that the duty is not absolute, but qualified. It is not possible to frame any exhaustive definition of the duty. The most that can be done is to classify the qualification and to indicate its limits. For this purpose *Hardy* v. *Veasey* (2) is of no assistance. The plaintiff, in his amended declaration in that case, set out a promise on the part of the bank not to disclose the state of his banking account except "on a reasonable and proper occasion." To this the defendant pleaded a denial and leave and licence. The disclosure complained of was made to a moneylender, to whom the defendants' manager applied with a view of obtaining assistance for the plaintiff. The learned judge who tried the action stated that the question for the jury would be

"whether the communication to the moneylender of the state of the plaintiff's account was an officious and unjustifiable one."

He added:

"If it was made with reasonable hope of an honest intention of getting assistance for the plaintiff I should doubt whether the action is maintainable."

The jury found for the defendants. The discussion in the Exchequer Chamber took place on an application for a new trial, and no decision was given except that there had been no misdirection and no wrong verdict. The plaintiff, by his pleading, had confined his complaint to a disclosure on some occasion other than a reasonable and proper occasion, and the Chief Baron, in his judgment, is only referring to the plaintiff's complaint when he uses those words. The question was never raised whether the proper way of ascertaining what was the defendants' duty was to ask a question of the jury in that form. Had that question been discussed, I cannot think that the court would have approved of such a question, partly because it is leaving to the jury a question which is primarily a question for the judge, and partly because it leaves the jury entirely without instruction as to what the circumstances are which they are entitled to take into consideration in arriving at a conclusion as to what is reasonable and what is proper.

In my opinion, it is necessary in a case like the present to direct the jury what are the limits and what are the qualifications of the contractual duty of secrecy implied in the relation of banker and customer. There appears to be no authority on the point. On principle, I think that the qualifications can be classified under four heads: (a) Where disclosure is under compulsion by law; (b) where there is a duty to the public to disclose; (c) where the interests of the bank require disclosure; (d) where the disclosure is made by the express or implied consent of the customer. An instance of the first class is the duty to obey an order under the Bankers' Books Evidence Act, 1879. Many instances of the second class might be given. They may be summed up in the language of Lord Finlay in *Weld-Blundell* v. *Stephens* (3) ([1920] A.C. at p. 965), where he speaks of cases where a higher duty than the private duty is involved, as where danger to the State or public duty may supersede the duty of the agent to his principal. A simple instance of the third class is where a bank issues a writ claiming payment of an overdraft, stating on the face of the writ the amount of the overdraft. The familiar instance of the last class is where the customer authorises a reference to his banker. It is more difficult to state what the limits of the duty are, either as to time or as

to the nature of the disclosure. I certainly think that the duty does not cease the moment a customer closes his account. Information gained during the currency of the account remains confidential unless released in circumstances bringing the case within one of the classes of qualification I have already referred to. Again, the confidence is not confined to the actual state of the customer's account. It extends to information derived from the account itself. A more doubtful question, but one vital to this case, is whether the confidence extends to information in reference to the customer and his affairs derived, not from the customer's account, but from other sources, as, for instance, from the account of another customer of the customer's bank.

It is very necessary to speak with caution on this question, on which there is no authority. I desire, therefore, to confine my observations to the facts of this particular case. The information which the branch manager is said to have disclosed, which disclosure is said to have constituted a breach of duty, came to the bank in the following manner. A cheque was drawn by a customer of the bank on their Moorgate Street branch in favour of the plaintiff. The cheque was paid into the account of a customer at the London City and Midland Bank. When the cheque came back to the Moorgate Street branch Mr. Fennell's attention was called to the fact that the plaintiff had not paid the cheque into his account, and Mr. Fennell then made inquiries of the London City and Midland Bank, the reply to which he is said to have committed a breach of his duty in disclosing.

The privilege of non-disclosure to which a client or a customer is entitled may vary according to the exact nature of the relationship between the client or the customer and the person on whom the duty rests. It need not be the same in the case of the counsel, the solicitor, the doctor, and the banker, though the underlying principle may be the same. The case of the banker and his customer appears to me to be one in which the confidential relationship between the parties is very marked. The credit of the customer depends very largely upon the strict observance of that confidence. I cannot think that the duty of non-disclosure is confined to information derived from the customer himself or from his account. To take a simple illustration. A police officer goes to a banker to make an inquiry about a customer of the bank. He goes to the bank because he knows that the person about whom he wants information is a customer of the bank. The police officer is asked why he wants the information. He replies because the customer is charged with a series of frauds. Is the banker entitled to publish that information? Surely not. He acquired the information in his character of banker. So in the present case. Mr. Fennell was put upon inquiry by a cheque drawn in the plaintiff's favour upon a customer's account. He acquired the information which he is said to have divulged in his character as the plaintiff's banker. I use the expression "in the character of a banker," because I find that expression used by GURNEY, B., in *Davies* v. *Waters* (4), in which the question was raised whether a solicitor had acquired certain information as attorney for a client or as his trustee. GURNEY, B., says (9 M. & W. at p. 613):

> "But the objection here goes further; for just an hour before the trial, being possessed of the deed, and possessed of it in the character of trustee, he takes it to the consultation, and there, in the character of attorney for the defendant, and for the express purpose of informing the minds of the counsel for the defendant, he reads the deed, and by that means acquires his knowledge of its contents. Can it be doubted that this is a knowledge acquired in the character of professional adviser of the party? If so, it is fit and proper that knowledge so acquired should be held sacred."

ROLFE, B., did not agree with this view of the facts, but I cite the passage because it introduces what is, I think, a convenient indication of the limits of professional or commercial privilege in relation to non-disclosure. In *Taylor* v. *Blacklow* (5) (3 Bing.N.C. at p. 249) VAUGHAN, J., in speaking of a violation by a solicitor of the professional privilege, speaks of it as a breach of a great moral duty, and he

adds that "the law is never better employed than in enforcing the observance of moral duties." In the present case I think the information obtained by Mr. Fennell as the result of his inquiry to the London City and Midland Bank was covered by the privilege of the customer, and that the bank are liable for any disclosure of that information which may have caused damage to the plaintiff, unless the bank can bring the disclosure of the information so derived under one of the classified qualifications I have already referred to. It follows from what I have said that, in my opinion, a direction to the jury in a case such as the present must inform the jury of the nature and limits and qualifications of the duty of the bank as a matter of law, leaving to them only questions for the purpose of ascertaining their view whether the communication complained of was or was not made, and whether it did or did not come, within any of the protected occasions to which I have drawn attention. For these reasons I consider that the appeal must be allowed with costs, the judgment entered for the defendants set aside, and a new trial ordered. The costs of the first trial to abide the event of the new trial.

SCRUTTON, L.J.—This application for a new trial raises questions of some general importance, though I can understand the jury who answered all questions against the plaintiff not taking a favourable view of his case. He had an account with the defendant bank which in October, 1921, was overdrawn about £8. He paid nothing into this account till April, 1922, when, being pressed to pay his debt, he agreed to do it by weekly instalments of a pound. He paid three of these, but not punctually, and in July, 1922, had not paid for some time, his overdraft then being six pounds or so. In these circumstances the bank manager found that cheques made payable to him were being paid into another person's account instead of being used to discharge his overdraft. He also found that one of these cheques came to the bank from the account of a betting man. He was naturally annoyed, and in endeavouring to obtain the private address of the plaintiff from his employers, he made statements, the exact terms of which were in dispute, about the state of the plaintiff's account, and the cheque coming from a bookmaker's account. On hearing of this the plaintiff brought an action against the bank: (i) for slander, alleging as special damage the loss of his situation; (ii) for breach of contract to keep his account secret. The two causes of action have different histories and arguments relating to them and I deal with them separately. As to slander the plaintiff alleged two conversations, one with Wells to whom Fennell is alleged to have said:

> "I am afraid that Mr. Tournier is engaged with bookmakers, as we have been able to trace a cheque or cheques passing from Mr. Tournier's account to bookmakers";

the other with Mr. Kenyon, to whom he is alleged to have said:

> "Tournier's account is overdrawn, and various promises made by him to give the matter his attention have not been fulfilled, cheques passed through Tournier's account were for betting men, and we think that Tournier is betting heavily."

The witnesses gave evidence substantially as pleaded. The bank manager said he asked the plaintiff's employers for his private address, and whether he was paid salary or commission, and on being asked why he wanted to know said that the plaintiff was slightly overdrawn and had not answered the bank's letters, and as the manager had seen cheques payable to the plaintiff coming through another bank account and found they came from a bookmaker's account, he thought the plaintiff ought to pay up. It will be seen he alleges that he said nothing about cheques passing from Tournier's account to bookmakers, or that Tournier was betting heavily; he did mention the overdraft, and that one cheque payable to Tournier had passed through a bookmaker's account. No application was made by the plaintiff to amend, by relying on the words proved by the defendant, but

A when the judge proposed to ask the jury the question "were the words complained of in para. 2 or para. 3 of the claim spoken by Mr. Fennell?" counsel asked him to add "or words to the like effect," which the judge refused. The jury found that the words alleged in the claim were not spoken. They went on to find that they, presumably the words alleged, were not defamatory. On this the judge had directed them that defamatory words were words tending to expose the plaintiff to B "hatred, ridicule, and contempt," in the mind of a reasonable man. I do not myself think this ancient formula is sufficient in all cases, for words may damage the reputation of a man as a business man, which no one would connect with hatred, ridicule, or contempt. This misdirection is, however, not raised by the notice of appeal. The jury appear to have thought that to say that a man's account was overdrawn and that he betted was no reasonable cause for "hatred, C ridicule, and contempt"; whether they would have thought such words damaging to the reputation of a business man I do not know. The more substantial matter is the refusal of the judge to add the words "to the like effect," and his failure to direct the jury that they should consider whether the words alleged or a material and defamatory part of them were in substance uttered. There is no doubt that precise words must be alleged in the statement of claim, and only a century ago D the most minute variation in proof was ground for non-suiting the plaintiff. One who complained of the words: "This is my umbrella, and he stole it from my back door," and proved: "It is my umbrella, and he stole it from my back door" was non-suited in 1819 by the full court: *Walters* v. *Mace* (6), it being held that the umbrella was not in the presence of the speaker, so that "This" referred to a present umbrella, and "It" to an absent one, a different thing. But I think E modern practice is as stated by LORD COLERIDGE in *Harris* v. *Warre* (1), that it is enough to prove the substance of the words alleged, or, I would add, of a material and defamatory part of them. In the case of interrogatories the court has decided in *Dalgleish* v. *Lowther* (7) that the defendant may be asked whether he spoke the words "or words to that effect," meaning, according to SIR FRANCIS JEUNE, "anything in substance like them," "words which though not exactly the same F are to that effect." So far as the words proved make a materially different allegation, amendment is necessary if that allegation is to be relied on, but, in my view, the jury should be directed that if they think the defendant used in substance the words or a material and defamatory part of the words complained of they should say so, and he is liable. I have no doubt that in this case part of the words alleged is materially different from the defendant's admission, but I think the G jury should have been directed to consider whether or not part of the defendants' admission was a material and defamatory part of the words complained of. It is obvious, however, that if the claim for slander stood alone, the statement about overdraft was justified and the jury obviously did not think and might reasonably not think the statement about one cheque from a bookmaker's account defamatory. On this part of the case if it stood alone I should not be disposed to order a new H trial, though I think the summing-up was defective.

The other cause of action is of far more public interest. The plaintiff alleged an absolute contract to be implied that the bank should not disclose the plaintiff's account on matters arising therefrom or any transactions relating thereto to anybody. The judge directed the jury there was no such absolute contract and I think he was right. There is clearly no privilege to abstain from answering in a court I of justice questions as to a customer's account (*Loyd* v. *Freshfield and Kaye* (8), 2 C. & P. at p. 329, per ABBOTT, C.J.); and the bank can disclose the state of the account by bringing an action to recover overdraft. The learned judge left to the jury the question:

> "Was the communication with regard to the plaintiff's account at the bank made on a reasonable and proper occasion?"

I think he took these words from the judgments of KELLY, C.B., and MARTIN, B., in *Hardy* v. *Veasey* (2), though in that case the actual question left to the jury

was: "Was the communication an officious and unjustifiable one?" But, having read them the question, the learned judge by some unfortunate oversight omitted to give the jury any direction as to by what standard reasonableness and propriety were to be considered. Indeed, as the jury had found that the words alleged by the plaintiff were not uttered, it is not clear to what communication the question and answer relate.

It is curious that there is so little authority as to the duty to keep customers' or clients' affairs secret, either by banks, counsel, solicitors, or doctors. The absence of authority appears to be greatly to the credit of English professional men who have given so little excuse for its discussion. As to bankers, there is the ruling of ABBOTT, C.J., already referred to, as to the duty to disclose in the law courts; there is the opinion of two judges on demurrer in *Tassell* v. *Cooper* (9) in 1850 that a count that a bank had a duty not to disclose the state of a customer's account showed no cause of action; but here counsel who was winning on another count abandoned the count attacked (see p. 532); there is the fact that in 1862 in *Foster* v. *Bank of London* (10), EARLE, C.J., asked the jury whether it was the duty of the bank not to disclose to a person presenting a bill or cheque the exact state of a customer's account as contrasted with a statement of "not sufficient assets," and, on their replying that the duty was as stated, said: "He was not aware of any law against that"; and, lastly, the judgment in 1868 in *Hardy* v. *Veasey* (2) of the Court of Exchequer that if there was a duty not to disclose the state of a customer's account, it was subject to an exception in favour of disclosure reasonable and proper in the interests of the customer himself. It is to be noticed that in the last case the court were under the impression that there was no reported case in which an action had been brought against a solicitor for disclosure of his client's affairs; they had not been referred to *Taylor* v. *Blacklow* (5), an action for such disclosure, where all the judges recognised such a duty, tracing it back to a passage in COMYNS' DIGEST; tit. Action on the case for deceit, A. 5 (see 3 Bing. at pp. 243–249). It might be possible to rest the duty on the express words in the bank's pass book: "The officers of the bank are bound to secrecy as regards the affairs of its customers," though even then exceptions must be introduced by implication. The contract is alleged in the claim as "implied," and according to the decision of this court in *Re Comptoir Commercial Anversois and Power, Son & Co.* (11), implied terms are a question of law for the court, the jury finding such facts as are necessary or material to enable the court to judge of the implication. The court will only imply terms which must necessarily have been in the contemplation of the parties in making the contract. Applying this principle to such knowledge of life as a judge is allowed to have, I have no doubt that it is an implied term of a banker's contract with his customer that the banker shall not disclose the account or transactions relating thereto of his customer except in certain circumstances. This duty equally applies in certain other confidential relations, such as counsel or solicitor and client, or doctor and patient. The circumstances in which disclosure is allowed are sometimes difficult to state, especially in the case of a medical man; and I do not propose to do more than indicate the exceptions material to the present case.

I think it is clear that the bank may disclose the customer's account and affairs to an extent reasonable and proper for its own protection, as in collecting or suing for an overdraft; or to an extent reasonable and proper for carrying on the business of the account as in giving a reason for declining to honour cheques drawn or bills accepted by the customer, when there are insufficient assets; or when ordered to answer questions in the law courts; or to prevent frauds or crimes. I doubt whether it is sufficient excuse for disclosure in the absence of the customer's consent that it was in the interests of the customer, when the customer can be consulted in reasonable time and his consent or dissent obtained. I think also in accordance with well-known authorities on the duties and privileges of legal advisers, that the implied legal duty towards the customer to keep secret his affairs does not apply to knowledge which the bank acquires before the relation of banker

A and customer was in contemplation, or after it ceased, or to knowledge derived from other sources during the continuance of the relation. For instance, the banker hears from an entirely independent source that one of its customers has speculative dealings in oil; may it disclose that fact to another of its customers also interested in oil? As we have only to imply terms the parties must necessarily have contemplated, how can it be said that it is a necessary term that the bank B shall not talk about the customer at all, though the subject-matter of its conversation is not derived from its dealings with the customer. This position would be the same as prevails in the case of legal advisers, as stated in TAYLOR ON EVIDENCE (11th Edn.), s. 930, heads (2) and (5), and supported by *Brown* v. *Foster* (12), *Griffith* v. *Davies* (13), as to which see per ALDERSON, B., in *Davies* v. *Waters* (4), and *Lewis* v. *Pennington* (14). It appears to me, therefore, that we cannot imply C an obligation to keep secret information about a customer derived, not from that customer or his account, but from the account of another customer. The second customer may complain, but not the first. It is not possible to apply this rule to the facts of the present case so as to avoid a new trial, for we do not know what words were spoken, or how any statement about cheques for betting was mixed up with statements about overdraft. I hold, therefore, that if the bank knows some- D thing about customer A. through customer B.'s account, his duty not to disclose is one owing to customer B. and not to customer A. None of these matters or standards by which the propriety of disclosure should be judged, was explained to the jury, and it is obvious that some of them were very material to the facts of this case. What, if anything, was known or suspected about betting was known through the account of another customer; but the suggestion, if made, that the E overdraft was due to betting, might be considered by the jury as the disclosure of the plaintiff's account, or might not. I think a new trial should be ordered of this issue, which is an important one; and as the treatment of the issue as to slander was not very satisfactory, I think the new trial should extend to the whole action. I, therefore, do not comment further on the facts of the case. The plaintiff must have the costs of the appeal, and those of the first hearing should abide the event F of the second hearing. The plaintiff must consider whether he should apply to amend.

ATKIN, L.J.—This is an action brought by the plaintiff against the defendant bank in respect of words spoken by the manager of a branch of the bank. The plaintiff alleges as causes of action (a) slander; (b) breach of an implied contract G not to divulge information concerning the plaintiff's transactions with the bank. The second point involves a question of considerable public importance and I propose to consider it first. In *Joachimson* v. *Swiss Bank Corpn.* (15) this court had to consider what were the terms of the contract made between banker and customer in the ordinary course of business where a current account is opened by the bank. All the members of the court were of opinion that the contract included several H implied terms, some of which were there stated so far as was necessary for the determination of that case, which turned upon the necessity of a demand before the customer could sue the bank for the amount of his credit balance. It is now necessary to consider whether there is any, and if so, what, implied term as to an obligation of secrecy on the part of the bank. The question of what terms are to be implied in a contract is a question of law: *Re Comptoir Commercial Anversois* I *and Power, Son & Co.* (11); and the rules by which the court should be guided are contained in passages from judgments of LORD ESHER in *Hamlyn & Co.* v. *Wood & Co.* (16), and of LORD WATSON in *Dahl* v. *Nelson Donkin & Co.* (17), cited by BANKES, L.J., [1920] 1 K.B. at p. 886. The principle is stated by SCRUTTON, L.J., in words substantially to the same effect.

> "The court and not the jury are the tribunal to find such a term; they ought not to imply a term merely because it would be a reasonable term to include if the parties had thought about the matter, or because one party, if he had thought about the matter, would not have made the contract unless the term

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> was included; it must be such a necessary term that both parties must have intended that it should be a term of the contract, and have only not expressed it because its necessity was so obvious that it was taken for granted."

Is there any term as to secrecy to be implied from the relation of banker and customer? I have myself no doubt that there is. Assuming that the test is rather stricter than LORD WATSON'S words require and is not merely what the parties as fair and reasonable men would presumably have agreed upon, but what the court considers they must necessarily have agreed upon, it appears to me that some term as to secrecy must be implied. The bank find it necessary to bind their servants to secrecy; they communicate this fact to all their customers on their pass book; and I am satisfied that if they had been asked whether they were under an obligation as to secrecy by a prospective customer, without hesitation they would say "Yes." The facts in this case as to the course of business of this bank do not appear to be in any degree unusual in general banking business. I come to the conclusion that one of the implied terms of the contract is that the bank enter into a qualified obligation with their customers to abstain from disclosing information as to his affairs without his consent, and I am confirmed in this conclusion by the admission of counsel for the bank that they do, in fact, consider themselves under a legal obligation to maintain secrecy. Such an obligation could only arise under a contractual term.

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The important point, one which presents difficulties, is as to the extent of the obligation. The plaintiff's pleading alleged the objection in wide terms as absolute and unconditional. The learned judge, as I think, quite rightly ruled that there was no such absolute duty, and the trial then proceeded without further amendment of the pleadings on the footing that the plaintiff relied on a breach of the true contract whatever it was. The learned judge directed the jury

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> "if the banker has made the disclosure justifiably—that is to say, if under the circumstances of the particular case it was reasonable and proper that he should make the communication—then there is no breach of contract on his part."

Without any further direction he left to the jury that question: "Was the communication with regard to the plaintiff's account at the bank made on a reasonable and proper occasion?" The direction and question appears to follow the direction to the jury given by BYLES, J., in *Hardy* v. *Veasey* (2) approved by the Court of Exchequer. I think that the decision in that case was based on the fact that the formula approved was that adopted by the plaintiff, covered in his pleading and accepted by him as representing the true issue, and he left that to the jury. In fact, however, to leave to the jury what is "justifiable" or "proper" is merely to tell them that the bank may not divulge information except on occasions when they may divulge it and that of what are those occasions the jury are the judges. This appears to me to treat as fact what is matter of law, and to afford no guidance to the jury, leaving the rights and duties as between customer and banker to vary with the individual views of juries in each case.

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The first question is to what information does the obligation of secrecy extend? It clearly goes beyond the state of the account, e.g., whether there is a debit or a credit balance and the amount of such balance. It must extend at least to all the transactions that go through the account and to the securities, if any, given in respect of the account. And in respect of such matters it must, I think, extend beyond the period when the account is closed or ceases to be an active account. It seems to me inconceivable that either party would contemplate that once the customer had closed his account the bank was to be at liberty to divulge as it pleased the particular transaction which it had conducted for the customer while he was such. I further think that the obligation extends to information obtained from other sources than the customer's current account if the occasion upon which the information was obtained arose out of the banking relations of the bank and its customers, e.g., with a view to assisting the bank in conducting the customer's business or in coming to decisions as to its treatment of its customers. Here again

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counsel for the bank admitted that the bank treated themselves as under such an obligation; and this I think would be in accordance with ordinary banking practice. In this case, however, I should not extend the obligation and information as to the customer obtained after he has ceased to be a customer. Speaking for myself, I find little assistance from considering the implications that have been found by the courts to arise from contracts in other occupations and professions such as those of solicitors or doctors. The limitations of the implied term must vary with the special circumstances peculiar to each class of occupation.

On the other hand, it seems to me clear that there must be important limitations upon the obligation of the bank not to divulge such information as I have mentioned. It is plain that there is no privilege from disclosure enforced in the course of legal proceedings. But the bank is entitled to secure itself in respect of liabilities it incurs to the customer or the customer to it, and in respect of liabilities to third parties in respect of the transactions it conducts for or with the customer. It is difficult to hit upon a formula which will define the maximum of that obligation which must necessarily be implied. But I think it safe to say that the obligation not to disclose information such as I have mentioned is subject to the qualification that the bank have the right to disclose such information when, and to the extent to which it is reasonably necessary for the protection of the bank's interests, either as against their customer or as against third parties in respect of transactions of the bank for or with their customer or for protecting the bank or persons interested or the public against fraud or crime. I have already stated the obligation as an obligation not to disclose without the customer's consent. It is an implied term, and may, therefore, be reviewed by express agreement. In any case the consent may be express or implied, and to the extent to which such consent is given the bank will be justified in acting. A common example of such consent would be where a customer gives a banker's reference. The extent to which he authorises information to be given on such a reference must be a question to be determined on the facts of each case. I do not desire to express any final opinion on the practice of bankers to give one another information as to the affairs of their respective customers except to say that it appears to me that, if it is justified, it must be upon the basis of an implied consent of the customer.

As to the rest of the case based on slander I think that this issue must also be submitted for a new trial. I do not think that it is a sufficient direction to a jury on what is meant by "defamatory" to say, without more, that it means: Were the words calculated to expose the plaintiff to hatred, ridicule, or contempt in the mind of a reasonable man? The formula is well known to lawyers; but it is obvious that suggestions might be made very injurious to a man's character in business which would not, in the ordinary sense, excite either hate, ridicule, or contempt, e.g., an imputation of a clever fraud which, however much to be condemned morally and legally, might yet not excite what a member of a jury might understand as hatred or contempt. Speaking for myself, I also think that it is undesirable where an issue of privilege is raised to leave a question of express malice to be decided by the jury before the judge has ruled whether the occasion is privileged. The judge has to determine, not only whether the occasion is privileged, but whether the defendant has gone beyond the privilege which the occasion creates: *Adam* v. *Ward* (18), [1917] A.C. at p. 321. In the words of Lord Loreburn:

> "All this is for the judge alone, and the question of malice, which is for the jury, cannot arise till the judge has ruled on the whole question of privilege."

In many cases, and I think this is one, the jury cannot form a correct opinion as to what is express malice until the judge has ruled whether the circumstances exist, as to legal or moral duty and so forth, on which legal privilege depends. If the occasion is not privileged, or has been, in fact, exceeded, the question of express malice is irrelevant; and I think it is a disadvantage to the administration of justice that questions should be asked of the jury unnecessarily, when the final

decision may appear to conflict with their answers. It is also, I think, clear that the plaintiff was entitled to put before the jury his case that the words proved, though not the very words pleaded, were words substantially to the same effect. Whether this be done by amending the pleading, by framing the question to the jury so as to raise the point, or by directing the jury that the words pleaded would be proved by proof of words substantially to the same effect, seems to me immaterial. No slander of any complexity could ever be proved if the ipsissima verba of the pleading had to be established. There appears to me to be ample authority in well-established every-day practice, and in the decisions as to the form of interrogatories in such cases, to support the view that I am expressing. For the above reasons, without expressing an opinion upon the points raised between the parties at the trial, I come to the opinion that this appeal must be allowed, and a new trial ordered.

New trial ordered.

Solicitors: *J. R. Cort Bathurst*; *Wilde, Wigston & Sapte.*

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

RIDER *v.* FORD

[Chancery Division (Russell, J.), March 12, 13, 1923]

[Reported [1923] 1 Ch. 541; 92 L.J.Ch. 565; 129 L.T. 347; 67 Sol. Jo. 484]

Landlord and Tenant—Option to purchase—Avoidance by rule against perpetuities—No time limit expressed for exercise of option—Tenant holding over as yearly tenant—Option to call for new tenancy—Effect of rule against perpetuities—Terms of new lease different from those of original lease.

By an agreement for a lease contained in a letter written by the plaintiffs to the defendant: "You to take the house for three, five, or seven years at the rent of £147 per annum, and to have the option of purchasing either the freehold for £2,900, or [of obtaining] a lease of ninety-seven years (ground rent £20) for £2,400." No formal document was executed by the parties embodying the terms. In 1908 the defendant entered into possession of the premises and after the expiration of seven years continued in possession as a yearly tenant. In May, 1922, the plaintiffs gave him notice to deliver possession of the premises in March, 1923, but he claimed to be entitled to exercise the option contained in the letter.

Held: the option, not being expressed to be subject to any limitation in time, continued in spite of the termination of the original term of seven years so long as the relationship of landlord and tenant existed between the parties; the option could not be read as giving only an option to the defendant personally or to his assignee and so only exercisable during the defendant's life, and, accordingly, the option to purchase was invalid as infringing the rule against perpetuities; an option to renew a lease, however, was not affected by the rule, and that was so although the fresh lease was in different terms from those of the original lease; and, therefore, the defendant was entitled to call for a new lease, but not to purchase premises.

Notes. Referred to: *Hutton* v. *Watling*, [1947] 2 All E.R. 641.

As to options to purchase and renew leases, see 23 Halsbury's Laws (3rd Edn.) 470 et seq; and for cases see 30 Digest (Repl.) 494 et seq. and 31 Digest (Repl.) 67–71.

A Cases referred to:

(1) *Moss* v. *Barton* (1866), L.R. 1 Eq. 474; 35 Beav. 197; 13 L.T. 623; 30 J.P. 243; 55 E.R. 870; 31 Digest (Repl.) 68, *2247*.

(2) *Hersey* v. *Giblett* (1854), 18 Beav. 174; 23 L.J.Ch. 818; 2 W.R. 206; 52 E.R. 69; 30 Digest (Repl.) 403, *464*.

(3) *Buckland* v. *Papillon* (1866), L.R. 1 Eq. 477; 35 L.J.Ch. 387; 13 L.T. 736; B 12 Jur.N.S. 155; affirmed, 2 Ch. App. 67; 36 L.J.Ch. 81; 15 L.T. 378; 12 Jur.N.S. 992; 15 W.R. 92, L.C.; 31 Digest (Repl.) 70, *2267*.

(4) *Re Leeds and Batley Breweries and Bradbury's Lease*, *Bradbury* v. *Grimble & Co.*, [1920] 2 Ch. 548; 89 L.J.Ch. 645; 124 L.T. 189; 65 Sol. Jo. 61; 31 Digest (Repl.) 61, *2179*.

C Also referred to in argument:

Woodall v. *Clifton*, [1905] 2 Ch. 257; 74 L.J.Ch. 555; 93 L.T. 257; 54 W.R. 7; 21 T.L.R. 581, C.A.; 30 Digest (Repl.) 495, *1395*.

Witness Action in which the plaintiffs, Rider & Son, claimed a declaration that the defendant was not, in the events which had happened, entitled to exercise an option contained in a letter written by the plaintiffs to the defendant in respect of D the purchase of the freehold of certain premises or the grant of a lease thereof for ninety-seven years. The facts appear in the headnote and the judgment.

G. B. Hurst, *K.C.*, and *Wilfred Hunt* for the plaintiffs.

Courthope Wilson, *K.C.*, and *Hodge* for the defendant.

RUSSELL, J.—This action is brought by the firm of Rider & Son against their E tenant, the defendant, to obtain a declaration that he is neither entitled to purchase the freehold of the house which he occupies, nor to call for a lease of the house. The words "have the option of purchasing a lease" in a letter dated June 4, 1907, are inaccurate because Messrs. Rider were the freeholders and there was no leasehold interest of ninety-seven years in existence which the defendant could purchase. The words really mean that the defendant should have the option, not only of F purchasing the freehold, but also of obtaining a demise of the premises for ninety-seven years at a particular ground rent in consideration of the payment of a premium of £2,400.

Is the defendant entitled in law to exercise either of these options? The plaintiffs say that such an option as this cannot be exercised after the original tenancy conferred by the document which gives the option has expired, and that, therefore, G the option is not exercisable by a tenant who holds over and becomes a tenant from year to year. On the other hand, cases have been cited in which quite a different view has been held of options to take a fresh lease of the premises, or, as it has been called, a renewal. For myself, I see no distinction in principle between the legal position of a tenant, who, having an option either to purchase the fee or to take a lease of the premises, holds over and becomes a tenant from year to year, H and that of a tenant who is in possession under the original lease and has what is called an option of renewal, or, in other words, an option to get a fresh lease of the premises on the same terms as those in the old lease.

The first case relied on by the defendant was that of *Moss* v. *Barton* (1), where in an agreement to let a house for three years at a yearly rent the landlord agreed to grant a lease at the same rent for five, seven, fourteen, or twenty-one years from I the end of the three years which expired in 1860. No formal lease was ever executed, but the plaintiff continued to occupy the premises and, four years after the expiration of the original term, claimed, in an action against the executors of his landlord, to exercise his option under the agreement. LORD ROMILLY, M.R., said:

"I am of opinion that the plaintiff is entitled to a decree. Under the original document, which was an agreement for a lease, the plaintiff is entitled to call on the defendants for specific performance, unless he has done something to bar his right, at any time afterwards. There was nothing to prevent his

continuing as tenant from year to year after the three years had expired, and the right to require a lease still existed."

By that I understand LORD ROMILLY to mean that the right to exercise the option continued so long as the relationship of landlord and tenant existed. The learned Master of the Rolls continued:

"The defendants say that they did not know of the original document, but they had notice of it by the plaintiff's application. Why did they not at the end of 1862 call on the plaintiff to exercise his option? They allowed him to continue in occupation, though they knew that the option continued till the agreement was carried into effect or waived. The case of *Hersey* v. *Giblett* (2) shows that a person entering into an agreement of that description may execute it at any time, if no time is stipulated for within which it is to be exercised, unless the landlord calls on him to do so and he makes default, in which case the landlord may determine the tenancy."

In *Buckland* v. *Papillon* (3) the defendant, who held a long lease of certain premises in Waterloo Place, London, agreed, by a memorandum dated Sept. 27, 1856, to let, and a Mr. Bloxam agreed to take, certain offices and cellars for a term of three years at a rent of £60 from Sept. 29, 1856. The memorandum then proceeded:

"And it is further agreed that the said John Papillon shall, whenever called upon to do so by the said George Frederick Bloxam, grant a lease to him at his, the said George Frederick Bloxam's expense, of the before-named offices and cellars at the rent of £60 per annum for a period of three years, seven years, or the remainder of the term from this date that the said John Papillon has at present in his power to grant, such lease to contain all the usual covenants. . . ."

Bloxam entered into possession of the premises and continued to occupy them until October, 1864, that is, five years after the expiration of the original term, without applying for a lease. Bloxam then became bankrupt and in the following December the assignee in bankruptcy sold his interest under the agreement to the plaintiff. The plaintiff took possession of the premises and shortly after, the defendant having served upon him a notice to quit, he filed a bill for specific performance of the agreement of Sept. 27, 1856. LORD ROMILLY, M.R., said (L.R. 1 Eq. at p. 480):

"I think that the original lessee who became bankrupt did nothing to disentitle himself to exercise the option he had of calling on the defendant to grant him such a lease as is stated in the agreement. I had recently to consider a similar point in *Moss* v. *Barton* (1), where I held that the fact of the lessee holding on with the consent of the lessor did not destroy the original agreement, or enable the lessor successfully to contend that it had been waived."

His decision was affirmed on appeal when LORD CHELMSFORD, L.C., said:

"Now upon the demurrer to this bill three questions were raised.—First, whether the bankrupt had not lost his right to call for a lease; . . . Upon the first point it was argued that the bankrupt had lost his right to demand a lease, in consequence of the lapse of time, and that the agreement was, in fact, for a lease of three years, with an option during that time to name a further term, and that, at the expiration of that term of three years, the right to demand a further lease was gone. Now, as to this, it must be observed that there was no limitation whatever of the time within which Bloxam was to exercise his option. If, during the course of three years, he had determined to have a lease for seven years, that would be from the date of the agreement, and he would only have it for the portion of time which remained to run. Undoubtedly, supposing that at the end of three years Bloxam had chosen to leave the place, that would have determined his option; but he continued in possession, and so became tenant from year to year, under the terms of the original agreement. I do not mean to include in those words the right to demand a lease,

A for that had nothing whatever to do with the tenancy from year to year; but I think that continuing in possession, with the sanction of the landlord, he was entitled to exercise the option. He had done nothing whatever to preclude him from demanding that lease at any time; and if the landlord wished to know upon what terms the tenant held, he might have called upon him to say whether he meant to have a lease or not. As the landlord did not choose to do B so, it appears to me that the time was unlimited in which the tenant could demand a lease. As long as he continued tenant with the sanction of the landlord, so long he retained his option."

Thus in *Moss* v. *Barton* (1), where the contract was to grant a lease on request, and no time was fixed within which the bequest was to be made, and in *Buckland* v. *Papillon* (3), where the contract was to grant a lease whenever called upon, it C was held that the right to exercise the option continued as long as the relationship of landlord and tenant continued between the person claiming to exercise the option and the person against whom it was claimed to be exercisable.

There are two options in the agreement in the present case and I cannot read into it any limit in point of time except that indicated by LORD CHELMSFORD in D *Buckland* v. *Papillon* (3), namely, that the option exists so long as the relationship of landlord and tenant continues, notwithstanding that the original term of seven years has run out. In fact *Buckland* v. *Papillon* (3) goes further than that, because there it was not the original person to whom the right was given that was seeking to exercise it but the assignee of his trustee in bankruptcy. The plaintiff relied on the decision of PETERSON, J., in *Re Leeds and Batley Breweries and Bradbury's* E *Lease* (4), where at first sight it seemed that this exact point had been decided, but on closer examination it is clear that that was not so. In that case the plaintiff had been the lessee of certain leasehold premises under a lease dated May 19, 1903, for a term of seven years. The lease contained a proviso that if the lessee desired to purchase the unexpired residue of the leasehold reversion, and should "at any time within six calendar months before the determination of this lease" give to the F lessors a written notice to that effect, then the person giving the notice should be the purchaser of the unexpired residue of the term at the price of £3,000. In February, 1910, the term created by the lease was extended for one year from June 1, 1910, so as to determine on May 31, 1911. At the end of the extended time the plaintiff continued in possession, becoming a tenant on sufferance, and, after payment of rent, a tenant from year to year. In November, 1919, eight years after G the original term had come to an end, the plaintiff gave the lessors notice of his intention to purchase the unexpired residue of the term of 999 years for £3,000. PETERSON, J., said:

"In the present case there was an option on the part of the lessee to purchase the reversion at any time six months before May 31, 1911. That was a conditional offer by the landlord, or a contract for sale on performance of a H condition, the condition being that six calendar months before May 31, 1911, the lessee should give notice in writing of his intention to purchase."

The learned judge held that in 1919 the option was no longer exercisable. That decision has no application to a case such as this where the option is not limited in time. In such a case the true view is, as is clear from the authorities to which I have referred, that an option unlimited in time exists so long as the relationship I of landlord and tenant continues. In my opinion, the defendant is entitled to exercise this option, but subject to any effect which the rule against perpetuities may have.

Counsel for the defendant in substance admits that the rule against perpetuities must render invalid the option to purchase the freehold unless the agreement is read as giving only an option to the defendant personally, or to an assignee of the defendant, only exercisable during the defendant's life. In my opinion, the agreement cannot be read in that way, and, therefore, I hold that the option to purchase the freehold is inoperative and invalid because of the rule against perpetuities.

As to the right to call for a lease of the premises the position is anomalous, but it is not disputed that under the authorities a covenant for what is called a renewal of the lease is outside the rule against perpetuities. It is argued that this is not a covenant for the renewal of a lease because the agreement in terms describes it as a right to purchase. That is merely a question of language and it is quite inaccurate to describe as a right to purchase a lease that which is really a right to call for a lease. It is further argued that although a right to renew a lease is outside the rule this is not such a right because it is a right to call for a lease in different terms from the original. But the right to renew is a right to call for a fresh lease. The new lease is the result of a fresh demise. Even if all the provisions in the fresh lease are word for word the same as in the old lease it is none the less a fresh demise and a fresh term with fresh covenants. I am unable to see any reason in law why the position as regards the rule against perpetuities should be any different in the case of a right to call for a lease even though the terms may not be in all respects the same as the terms of the original lease, and the case of a right to call for a lease in which every term may be word for word the same. In my opinion, the right to call for the lease of ninety-seven years, to run from the expiration of the existing tenancy, is not invalidated by the rule against perpetuities and may be exercised by the defendant, but he is not entitled to specific performance in the event of his exercising his option to purchase the freehold reversion.

Solicitors: *Sewell, Edwards & Nevill*; *Lawrance, Webster, Messer & Nicholls.*

[*Reported by* J. L. Denison, Esq., *Barrister-at-Law.*]

BAKER *v.* INLAND REVENUE COMMISSIONERS

[House of Lords (Viscount Cave, L.C., Viscount Haldane, Viscount Finlay and Lord Sumner), December 14, 17, 1923]

[Reported [1924] A.C. 270; 93 L.J.K.B. 211; 130 L.T. 513]

Stamp Duty—Conveyance on sale—Settlement—Settlement of real property—No valuable consideration—Substantial benefit conferred on grantee beyond what he gives—Valuable estates settled on family—Trifling allowance to settlor—Finance (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 74 (1) (5).

By a scheme, which was sanctioned by the court, a sum was raised out of settled property to be applied in the purchase from mortgagors of the life estate and certain policies on the life of the tenant for life. On the tenant in tail male coming of age he executed a disentailing assurance by which, with the consent of his father, the tenant for life, as protector, he disentailed the estates and vested the remainder in himself in fee simple. By a re-settlement, executed by him, it was provided that certain allowances of moderate sums should be made to him, the balance of the income going to the family, and the settlor then reserved to himself the first life estate in remainder, and after his death the estates were settled to the use of his sons successively in tail male and then to other members of the family, with the usual remainders in favour of different branches of the family and powers to jointure widows and give portions to younger children.

Held: (i) the words "conveyance or transfer" in s. 74 (1) of the Finance (1909–10) Act, 1910, included a settlement of real property; a conveyance, although for value, came within s. 74 (5) as lacking valuable consideration if it

conferred on the grantee a substantial benefit beyond what that grantee gave—in other words, if it was in substance a gift to the person taking under it after allowing for any consideration which he brought in; having regard to the value of the estates which the son settled on his descendants and the other members of the family and the trifling nature of the allowance which he obtained in return the re-settlement fell within the ambit of s. 74 (5) and was liable to be stamped with ad valorem duty as a conveyance or transfer on sale under Sched. I to the Stamp Act, 1891.

Decision of Court of Appeal, [1923] 1 K.B. 323, affirmed.

Notes. Applied: *Westmorland* v. *I.R.Comrs.*, [1928] 1 K.B. 703. Referred to: *Stanyforth* v. *I.R.Comrs.*, [1929] All E.R.Rep. 176.

As to stamp duty on voluntary dispositions, see 28 Halsbury's Laws (2nd Edn.) 475–477; and for cases see 39 Digest 284, 285. For Finance (1909–10) Act, 1910, see 21 Halsbury's Statutes (2nd Edn.), p. 762, and for Stamp Act, 1891, see ibid., vol. 21, p. 618.

Appeal by the trustees of a re-settlement, dated Aug. 26, 1915, from an order of the Court of Appeal (Lord Sterndale, M.R., Warrington and Younger, L.JJ.) reversing an order of Sankey, J., on a Case stated by the respondents pursuant to s. 13 of the Stamp Act, 1891, for the opinion of the court on the assessment of stamp duty by the respondents on the re-settlement.

The question in issue was whether the re-settlement was an instrument liable to ad valorem stamp duty as a conveyance or transfer operating as a voluntary disposition inter vivos within the meaning of s. 74 of the Finance (1909–10) Act, 1910. The respondents assessed the re-settlement with ad valorem stamp duty at £689 as being such a conveyance or transfer and with a deed stamp of 10s. as to which no question arose. The appellants contended that the re-settlement was executed by Francis Cayley in pursuance of a contract between himself and his father as protector of the settlement in good faith and for valuable consideration, that such execution was the price paid by him for his father's consent to a disentailing assurance (without which the re-settlement could not have been made), and also in consideration of the annual and other sums payable to him under the re-settlement, that the assent by Sir Everard Cayley as protector of the settlement was valuable consideration for the conveyance made by Francis Cayley, that the conveyance made by Francis Cayley was not a conveyance or transfer operating as a voluntary disposition inter vivos, and, further, that s. 74 of the Finance (1909–10) Act, 1910, was inapplicable to the re-settlement.

By s. 74 of the Finance (1909–10) Act, 1910:

"(1) Any conveyance or transfer operating as a voluntary disposition inter vivos shall be chargeable with the like stamp duty as if it were a conveyance or transfer on sale, with the substitution in each case of the value of the property conveyed or transferred for the amount or value of the consideration for the sale. . . . (5) Any conveyance or transfer (not being a disposition made in favour of a purchaser or incumbrancer or other person in good faith and for valuable consideration) shall, for the purposes of this section, be deemed to be a conveyance or transfer operating as a voluntary disposition inter vivos, and (except where marriage is the consideration) the consideration for any conveyance or transfer shall not for this purpose be deemed to be valuable consideration where the commissioners are of opinion that by reason of the inadequacy of the sum paid as consideration or other circumstances the conveyance or transfer confers a substantial benefit on the person to whom the property is conveyed or transferred."

Sankey, J., held that s. 74 applied to settlements of real estate, and that the re-settlement was a disposition inter vivos within the meaning of that section, but that it was a disposition in good faith, and for valuable consideration within sub-s. 5 of that section, and was, accordingly, not liable to ad valorem stamp duty. The Court of Appeal, reversing the judgment of Sankey, J., held, that there was ample

evidence to support the view of the commissioners that the conveyance conferred a substantial benefit upon the persons to whom the property was conveyed, and that the re-settlement was liable to ad valorem duty ([1923] 1 Q.B. 323). The trustees appealed to the House of Lords.

C. E. E. Jenkins, K.C., and *J. E. Harman* for the appellants.

The Solicitor General (*Sir Thomas Inskip*, K.C.), *Sir Leslie Scott*, K.C., and *G. T. Simonds*, for the respondents, were not called on to argue.

VISCOUNT CAVE, L.C.—The question raised in this appeal is whether a certain re-settlement of family estates should, or should not, be stamped with an ad valorem duty stamp under s. 74 of the Finance (1909–10) Act, 1910. The re-settlement in question came about in this way. Before and in the year 1913 certain estates stood settled to the use of Sir Everard Cayley for life, with remainder to his son Francis Cayley, then an infant under the age of twenty-one years, as tenant in tail male, with other remainders over in favour of members of the family. Sir Everard's life estate had, some years before, been mortgaged, with some policies on his life, to the Legal and General Assurance Society, and that mortgage had been foreclosed, so that both the life estate and the policies were the property of the assurance society, and there was, in substance, no income from the estates coming to the Cayley family.

In that state of affairs it was not unnatural that the parties should cast about for a means of producing a better state of things. In 1913 they applied to the Court of Chancery, which sanctioned a scheme under which there was raised out of the settled property, including capital moneys held on the terms of the Settled Land Acts, a sum of about £77,000 to be applied to the purchase from the assurance society of the life estate and the policies. It was at the same time provided that while Francis Cayley was an undergraduate at a university an allowance should be made to him, and that the net balance of income during his minority should be paid to his mother, Lady Mary Cayley, for the maintenance of herself, her husband and children. It was also provided that when Francis Cayley attained twenty and a half years of age an application should be made to the court with a view to the re-settlement of the estates. That scheme went through, and the purchase was carried out. Before Francis Cayley attained the age of twenty-one application was made to the court, and on the day when he attained that age an order was made by the court approving a proposed re-settlement of the Cayley estates. That order recited that Francis Cayley was himself desirous of making the re-settlement. The re-settlement was, accordingly, made, and was dated Aug. 25, 1915. Before the re-settlement was executed there was a disentailing assurance by which Francis Cayley as tenant in tail male, with the consent of his father as protector, disentailed the estates, and vested the remainder in himself in fee simple; and this disentailing assurance contained a covenant by Francis to re-settle the estates in the manner approved by the court. By it the life estate of Sir Everard Cayley was first dealt with, and it was provided that certain allowances should be made out of it to Francis Cayley, commencing at £250 a year, and increasing, first on his attaining the age of twenty-five to £300, and then on his marriage to £500 a year, and the balance of the income during Sir Everard's life, after keeping down the interest, premiums, and other payments, was to go to Lady Mary Cayley, to put it generally, for the benefit of the family. That disposed of the life estate. By the second testatum in the re-settlement Francis conveyed his remainder, which had then become a remainder in fee simple, to the ordinary uses in strict settlement, that is to say, he reserved to himself the first life estate in remainder, and after his death the estates were settled to the use of his sons successively in tail male, and then to other members of the family. There were the usual series of remainders in favour of different branches of the Cayley family, and the usual powers to jointure widows, and to give portions to younger children.

That is the re-settlement in respect of which the question is raised, whether or not it falls within s. 74 of the Act of 1910. The effect of s. 74 (1) of the Act of

1910, having regard to other provisions in the Finance Acts, is that a duty of one per cent. upon the value of the property conveyed is to be imposed on a conveyance or transfer of the character described in the subsection. I pass over sub-ss. (2), (3), and (4), and go on to sub-s. (5), which gives what may be called a definition of the expression "conveyance or transfer operating as a voluntary disposition inter vivos." That subsection provides:

> "Any conveyance or transfer (not being a disposition made in favour of a purchaser or incumbrancer or other person in good faith and for valuable consideration) shall, for the purposes of this section, be deemed to be a conveyance or transfer operating as a voluntary disposition inter vivos. . . ."

Stopping there for a moment, the effect of the subsection so far is that any conveyance or transfer not being a disposition for value, is to fall within s. 74 (1). I do not feel any doubt that the words "conveyance or transfer" there include a settlement of real estate, partly because, by the Stamp Act, 1891, which is to be read with this statute, it is provided (s. 62):

> "Every instrument, and every decree or order of any court or of any commissioners, whereby any property on any occasion, except a sale or mortgage, is transferred to or vested in any person, is to be charged with duty as a conveyance or transfer of property,"

and partly because I find both in sub-s. (4) and sub-s. (5) of s. 74 of the Act of 1910 expressions which show plainly that the expression "conveyance or transfer" primâ facie includes a settlement. Therefore, I think it clear that so far a deed of this character falls within the section, but subject to the observation that, if the deed is executed for valuable consideration, that brings it within the exception and so takes it out of the clause. There was some valuable consideration for this settlement. I do not myself hold—and here I am in agreement with what the Commissioners of Inland Revenue have found—that the consent of the protector is valuable consideration within those words. That consent was a condition necessary to the execution of the disentailing assurance, but it was not valuable consideration given to Francis Cayley. He did, however, take valuable consideration, because, as one of the terms of executing the re-settlement, he got an allowance for himself during his life commencing at £250 a year, increasing to £500, and he also got a power to jointure his widow, even during his father's lifetime, and a power to appoint portions to his younger children. Therefore, he did receive some consideration for his action in re-settling the estates.

Now I have to pass on to the second part of sub-s. (5), which has a bearing upon that state of things. The subsection proceeds:

> "and (except where marriage is the consideration) the consideration for any conveyance or transfer shall not for this purpose be deemed to be valuable consideration where the commissioners are of opinion that by reason of the inadequacy of the sum paid as consideration or other circumstances the conveyance or transfer confers a substantial benefit on the person to whom the property is conveyed or transferred."

I think that the meaning of that is that a conveyance, although for value, comes within the section if it confers upon the grantee a substantial benefit beyond what that grantee gives, or, in other words, if it is in substance a gift to the person taking under it after allowing for any consideration which he brings in. In such cases the conveyance does confer a benefit, that is to say a gift, on the person to whom the conveyance is made, and to that extent is to be treated as a voluntary disposition. The commissioners have, in their Case, said that this conveyance falls within the description in the latter part of sub-s. (5). They have said it in rather a strange way, because they have stated that they

> "were of opinion that, by reason of the inadequacy of the sum paid as consideration, and other circumstances, the conveyance conferred a substantial benefit upon the persons to whom the property was conveyed."

I think it unfortunate that they refer there to "the inadequacy of the sum paid," because there was no sum paid; but I read it as a finding that by reason of the circumstances of the case the conveyance did confer a substantial benefit on the persons to whom the property was conveyed, that is to say, to the persons who took estates under the settlement. Therefore, they have in fact given the opinion which is required of them by sub-s. (5) in order to bring the case within the section. It is suggested that this opinion is not subject to appeal. It is needless to deal with that point on principle because the commissioners have expressly referred the question to the court by providing in the Case that

> "if the court on the affidavits and orders is of opinion that there was ground for the commissioners coming to this conclusion the assessment is to be maintained."

Therefore, their finding in the Case is expressly left open to consideration by the court, and, on considering it, I feel bound to say that I agree with the finding. It is obvious to anyone that, having regard to the value of the estates which Francis Cayley settled upon his descendants and the other members of his family, and the trifling nature of the allowance which he obtained in return, the conveyance did confer a very substantial benefit upon the persons who took under the uses limited by the re-settlement. Therefore, I come to the conclusion to which the commissioners came. The result is that, in my opinion, they were right in holding that this re-settlement came within the ambit of s. 74 of the Act of 1910, and ought to be stamped with ad valorem duty, and, accordingly, that the order of the Court of Appeal should be affirmed.

There is one question of detail which I have to mention. Under s. 74 (1) the stamp is to be calculated upon the value of the property conveyed or transferred. We have had no argument whether the amount fixed by the commissioners as the value of the property conveyed is correct or not, but we have been informed by counsel for the respondents that the amount was fixed by reference to the value of the estates in possession after deducting all incumbrances, and deducting the value of the life estate of Sir Everard Cayley. So for that it is right, but a doubt occurred to your Lordships whether there should not also have been deducted the value of the life estate in remainder which Francis Cayley reserved to himself by the terms of the re-settlement. It is not necessary for your lordships to determine that point, because counsel for the respondents has agreed that, without conceding the general principle, which may have to be argued in another case, he is willing, in this case, to make that deduction, and to reduce the amount of the assessment accordingly. Your Lordships are, I understand, prepared to accept that suggestion, which is also satisfactory to the appellants, and, subject to that modification, I move your Lordships that the judgment be affirmed, and the appeal dismissed with costs.

VISCOUNT HALDANE.—I entirely agree, and but for a certain obscurity attending the course of the legislation with regard to the stamp in this case, I should not have thought it necessary to add anything. The Stamp Act, 1891, imposes duties which are set out in Sched. I upon various kinds of transfers. One of those duties relates to a "conveyance or transfer on sale" which is to be stamped ad valorem. Then there are settlements, and the definition of "settlement" is somewhat limited and may not extend to everything which, in popular terms, would be called a settlement, but there is inserted in the schedule a provision that a conveyance or transfer of any kind which has not been described under the head of a conveyance or transfer on sale is to bear a stamp, but only a 10s. stamp. When the very revolutionary Finance (1909–10) Act, 1910, was passed a section was introduced (s. 74) providing by sub-s. (1) that any conveyance or transfer operating as a voluntary disposition inter vivos was to be chargeable as if it were a transfer on sale. The section contained a further head (sub-s. (5)) which was introduced to prevent certain questions which it was thought might be raised by referring back to the Act of 1891. It was enacted that any conveyance or

A transfer which was not a disposition made in favour of a purchaser or incumbrancer should be deemed to be a conveyance or transfer operating as a voluntary disposition. So far that brings it at once under the new legislation contained in sub-s. (1). Then it goes on:

> "and (except in the case of marriage) the consideration for any conveyance or transfer shall not for this purpose be deemed to be valuable consideration [which might take it out of the category of being a voluntary disposition inter vivos, and make it a conveyance under a bargain] where the commissioners are of opinion that by reason of the inadequacy of the sum paid as consideration, or other circumstances the conveyance or transfer confers a substantial benefit on the person to whom the property is conveyed or transferred."

C That being so, if the commissioners are of opinion that a substantial benefit is conferred by the settlement under consideration, and that opinion is accepted, that gets rid of all questions which might arise under the earlier part of the legislation. I think that in this case the conveyance was one by which, by reason of the inadequacy of the consideration, and also because the whole transaction from the beginning, and in its substance, was a provision made by the son for the family D much more than for himself, a substantial benefit was conferred on those in whose favour the property was conveyed.

Whether or not it be possible legally to separate what was done by the order of 1913 from the subsequent transactions of 1915, I do not think that those transactions can be adequately interpreted without reference to what was done in 1913. In 1913 it was evident that an old family had got, by reason of the difficulties of E the father, the tenant for life of extensive settled estates, into a position of much financial complication, and a scheme was devised for getting rid of this. The father's life estate had passed into the hands of mortgagees, and the proposal, in order to effect the transactions required if the family position was in some measure to be restored, was to raise out of the fee of the estate, which, as the estate was then situated, was a fee tail in Francis Cayley, the eldest son, such moneys as F might enable the life interest to be bought back and dealt with, and the estate to be recouped by the purchase of certain policies on which, of course, premiums would have to be kept up out of the estate, but which would ultimately recoup what had been raised by mortgage. Accordingly, a scheme for this purpose, or rather the first part of the scheme, was approved in chambers by a judge of the Chancery Division. The rest of the scheme could not be carried out until the eldest son G had attained twenty-one, and was in a position to execute the necessary conveyances. When that time came, the father, who, although he had parted with his life estate, was still protector of the settlement, agreed to concur with the son in disentailing, and the terms of the transaction were that there should be a re-settlement. I have often wondered how the Court of Chancery got a jurisdiction as extensive as that which it has assumed in dealing with the property of infants. H It is quite true that the court always had a certain power of controlling the administration of an infant's property in his own interest. That is one thing. It is quite another thing to cut up that property, and take some of it away. But that has been done over and over again, and it is too late to-day to question the existence of a power exercised in this very far-reaching fashion. To interpose the interference of the court to sanction an arrangement under which an infant eldest son, I tenant in tail in remainder, is to concur in a settlement of the property is quite natural. By a tradition which has long obtained in this country it was a general custom, as soon as an eldest son came of age, that he, being tenant in tail, should concur with his father in a re-settlement under which he in his turn became the tenant for life with remainder to his eldest son, and there were the usual provisions for portions, possibly only in substance keeping alive those which already existed, or possibly adding to them. That was done because it was, in the contemplation of the court, considered to be an advantageous thing to carry on a family, and perpetuate the position of the eldest son as the owner of an estate in the mode

which was current in the country to which he belonged, and, accordingly, it was treated as a proper thing to sanction in the interest of the eldest son. But when the process of the re-settlement was extended further to taking a great interest out of the interest of a tenant in tail in remainder, then it became another matter, and it is there that my feeling of wonder at the extent to which the court has carried its jurisdiction in practice arises.

In this case, the son, Francis Cayley, behaved in a highly honourable manner. His father, mother, and brothers and sisters were in great straits, and he appears to have been very willing to help them, even at a sacrifice to himself. Accordingly, he concurred in a re-settlement, which doubtless carried out what had been contemplated from the beginning of the negotiations before 1913, when the first order in chambers was made, and he did a number of things. First of all, his father's life interest was re-purchased at the expense of the fee. Then it was settled so as to make a provision, and not a very large one, for himself, and also for his mother, which would enable the family to be kept free from great straits. Then he cut down his estate tail to an estate for life, but not before he had made other substantial provisions for his mother and for the other children of the family, and had left himself in a position by no means so good from the point of view of money as was the case before this re-settlement was entered upon. In these circumstances I think that the conveyance, when looked at, becomes one by which, by reason of the inadequacy of the consideration, and also because the whole transaction from the beginning, and in its substance, was a provision made by the son for the family much more than for himself a substantial benefit was conferred on those in whose favour the property was conveyed. If that be so then the case comes exactly within s. 74 (5) of the Finance Act, 1910. The commissioners, to whom, under the somewhat ambiguously-worded provision in that section, it is referred to determine what the character of the consideration is, have given an opinion. It is not necessary here to decide the extent to which it might be reviewed. It may be that it was thought that the matter was too intricate for a court of law to go into without inquiry, and that the commissioners themselves were the best and most proper people to inquire. It may well be that we have power, sitting as judges, to scan any error which we may deem to exist in point of law or in point of principle in the way in which they have approached the subject. It is not necessary to give any opinion upon that question in this case, for the commissioners are willing to deal with the assessment, and those who represent them have heard what your Lordships have had to say upon the subject. For these reasons I concur in the motion which has been proposed.

VISCOUNT FINLAY.—I am of the same opinion, and have very little to add. The Act of 1910 made a considerable change by providing in s. 74 (1) that any conveyance operating as a voluntary disposition inter vivos should be chargeable with the like stamp duty as if it were a conveyance on sale, substituting, of course, the value of the property for the amount of the consideration for the sale. That is the first provision in this rather long s. 74, which has to be considered in the present case. The other part of that section which requires consideration is sub-s. (5) and that, for present purposes, I think may be divided into two parts. The first consists of the opening words:

> "Any conveyance or transfer (not being a disposition made in favour of a purchaser or incumbrancer or other person in good faith and for valuable consideration) shall, for the purposes of this section, be deemed to be a conveyance or transfer operating as a voluntary disposition inter vivos."

That is a general provision from which are excepted dispositions made in good faith and for valuable consideration. The first question which came before the commissioners was whether the conveyance by Francis Cayley fell within that exception of conveyances for valuable consideration and in good faith. They held that it was not a conveyance in favour of a purchaser or incumbrancer or other person in good faith and for valuable consideration, giving as their reason that

the conveyance disposed of the property conveyed in accordance with his own wishes, and not in accordance with any directions given to him by any person giving him value for the right so to direct. I am not able, upon the materials before me, to agree with that conclusion. For the reasons which the LORD CHANCELLOR has given, I think that the conveyance was one for valuable consideration, and, of course, it was in good faith.

That disposes, so far as the present case is concerned, of the first part of sub-s. (5), but the real pinch of the case arises on the second portion of the subsection, which begins by saying what is to be deemed to be a conveyance or transfer operating as a voluntary disposition inter vivos, and then goes on:

> "and (except where marriage is the consideration) the consideration for any conveyance or transfer shall not for this purpose be deemed to be valuable consideration where the commissioners are of opinion that by reason of the inadequacy of the sum paid as consideration or other circumstances the conveyance or transfer confers a substantial benefit on the person to whom the property is conveyed or transferred."

The first observation which I wish to make is this. The exception of the case in which marriage is the consideration indicates, to my mind, very clearly that it was not intended to except settlements from the operation of this clause. We were pressed with an argument upon that point, but it seems impossible to suppose that where the thing took the shape of a settlement the section was not to operate if the conditions were satisfied, and the fact that marriage is mentioned as an excepted case shows that settlements must have been in consideration. But then the clause goes on to confer a certain power upon the commissioners with regard to the adequacy of the consideration. I confess that I have very considerable doubt whether the full extent of those words as they appear in the section was appreciated at the time when it was passed into law. As soon as you have a provision that voluntary conveyances shall be subject to the same duty as if they were on sale the question arises: What will happen supposing that a sum is mentioned as a consideration, but it is an inadequate sum? It is perfectly clear that if no provision were made to meet that case there might be wholesale evasion of the provision; some sum which was not a mere nominal sum, but was a wholly inadequate consideration might have been inserted, and unless that case had been dealt with, the provisions of the Act might have been altogether nugatory. The latter part of the section was inserted for that purpose. Many people might have been disposed at first sight to read this provision as merely intended to prevent such inadequate consideration being put in for the purpose of evading the Act. Some power in the commissioners to deal with such cases was obviously necessary. I very much doubt whether it was intended to give a power to weigh the benefits obtained under the ordinary case of a re-settlement on the eldest son coming of age, or any family circumstances occurring which made a re-settlement desirable, but what we have to deal with is the words used, and I think it is impossible to escape from the wide words there employed. The commissioners have devolved upon them the duty of forming an opinion whether

> "by reasons of the inadequacy of the sum paid as consideration or other circumstances the conveyance or transfer confers a substantial benefit on the person to whom the property is conveyed or transferred."

I concur in what VISCOUNT CAVE, L.C., has said as to the form in which the opinion of the commissioners on this point is expressed. The circumstances which they had in their minds are not stated, that is to say, they merely copied the words of the Act, changing the word "or" into "and." The Act provides for the case of inadequacy of the sum paid as consideration *or* other circumstances, and the finding of the commissioners is that they were of the opinion that "by reason of the sum paid as consideration *and* other circumstances" the conveyance conferred a substantial benefit on the persons to whom the property was conveyed. I think that it would have been more satisfactory if the circumstances on which they

relied had been stated. I have no doubt that they had in their minds the fact that Francis Cayley made a very considerable sacrifice in this arrangement for the benefit of the family. Whether it was intended or not, I think that the commissioners have undoubtedly the power, if it be their opinion that "substantial benefit is conferred upon the persons to whom the property is conveyed," of passing in review, so to speak, the terms of such a settlement, and seeing how far it conferred substantial benefits on certain persons. That being so, I think it impossible to say that the section did not give them power to do what they did. I confess that it is with considerable reluctance that I have arrived at this conclusion, but I do not think on the whole, after consideration, that there is any escape from the words of the subsection.

LORD SUMNER.—I concur.

Appeal dismissed.

Solicitors: *Gibson & Weldon*, for *Tasker, Hart & Munby*, Scarborough; *Solicitor of Inland Revenue.*

[*Reported by* W. C. Sandford, Esq., *Barrister-at-Law.*]

Re WHITBURN. WHITBURN *v.* CHRISTIE

[Chancery Division (Sargant, J.), January 11, 12, 1923]

[Reported [1923] 1 Ch. 332; 92 L.J.Ch. 362; 129 L.T. 449; 39 T.L.R. 170; 67 Sol. Jo. 276]

Will—Heirloom—Gift to accompany realty strictly settled—Disposition of realty—Effect on trusts concerning heirlooms.

Where heirlooms are bequeathed to accompany real estate strictly settled and the real estate is subsequently disposed of by voluntary deed inter vivos, the trusts declared concerning the heirlooms are not revoked or affected by the disposition, and the heirlooms are still held on the trusts declared by the will.

Darley v. *Langworthy* (1) (1774), 3 Bro.P.C. 359, followed.

Martineau v. *Briggs* (2) (1875), 23 W.R. 889, and *Re Towry's Settled Estate* (3) (1889), 41 Ch.D. 64, distinguished.

Notes. As to failure of a gift in a will, see 24 Halsbury's Laws (2nd Edn.) 126 et seq.; and for cases see 44 Digest 403 et seq.

Cases referred to:

(1) *Darley* v. *Darley* (1767), Amb. 653, L.C.; reversed sub nom. *Darley* v. *Langworthy* (1774), 3 Bro. Parl. Cas. 359; 1 E.R. 1369, H.L.; 44 Digest 946, *8011.*

(2) *Lady Langdale* v. *Briggs, Ex parte Lady Bacon, Ex parte Martineau* (1873), 28 L.T. 467; sub nom. *Langdale* v. *Briggs, Martineau* v. *Briggs, Martineau* v. *Chambers*, 21 W.R. 620; affirmed sub nom. *Martineau* v. *Briggs* (1875), 45 L.J.Ch. 674; 23 W.R. 889, H.L.; 44 Digest 558, *3741.*

(3) *Re Towry's Settled Estate, Dallas* v. *Towry* (1889), 41 Ch.D. 64; 58 L.J.Ch. 593; sub nom. *Re Towry, Dallas* v. *Law*, 60 L.T. 715; 37 W.R. 417, C.A.; 44 Digest 384, *2194.*

(4) *Wesselenyi* v. *Jamieson*, [1907] A.C. 440, H.L.; 44 Digest 865, *d.*

(5) *Re Fowler, Fowler* v. *Fowler*, [1917] 2 Ch. 307; 86 L.J.Ch. 547; 117 L.T. 500; 33 T.L.R. 287; on appeal, [1917] 2 Ch. at p. 324, C.A.; 44 Digest 945, *8005.*

(6) *Re Cornwallis, Cornwallis* v. *Wykeham-Martin* (1886), 32 Ch.D. 388; 55 L.J.Ch. 716; 54 L.T. 844; 35 Digest 705, *61.*

Also referred to in argument:

Agnew v. *Pope* (1857), 1 De G. & J. 49; 29 L.T.O.S. 170; 3 Jur.N.S. 625; 5 W.R. 512; 44 E.R. 640, L.C. & L.JJ.; 44 Digest 327, *1588.*

Lord Carrington v. *Payne* (1800), 5 Ves. 404; 31 E.R. 652; 44 Digest 325, *1569.*

Adjourned Summons.

By his will, dated Sept. 28, 1900, the testator gave and bequeathed all his household plate, furniture, linen, china, pictures, books and other household effects which should at his death be in or about his mansion house at Addington Park to his trustees in trust to permit his wife to have the use and benefit thereof during her widowhood and afterwards in trust

> "to permit the same to be held or enjoyed as heirlooms by the person or persons for the time being entitled to the said capital messuage or mansion house under the limitations herein declared and contained or as nearly as the rules of law and equity will permit, but so that the said heirlooms shall not vest absolutely in any person hereby made tenant in tail by purchase of the said capital messuage or mansion house unless he or she shall attain the age of twenty-one years."

He devised his Addington Park estate to his trustees in trust to permit his wife to occupy and enjoy it during widowhood, and, subject thereto, he directed his trustees to stand possessed thereof in the case of the plaintiff, C. W. S. Whitburn, for life without impeachment of waste with remainder to his sons successively according to seniority in tail general with similar remainders for his daughters with remainder to Mrs. Christie for life without impeachment of waste with divers remainders over. In 1910, the testator by two voluntary deeds settled Addington Park on different uses thus rendering the devises thereof in his will inoperative. This summons was taken out raising the question whether the trusts declared by the will concerning the household effects were effected by the dispositions made by the two voluntary deeds.

Ashworth James for the plaintiff.
Humphrey H. King for the trustee under the voluntary deeds.
Bryan Farrer for Mrs. Christie.
Charles Church for Mrs. Christie's son and grandson.
C. A. Bennett for the persons entitled to residue.

SARGANT, J.—The question which I have to determine is whether the gift in remainder made by the will of the testator of his household furniture, plate, china, linen, pictures, books and other household effects which at his death were in or about his mansion house of Addington Park was affected by the disposition made by the two documents executed after the date of the testator's will, and before his death. [His Lordship stated the facts, and continued:] The effect of the two voluntary deeds was to take the Addington Park estate entirely outside of the operation of the will and to render the will ineffective as regards it. On that the question has arisen whether the result of the devises of the real estate having become inoperative by reason of the execution of the voluntary deeds is also to render the will inoperative on the chattels which were directed by the will to be held to be enjoyed by the persons entitled to the mansion house under the limitations declared in the will. The matter has been very fully argued, and I think that no useful purpose will be served by my reserving judgment.

A number of cases have been cited dealing with very similar questions, but they seem to me to differ in one vital respect. In each of these there have been similar gifts by will and a subsequent alteration occasioned not by a deed executed by the testator but by a codicil. The cases to which I refer in particular are *Martineau* v. *Briggs* (2), a case in the House of Lords, and *Re Towry's Settled Estate* (3), a case in the Court of Appeal. In *Martineau* v. *Briggs* (2) there was a devise of

freehold estates in strict settlement, and then a corresponding gift of the copyhold estates and leasehold estates

> "upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisoes, and declarations as, regard being had to the different natures of the respective properties, will best or nearest correspond with the uses, trusts, intents, purposes, powers, provisoes, and declarations hereinbefore expressed and contained of and concerning the freehold manors, hereditaments, and premises hereinbefore devised."

Then by a codicil there was an alteration of the uses declared with regard to the freehold estates. The House of Lords held (affirming the decision of WICKENS, V.-C.):

> "That although it was probable from the circumstances that the testator intended his copyhold and leasehold estates to follow the limitations of his freeholds as declared in the codicil, still, as there were no words in the codicil to give effect to such an intention, the court would not supply them, and that the copyhold and leasehold estates passed according to the trusts originally declared in the will."

In construing the will, LORD CAIRNS based his judgment on the view that, although the leaseholds and copyholds were in terms given on trusts corresponding to the freeholds, yet that was merely a short method of repeating with regard to those estates the use or uses corresponding to those which had been declared concerning the freehold estates. He thought that there was no expression in the will which necessarily united the enjoyment of the copyhold and leasehold estates with that of the freehold estates. That being so, there was no reason to construe the codicil as intending to do more than the codicil was expressed to do—namely, to alter the limitations of the will with regard to the freehold property. That was the effect of that case and the reasoning on which it was decided.

On the other hand, in *Re Towry's Settled Estate* (3), there was a gift very similar to the gift in the present case of chattels to be enjoyed by the persons who should for the time being be entitled to a certain mansion house which had been settled in strict settlement, and the devolution of the settled estate was afterwards altered by a codicil. The court came to the conclusion that there was such an intention shown by the will to unite the enjoyment of the chattels with the ownership of the real estate, that the total intention to be inferred from the will and codicil together was to alter the trusts of the chattels in a manner corresponding with the express alteration of the uses of the freehold hereditaments in connection with which they were to be enjoyed. Here, if what the testator had done by his two voluntary deeds had been effected by a codicil, I am inclined to think that I should have decided that the result of the total testamentary disposition would have been in accordance with the decision in *Re Towry's Settled Estate* (3); because I should have thought that the testator, having made the disposition that he did of his real estate, and having made the corresponding disposition of his personal estate with an express, or sufficiently indicated, intention to unite the enjoyment of the one with the other, must, when he came by his codicil to alter the disposition of his real estate, have intended to make a corresponding alteration of his disposition of his personal chattels. But, in fact, something very different from that has happened. The testator made the alteration in question, not by codicil, not by a document which was capable of altering his testamentary disposition at all, but by a document inter vivos.

That being so, I am faced with a problem different from that which had been solved by the House of Lords in *Martineau* v. *Briggs* (2), or by the Court of Appeal in *Re Towry's Settled Estate* (3). The problem is not what was the ultimate testamentary disposition of the testator, but what was the effect of a deed inter vivos on a testamentary disposition that had been previously made. For this purpose, it seems to me that no importance is to be attached to the fact that the alteration was made under these voluntary deeds by the testator himself, but that

the subject must be treated exactly as if the alteration had been made by somebody other than the testator; that is, by somebody who might have had, for instance, an overruling power of appointment over the property. I have been pressed by counsel for the persons entitled to the residue with the argument that the real estate must be considered as the principal subject-matter dealt with by the testator, and that the personal chattels were to be considered as an accessory subject-matter bequeathed for the purpose of being enjoyed together with the real estate. But, in my judgment, that does not determine the question in favour of those who claim that the gift of the accessory subject-matter has been revoked because the gift of the principal subject-matter has been revoked. The two gifts are gifts which, though interdependent, are in fact separate gifts. I have to construe the language employed by the testator with reference to the chattels. The testator bequeathed them

> "In trust to permit the same to be held and enjoyed as heirlooms by the person or persons for the time being entitled to the said capital messuage or mansion house under the limitations herein declared and contained."

Does that mean that they were to be enjoyed by the persons named expressly or by reference "under the limitations herein declared and contained," or that they were to be enjoyed by the persons entitled under the limitations not merely by virtue of the will alone, but also by virtue of any other document or fact affecting the devolution of the property? In my judgment, on the ordinary principles of construction of a will, it is the former interpretation that has to be adopted.

It appears to me that the cases which have been cited, *Wesselenyi* v. *Jamieson* (4), *Re Fowler* (5), and *Re Cornwallis* (6), all point in that direction. They are not precisely similar to this case for the reason that they deal with facts which happened after the death of the testator and after the will had become operative. But, in my judgment, that is not a sufficient reason why the same principle should not be applied. Moreover, there is one case of the highest authority which, as it appears to me, is precisely in favour of the view to which I am coming. That is *Darley* v. *Langworthy* (1). In that case, one Vincent Darley had devised lands to his wife for life, with remainder in settlement. Besides the freehold estates, he was entitled to certain property called Bonds Walls for a long term of years and also to certain chattels. By his will, after reciting that he was entitled to a messuage or tenement called Bonds Walls, lying contiguous and adjoining his freehold estate called Battens for the remainder of a term of 900 years, he directed his trustees and executors

> "to grant and assign the same tenement unto some person or persons in trust, if it could or might be done by any ways or means whatsoever, that the same might go unto, and always during the remainder of the said term be enjoyed by the owner or possessor of Battens for the time being, and not to be separated therefrom, as long as the said term should last; and the testator gave to his said wife, the appellant, the rents, issues, and profits of all his chattel estates for so many years as she should live, if the terms therein so long continued, and she should choose to reside at Battens aforesaid. And he also gave to his wife, and Richard Welsh, all the rest of his goods, chattels and personal estate,"

and then he appointed executors. After the date of his will the testator suffered a recovery of the real estate called Battens. The first question that arose was whether the recovery that he had suffered was a revocation of his will so far as Battens was concerned; and it was decided by the Court of Common Pleas that it was. So that there was in that case almost precisely the same set of circumstances as occurred here, namely, a devise of real estate in strict settlement, an express annexation of the chattels and leasehold term to the real estate, obviously as an accessory to the principal, and a subsequent cancellation or revocation of the will, so far as the real estate was concerned, not by a testamentary revocation, but by an act inter vivos. That being so, the question arose whether the revocation of the

will effected as regards the real estate by the recovery, also operated to revoke the gift of the chattels and the personal estate. That question went to the House of Lords on appeal from the Court of Chancery. The argument is very clearly put (3 Bro. Parl. Cas. at p. 364) in favour of the revocation of the chattel interests:

> "The devise, therefore, of Battens, the principal, being revoked by the recovery, the bequest of the chattel interests, the accessories must fall with it; and there would consequently have been an intestacy as to them as well as Battens, but for the residuary bequests, under the trusts of which the respondent was become entitled to them, by having attained his age of twenty-one."

Unfortunately, no reasons are given for the decision of the House of Lords, but the result was:

> "It was ordered and adjudged that so much of the decrees therein complained of, as declared, that the bequest of the leasehold estate called Bonds Walls, and of all the testator's chattel estate, and the use of his household goods, plate, and furniture at Battens, and his live and dead stock, became consequentially revoked by the common recovery suffered of Battens; and the directions given by the decree, pursuant to such declaration, should be reversed: and it was declared that the appellant was entitled to the benefit of the said bequests, discharged from the condition of living at Battens, which the common recovery had put out of her power."

It appears to me that that is a decision of the highest authority which completely covers the present case. It shows that, although the bequest of chattels to be enjoyed together with the real estate may be of the nature of an accessory gift to be enjoyed with the principal gift, yet if the revocation of the principal gift is made by the voluntary act of the testator himself, that act not being testamentary, the result will be that the bequest of the accessory will not be revoked together with the devise of the principal, but will stand.

That being the state of the authorities, it seems to me that I must declare that the trusts declared by the will concerning the chattels in question were not revoked or affected by the disposition made by the two voluntary documents, and that the chattels are still held on the trusts declared by the will.

Solicitors: *Bischoff, Coxe, Bischoff & Thompson*; *James & James*; *Bird & Bird.*

[*Reported by* L. Morgan May, Esq., *Barrister-at-Law.*]

A

BALLANTINE & CO. *v.* CRAMP AND BOSMAN

[KING'S BENCH DIVISION (McCardie, J.), April 18, 1923]

[Reported 129 L.T. 502; 16 Asp.M.L.C. 224]

B *Sale of Goods -Rejection—Instalment contract—Average weight of goods not to exceed 60 lb.—One shipment over average weight.*

By a contract dated Dec. 8, 1920, the sellers sold to the buyers about 2,500 carcases of frozen meat, the weight to be under 72 lb., and the average not to exceed 60 lb. Each month's or steamer's contract was to be considered a separate contract, and payment was to be made against documents on arrival C of the steamer at the port of discharge. The sellers shipped the carcases on two vessels, the *W.* which arrived on Aug. 14, 1921, and the *P.C.* which arrived in October, 1921. The *W.* contained 1,092 carcases of average weight of 62·81 lb. The average weight of the carcases on the *P.C.* was 53·43 lb. The average weight of the whole quantity shipped was under 60 lb. The buyers rejected the carcases shipped on the *W.* on the ground that their average D weight was over 60 lb.

Held: the words "average not to exceed 60 lb." constituted part of the description of the goods; the object of the words "each month's or steamer's contract to be considered a separate contract" was to provide that these might be different stages of performance, so the contract was, in substance, an instalment contract under the Sale of Goods Act, 1893; and, therefore, the sellers E must comply at each stage of the performance with their obligations, and the buyers were entitled to reject the carcases shipped on the *W.*

Notes. As to sales of goods by description, see 29 HALSBURY'S LAWS (2nd Edn.) 59 et seq.; and for cases see 39 DIGEST 432 et seq.

Cases referred to:

F (1) *Manbre Saccharine Co.* v. *Corn Products Co.*, [1919] 1 K.B. 198; 120 L.T. 113; sub nom. *Mambre Saccharine Co.* v. *Corn Products Co.*, 88 L.J.K.B. 402; 35 T.L.R. 94; 24 Com. Cas. 89; 39 Digest 576, *1807*.

(2) *Re Moore & Co., Ltd., and Landauer & Co.*, [1921] 2 K.B. 519; 90 L.J.K.B. 731; 125 L.T. 372; 37 T.L.R. 452; 26 Com. Cas. 267, C.A.; 39 Digest 433, *621*.

G (3) *Jackson* v. *Rotax Motor and Cycle Co.*, [1910] 2 K.B. 937; 80 L.J.K.B. 38; 103 L.T. 411, C.A.; 39 Digest 451, *787*.

(4) *Aitken, Campbell & Co., Ltd.* v. *Boullen and Gatenby*, 1908 S.C. 490; 39 Digest 567, *t*.

(5) *Molling & Co.* v. *Dean & Son, Ltd.* (1901), 18 T.L.R. 217, D.C.; 39 Digest 585, *1870*.

H (6) *Polenghi Bros.* v. *Dried Milk Co., Ltd.* (1904), 92 L.T. 64; 53 W.R. 318; 21 T.L.R. 118; 49 Sol. Jo. 120; 10 Com. Cas. 42; 39 Digest 456, *833*.

(7) *Biddell Bros.* v. *E. Clemens Horst Co.*, [1911] 1 K.B. 214; 103 L.T. 661; 27 T.L.R. 47; 55 Sol. Jo. 47; 16 Com. Cas. 14; reversed, [1911] 1 K.B. 934; 80 L.J.K.B. 584; 104 L.T. 577; 27 T.L.R. 331; 55 Sol. Jo. 383; 12 Asp.M.L.C. 1; 16 Com. Cas. 197, C.A.; reversed sub nom. *E. Clemens* I *Horst Co.* v. *Biddell Bros.*, [1912] A.C. 18; 81 L.J.K.B. 42; 105 L.T. 563; 28 T.L.R. 42; 56 Sol. Jo. 50; 12 Asp.M.L.C. 80; 17 Com. Cas. 55, H.L.; 39 Digest 575, *1801*.

(8) *Reuter* v. *Sala* (1879), 4 C.P.D. 239; 48 L.J.Q.B. 492; 40 L.T. 476; 27 W.R. 631; 4 Asp.M.L.C. 121, C.A.; 39 Digest 426, *566*.

(9) *Brandt* v. *Lawrence* (1876), 1 Q.B.D. 344; 46 L.J.Q.B. 237; 24 W.R. 749, C.A.; 39 Digest 425, *565*.

Special Case Stated under R.S.C., Ord. 34.

By a contract in writing dated Dec. 8, 1920, the plaintiffs sold to the defendants

and the defendants agreed to buy from the plaintiffs certain frozen meat on the following terms:

Quantity	...	About 2,500 carcases.
Description	...	New Zealand wethers and maiden ewes. (First grade of the brand or brands shipped.)
Weight	...	Under 72 lb. Average not to exceed 60 lb.
Price	...	8¾d. per lb. c.i.f. London.
Shipment	...	Not later than June 30, 1921.

The contract was a typewritten form filled up as to quantity, description, weight, price and shipment as above set out, and thereon were the following terms signed at the foot by the plaintiffs and signed as confirmed by the defendants.

"Each month's or steamer's contract to be considered as a separate contract. Insurance to be effected under conference clauses for not less than 2 per cent. above invoice value (strikes, riots, civil commotions, and war risks excepted and at buyer's risk and charge). Payment nett cash against documents on arrival of steamer or steamers at port of discharge or approximate due date thereof, ship lost or not lost, on Colonial (shipping) weights. Colonial weights and grading for quality to be accepted as final with all liberties as per bill of lading. This contract is subject to force majeure and strikes. Not liable for non-delivery or delay due to fires, strikes, lock-outs, breakdowns, war government, or government's action. Any disputes arising under this contract to be settled by private treaty if possible, failing which by arbitration in the usual manner. Notice of claims (if any) to be handed to us in writing within twenty-one days after final discharge of vessel carrying the goods.—L. C. Ballantine & Co.—We confirm the above, Cramp and Bosman."

By letters dated May 6 and 30 and June 6, 1921, the plaintiffs notified to the defendants shipments against the contract per steamship *Whakatane* and steamship *Port Caroline* subject to revision on receipt of documents, and the plaintiffs in fact shipped from New Zealand goods in purported compliance with such contract in the following manner:

Date	Ship	Quantity	Weight, lbs.	Average per Carcase
1921				
May 11 } June 10 }	Steamship *Whakatane* ...	1,092	68,597	62·81
May 23	Steamship *Port Caroline* ...	1,494	79,820	53·43
	Total	2,586	148,417	57·77

The carcases shipped on the steamship *Whakatane* were shipped under bills of lading dated as follows:

Date	Number of Carcases	Weight, lbs.	Average per Carcase
May 11, 1921	110	7,438	67·61
May 11, 1921	117	6,238	53·31
June 10, 1921 ...	428	25,943	60·61
June 10, 1921 ...	402	27,317	67·95
June 10, 1921 ...	35	1,661	47·46
Total	1,092	68,597	62·81 av.

The steamship *Whakatane* arrived in London on or about Aug. 14, 1921, and on Aug. 15, 1921, the plaintiffs twice tendered the shipping documents relating to the said shipment to the defendants and required the defendants to pay £2,500 18s. 7d., the price of the same. The defendants refused to take up the documents or pay for the goods comprised in such shipment on the ground alleged in a letter from the defendants to the plaintiffs dated Aug. 16, 1921, that the average weight of the goods was above 60 lb., being the average weight stipulated in the contract and that the tender was, therefore, a bad tender. The defendants did not rely on any other ground for claiming to repel the tender. The plaintiffs contended that the tender was a good tender, and, after notice to the defendants, sold the goods which realised nett, £1,990 17s. 4d. The steamship *Port Caroline* arrived in London on Oct. 4, 1921, and on or about that date the plaintiffs tendered the shipping documents relating to that shipment to the defendants. The defendants duly took up the documents and paid the price to the plaintiffs. The wholesale prices current in mid-August, 1921, for frozen New Zealand sheep were shown in the printed list of weekly quotations issued by the British Incorporated Society of Meat Importers dated Aug. 19, 1921, which list was annexed to and formed part of the Case. In consequence of the defendants' refusal to accept the tender of the documents referred to above, arbitrators and an umpire were appointed with a view to arbitration in pursuance of the contract. Subsequently, however, the parties agreed that the dispute should be determined by the court, and that a Case should be stated for the opinion of the court under R.S.C., Ord. 34. The questions for the opinion of the court were: (i) Whether on the true construction and effect of the contract and in the events above stated the defendants were entitled to reject the tender. If the court should be of opinion in the negative of question (i) then judgment should be entered for the plaintiffs for £510 1s. 3d., and costs to be taxed. (ii) If the defendants' contention were held to be right, whether on the true construction and effect of the contract and in the events stated the plaintiffs were entitled to recover from the defendants pro rata damages in respect of such of the consignments made on the steamship *Whakatane* the average weight of which was under 60 lb. If the court should be of opinion in the affirmative of question (i) and the negative of question (ii) then judgment should be entered for the plaintiffs for £20 9s. 1d. with costs to be taxed.

P. B. Morle for the plaintiffs, the sellers.

T. E. Haydon for the defendants, the buyers.

McCARDIE, J., stated the facts and continued: The serious question at issue is whether or not the buyers were entitled to refuse the tender of the *Whakatane* documents and goods. The argument for the sellers is that the court must look, not at the average weight of the goods on board the *Whakatane*, but must look also at the average weight of the goods on the *Port Caroline* which arrived a couple of months later. The buyers, on the other hand, say that, on the proper interpretation of this bargain, regard must be had to the average weight of the meat on the *Whakatane* as tendered to them in August, 1921. The point at issue, in my view, is not peculiar to this contract at all, because it is one that is common to a vast number of contracts of this description. The question is, what is the proper meaning of this bargain? In the first place I take it to be clear that the words "average not to exceed 60 lb." constitutes a part of the description of the goods. That seems clear on *Manbre Saccharine Co.* v. *Corn Products Co.* (1) ([1919] 1 K.B. at p. 207), and *Re Moore & Co., Ltd. and Landauer & Co.* (2) ([1921] 2 K.B. at p. 524).

The next question is whether this contract is to be deemed a divisible contract and divisible in the sense that, with respect to each part of the contract, each stage of performance, the sellers must comply with their obligations. In my view, this contract is, in substance, an instalment contract. The effect of the words "each month's or steamer's contract to be considered as a separate contract" is to provide that, under the one contract, there may be different stages of performance. It is

for practical purposes to be deemed an instalment contract within s. 31 of the Sale of Goods Act, 1893. With regard to a contract of that description, I think it is rightly described in BENJAMIN ON SALE OF GOODS (6th Edn.), p. 816, as a contract which is a contract for the whole quantity, though it is divisible in performance. If it be a divisible contract, then there arises a question as to the obligations of the vendors with regard to each stage of the performance, and, in my opinion, the burden rests on the vendor, if he elects, as he may, to fulfil his contract by different steamers, to provide that the shipment on each steamer shall comply with the requirement that the average is not to exceed 60 lb. Unless that effect be given to it, I am unable to see how the contract could satisfactorily work in practice. It is to be noticed that the last clause of the contract is "Notice of claims (if any) to be handed to us in writing within twenty-one days after final discharge of vessel carrying the goods," and it is very difficult to see how that clause could apply at all if the contention of the vendors is correct. Further, if one takes another illustration, namely, the case where goods are delivered in five instalments, it would be of interest to reflect on the position of the buyer if the contention of the vendors is correct. Suppose the first instalment was 65 lb., the second, third and fourth instalments a like weight, what is the buyer to do? Is he merely to hope that the average may conceivably be made up by the fifth instalment to be delivered by the vendor? Quite apart from such an illustration as that, it seems to me that one must look at the practical working of this matter. The buyer would re-sell; he would make a sale to arrive. And it seems to me that if, as is quite common, those re-sales are to be made, the buyer would require with respect to each shipment the fulfilment of the obligation that the average is not to exceed 60 lb. Both on the wording of the contract and on the practical considerations applicable to it, illustrated by what I have just said, I am of opinion that the buyers were right in this case in rejecting the goods.

I do not think I need refer to the points which were discussed in the very interesting and able argument of counsel for the sellers as to the position of the buyers if they were not entitled to reject any one cargo on the ground that the average was not in accordance with the contract but were bound, as he suggests, to keep over the right of rejection until the last of the instalments had been delivered. The impracticability of that is obvious when, as pointed out by counsel for the buyers, it is seen that the period for shipment by the vendor may range from December, 1920, until the end of June, 1921. Various decisions have been quoted before me on this point. I shall not discuss them in detail. There is first of all the English case of *Jackson* v. *Rotax Motor and Cycle Co.* (3). Then the Scottish case of *Aitken* v. *Boullen* (4), and also *Molling & Co.* v. *Dean & Son, Ltd.* (5). I mention those cases because I think it is desirable that it should be known that they have been referred to in the argument before me, and I also for that purpose only mention *Polenghi Bros.* v. *Dried Milk Co., Ltd.* (6) (10 Com. Cas. at p. 42). *Biddell Bros.* v. *E. Clemens Horst Co.* (7) has also been mentioned for consideration by the court. For the reasons given, therefore, I am of opinion that, on the main point, the buyers are right.

But there is a third and most ingenious point raised by the sellers here. They say: "Assuming we are wrong on the main point, yet there is this further question that we desire the court to decide; and it arises upon this fact, that although the average weight of the *Whakatane* cargo was over 62 lb. per carcase, yet in fact that cargo was represented by five bills of lading, and the five bills of lading represented lots of goods of varying average weights; the highest weight was 67 lb. per carcase, but the average weight of the lots of meat included in two of the bills of lading was 47 lb. and 53 lb. respectively; and, therefore, we ought to get damages because you refused the tender of the various bills of lading, two of which include meat of an average weight which accorded with the contract." That is, as I have said, a most ingenious point, but, in my humble opinion, it is an unsound one. The steamer's contracts in substance were one; various bills of lading were given for convenience' sake, but the shipments were one shipment by this steamer, the

Whakatane. It was notified by the sellers' letter as one shipment by that boat; one tender of the documents was made. There was no division indicated by the vendors at all. The tender was an indivisible tender of a given number of documents for which the price of £2,500 18s. 7d. was demanded. In my opinion, there was no business or legal element of divisibility in that proffer of documents, and for that reason I am of opinion that the vendors must also fail on this subordinate point. So far as authority goes, I will only say that *Reuter* v. *Sala* (8), so far as it is relevant to the matter before me, is in favour of the buyers rather than in favour of the sellers. On this matter also I may add, for the purpose of which counsel are aware, that the court has had the advantage of a discussion on the decision of the Court of Appeal in *Brandt* v. *Lawrence* (9).

The result is, therefore, on these questions put before me, I am of opinion that there must be judgment for the defendants with costs.

Solicitors: *Constant & Constant*; *Thos. Wm. Hall & Sons.*

[*Reported by* J. M. Scrimgeour, Esq., *Barrister-at-Law.*]

BOSTON CORPORATION *v.* FENWICK & CO., LTD.

[King's Bench Division (Bailhache, J.), April 24, 27, 1923]

[Reported 129 L.T. 766; 39 T.L.R. 441; 16 Asp.M.L.C. 239; 28 Com. Cas. 367]

Ship—Wreck—Removal—Liability of shipowner—Ship treated by owners as constructive total loss—Notice of abandonment to underwriters.

The expense of removing a wreck can only be recovered from the owners at the time the expense is incurred. If the owners of a vessel that has become a wreck treat it as a constructive total loss, and give notice of abandonment to their underwriters, they divest themselves of their property in the vessel abandoned and cease to be its owners, and, thereafter, are not liable for the expense of removal.

Barraclough v. *Brown* (1), [1897] A.C. 615, followed.

Quære whether the property in the wreck is automatically transferred to the underwriters when they have refused to accept a valid notice of abandonment, or whether the wreck becomes a res nullius.

Notes. Referred to: *Blane Steamships, Ltd.* v. *Ministry of Transport*, [1951] 2 K.B. 965.

As to constructive total loss of a ship, see 22 Halsbury's Laws (3rd Edn.) 149 et seq.; and for cases see 29 Digest 287 et seq.

Cases referred to:

(1) *Barraclough* v. *Brown* (1896), 65 L.J.Q.B. 333; 74 L.T. 86; 12 T.L.R. 250; 8 Asp.M.L.C. 134; 1 Com. Cas. 262, 329, C.A.; affirmed, [1897] A.C. 615; 66 L.J.Q.B. 672; 76 L.T. 797; 62 J.P. 275; 13 T.L.R. 527; 8 Asp.M.L.C. 290; 2 Com. Cas. 249, H.L.; 29 Digest 287, *2340*.

(2) *Sinclair* v. *Brougham*, [1914] A.C. 398; 83 L.J.Ch. 465; 111 L.T. 1; 30 T.L.R. 315; 58 Sol. Jo. 302, H.L.; 12 Digest (Repl.) 316, *2436*.

(3) *Arrow Shipping Co.* v. *Tyne Improvement Comrs., The Crystal*, [1894] A.C. 508; 63 L.J.P. 146; 71 L.T. 346; 10 T.L.R. 551; 7 Asp.M.L.C. 513; 6 R. 258, H.L.; 29 Digest 287, *2339*.

(4) *Smith & Sons* v. *Wilson*, [1896] A.C. 579; 75 L.T. 81; 12 T.L.R. 505; 8 Asp.M.L.C. 197; 29 Digest 254, *2057*.

Action.

The facts are set out in the judgment of BAILHACHE, J.

C. R. Dunlop, K.C., and *G. P. Langton* for the plaintiffs.
R. A. Wright, K.C., and *Sir Robert Aske* for the defendants.

Cur. adv. vult.

April 27. **BAILHACHE, J.**, read the following judgment.—On Feb. 28, 1922, the defendants' steamship *Lockwood* stranded in the river Witham and blocked up the fairway to Boston Harbour. The plaintiffs are the harbour authority, having the right under s. 29 of the Port of Boston Act, 1842, and under s. 56 of the Harbours, Docks and Piers Clauses Act, 1847, to remove wrecks impeding the harbour and to recover the cost of so doing from the owners. They may also, on non-payment, sell the wrecks. The plaintiffs removed the *Lockwood* and asked the defendants to pay the cost. The defendants refused. The plaintiffs sold the wreck and they seek to recover the balance of the cost from the defendants, who deny liability. The plaintiffs base their claim on the statutes mentioned.

The relevant facts are these. On Mar. 2, 1922, the defendants, rightly treating the *Lockwood* as a constructive total loss, gave notice of abandonment to their underwriters. The notice was good, although the underwriters did not accept it. On Mar. 8, the defendants told the plaintiffs what they had done. There is at Boston a deep-sea fishery company of which a Mr. Parkes is the manager. He is not a member of the plaintiff corporation, but he is in close touch with them. He suggested to the plaintiffs that something might be made for both of them out of the salvage of the *Lockwood*. Accordingly, an offer was made by him and was accepted by the plaintiffs, which is embodied in a minute dated Mar. 11, 1922, which records that the plaintiffs accepted Mr. Parkes' offer to raise the *Lockwood* and to share the profit or loss. Shortly afterwards, it occurred to Mr. Parkes that a still larger profit might be made if the *Lockwood* was not only raised but repaired as well. The plaintiffs fell in with this view, and Mr. Parkes went to London and saw the Salvage Association, who by this time were representing the underwriters. They, too, liked the scheme, as it was proposed to do the whole work for £12,000 on "no cure no pay" terms. The *Lockwood* was insured against total loss for £15,000, the repaired value to be the insured value. If, therefore, an agreement could be come to on the lines suggested, the underwriters would pay a particular average loss and not a constructive total loss and would be saved a considerable sum, and everybody, except the defendants, would be pleased. Sir Joseph Lowry pressed the defendants to fall in with the suggestion, and this they did, stipulating, however, with Sir Joseph Lowry that they should do so without prejudice to their notice of abandonment, to which he assented. A contract embodying the arrangement was drawn up and signed on Mar. 15, 1922. It was signed on behalf of the plaintiffs by Mr. Parkes, and is in the following terms:

> "It is hereby agreed between the Boston Dock and Harbour Commissioners, hereinafter called the contractors, and Messrs. France, Fenwick & Co., Ltd., hereinafter called the owners, as follows: (i) The contractors agree on the terms of 'no cure no pay' to raise, float, and repair the s.s. *Lockwood*, now stranded in the river Witham, without delay. To make good to the satisfaction of the surveyors to Lloyd's Register, and so that the vessel can regain her class at Lloyd's, all the damage which the vessel has sustained through sinking or may sustain during the operations of refloating, docking, repairing, and otherwise, until she is redelivered to the owners. The owners' representative to have the right of watching the operations throughout. (ii) In consideration of the above, the owners agree to pay the sum of £12,000 (twelve thousand pounds) on the successful completion of the raising, floating and reconditioning of the vessel as aforesaid. In the event of it proving impracticable to float and repair the steamer no payment is due under this agreement. (iii) The contractors agree to hold the owners indemnified from any liability they may have

sustained or be under for removing the said vessel or her cargo from the fairway."

The contract is short, and contains as many fatal defects as it is possible to compress into so small a compass. It is on "no cure no pay" terms. It is a contract to recondition. And it is not under seal. The first two defects make the contract ultra vires, and the third makes is unenforceable, to say nothing of the signature. The plaintiffs bethought themselves, later, when much of the salvage had been done, that a contract with a corporation is the better for a seal, and they asked the defendants to consent to the affixing of a seal, but the defendants refused. Meanwhile, it had been discovered that Mr. Parkes's £12,000 was totally inadequate, and that the expense of salving and reconditioning would be nearer £20,000 or £22,000. Mr. Parkes declined to go on; so did the corporation; but the *Lockwood* was placed on the mud out of the fairway and was ultimately sold. On Sept. 29, 1922, the question what was to be done came before the plaintiffs, and a resolution of that date records that there were originally two projects before them—one, for removing the wreck and selling or destroying her; and the other, for reconditioning her and selling her when finished to the owners. The minute plaintively adds: "The latter having been adopted, the whole matter developed complicated legal questions."

The plaintiffs sought comfort in the opinion of an eminent counsel who had a wide knowledge of Admiralty law, but the comfort which they found was cold. In these circumstances, the plaintiffs, having raised the *Lockwood* under the contract of Mar. 15, find themselves unable to sue on it because, in addition to its vices, it has not been performed. They therefore seek to throw the contract on the scrap-heap, alleging that they were all along acting under their statutory powers, and they claim the amount which they may have to pay Mr. Parkes from the defendants as a debt. Meanwhile, they have paid poor Mr. Parkes nothing, and he is suing them in another action. It is very doubtful whether the plaintiffs, having acted under the contract of Mar. 15, can ignore that contract and claim to have been exercising their statutory rights. A good deal of the reasoning in the House of Lords in *Sinclair* v. *Brougham* (2) seems to point the other way. I do not, however, decide the point, as I am attracted by another and simpler defence which has the great merit of being covered by authority, subject only to a point which is sought to be made on the abandoned contract of Mar. 15.

Assuming the plaintiffs to be able to fall back on their statutory powers, it is to be observed that the expense of removing a wreck can only be recovered from the owners, and by the word "owners" is meant owners at the time the expense was incurred: see *The Crystal* (3). Treating the issue between the parties, then, as dependent on the plaintiffs' statutory powers, as the plaintiffs now wish to do, the defendants deny that they were the owners at the material time, that is, when the expenses were incurred, and they rely on their notice of abandonment to the underwriters and their communication of that notice to the plaintiffs. In this I think they are right, both on principle and authority. On principle, it must be borne in mind that, in the case of a constructive total loss, an owner can only abandon to his underwriters. Having done this, he divests himself of his property in the thing abandoned and ceases to be its owner. On authority, *Barraclough* v. *Brown* (1) is conclusive; but in view of counsel for the plaintiffs' strenuous argument to the contrary, I had better make good that point by a further reference to the case itself. The facts were that the steamship *T. M. Lennard*, belonging to the defendants, outward bound from Goole, went ashore in the Ouse and became at once an impediment to navigation and a constructive total loss. The owners abandoned the wreck to their underwriters, who tried to raise it, and, having failed in their turn, abandoned to the plaintiffs. The plaintiffs blew the wreck up and sued the original owners for the expenses. It was held that the plaintiffs could not recover, as the defendants had, by abandoning to their underwriters, ceased to be owners when the expenses had been incurred.

Counsel for the plaintiffs contended that the abandonment which defeated the plaintiffs' claim in that case was the abandonment to them by the underwriters. This was a bold contention in view of the sentence in the judgment of LORD ESHER, M.R., in the Court of Appeal. LORD ESHER, M.R., asks who were the owners, and goes on (1 Com. Cas. at p. 331):

> "The defendants, before the expenses were incurred, had abandoned her to the underwriters, and therefore we must decide that the defendants were not liable."

Although that case went on a different point in the House of Lords, LORD WATSON says ([1897] A.C. at p. 621):

> "I am content to rest my opinion on the merits of the case on the reasons assigned by MATTHEW, J., and the learned judges of the Court of Appeal."

There would thus be an end in the defendants' favour but for a point which the plaintiffs seek to make on the contract. They say that, although the defendants did at one time abandon to their underwriters, they receded from that position and took up the position of owners, and they refer to the negotiations leading to the contract of Mar. 15 and to the contract itself wherein the defendants are "hereinafter called the owners." To this there is more than one answer: First, if the plaintiffs abandon that contract as so much waste paper, as they do and must, the contract and all the negotiations leading to it are excluded from consideration. Next, the contract, if carried out by the plaintiffs, would have rendered the loss a particular average and not a constructive total loss, and the defendants, for the purposes of that contract, were necessarily the owners, and their abandonment was at an end. It is obvious, however, that they were describing themselves as owners for the purposes of that contract only, and not otherwise, and were certainly not resuming the position of owners vis-à-vis the plaintiffs exercising their statutory powers. This clearly appears from the correspondence between the Salvage Association and the defendants' solicitors, and is also clear from cl. 3 of the agreement itself. The fact is that the owners had little faith in the contract, and only entered into it at the request of their underwriters. Further, the plaintiffs themselves knew quite well the position taken up by the defendants, because, in describing the arrangements made between the parties, they say, in their minute of Sept. 29, 1922, that the other project was for "reconditioning her and selling her to the owners," a description quite inconsistent with their present contention. One does not sell to a man what is already his. I need not pursue the matter further. My first reason seems to me fatal to the plaintiffs. It would be as sensible to try to hold the plaintiffs to cl. 3 of the contract as to try to draw an inference adverse to the defendants from the description contained in it.

Counsel for the plaintiffs referred me to *Smith & Sons* v. *Wilson* (4). I only refer to it to say that it is wholly irrelevant for the reasons which sufficiently appear in the judgment. By the statutes the expense of raising a wreck is to be repaid. I could not, in any case, give judgment for the plaintiffs for any specific sum. They have paid nothing and are disputing their liability, and, until that question is determined, it cannot be known what expense they have incurred. As, however, I have come to the conclusion that the defendants are not liable, the point is immaterial.

I have refrained from expressing any opinion whether a valid notice of abandonment, unaccepted by underwriters, while it divests the owner of his property in the wreck at the same time automatically transfers the property to the underwriters. I will only say that there is a good deal to be said against this view in favour of the wreck becoming in such circumstances a res nullius. The point does not call for decision. My judgment is for the defendants, with costs.

Judgment for the defendants.

Solicitors: *Thomas Cooper & Co.*; *Botterell & Roche.*

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

A

BOURGEOIS *v.* WEDDELL & CO.

[King's Bench Division (Lord Hewart, C.J., Lush and Sankey, JJ.), December 17, 1923]

B

[Reported [1924] 1 K.B. 539; 93 L.J.K.B. 232; 130 L.T. 635; 40 T.L.R. 261; 68 Sol. Jo. 421; 29 Com. Cas. 152; 88 J.P.Jo. 25]

Arbitration—Evidence—Arbitrator as witness before umpire—Competency.

A dispute arising between the buyer and the sellers whether a quantity of
C meat was in accordance with the contract of sale was referred to arbitration. The buyer appointed K. as his arbitrator, who had inspected the meat and reported on it before the reference to arbitration. The arbitrators being unable to agree on their award, the matter was referred to an umpire. At the hearing before the umpire, the buyer tendered K. as a witness. The sellers objected to his competency as a witness.

D **Held:** the arbitration being a commercial arbitration, K. was not disqualified from being called as a witness.

Notes. As to conduct of an arbitration, see 2 Halsbury's Laws (3rd Edn.) 34 et seq.; and for cases see 2 Digest (Repl.) 553 et seq.

Case Stated by a legal umpire under the Arbitration Act, 1889, s. 19.

By a contract in writing, the respondents, Weddell & Co., sold to the claimant,
E F. Bourgeois, 200 tons of Argentine beef c.i.f. Antwerp. In respect of 100 tons of the beef so sold a dispute arose between the parties, the claimant alleging that the beef delivered was not in accordance with the contract in that, instead of being fresh meat, it had apparently been lying for a considerable time in store and was old, mouldy and stale. The dispute was referred to arbitration, the claimant appointing as his arbitrator Mr. Frank Knowles, and the respondents appointing
F eventually Mr. W. Blankley. The arbitrators, being unable to agree on their award, agreed to appoint as umpire Mr. W. N. Raeburn, K.C. Formal terms of reference were drawn up and embodied in an agreement of reference dated Oct. 1, 1923, signed, not by the arbitrators, but by the claimant and the respondents. This agreement contained the following clause:

G "The umpire shall be entitled to receive and act upon such evidence as he may see fit to admit, whether such evidence shall be legally admissible or not."

In due course the parties attended by their counsel before the umpire for the purpose of calling evidence. The arbitrators were also present. Counsel for the claimant, after calling the claimant and a meat salesman who had inspected the meat, tendered as a witness Mr. Knowles, the claimant's arbitrator, who had
H inspected the meat on his behalf and had made an adverse report which the claimant communicated to the respondents before the reference to arbitration. Some correspondence had passed between the parties, in which the respondents had drawn the claimant's attention to the possible difficulty which might arise if they named as arbitrator a gentleman who would clearly be a material witness. Nevertheless the claimant did not withdraw his nomination of Mr. Knowles. The
I respondents, before Mr. Knowles was sworn as a witness before the umpire, objected to his competency as a witness and asked the umpire to state a Case, which he agreed to do.

The questions for the opinion of the court were: (a) In the circumstances, and apart from any question of discretion arising under the express terms of the agreement of reference of Oct. 1, 1923, was Mr. Knowles a competent witness in the arbitration? (b) If the answer to the foregoing question is in the negative, could the umpire nevertheless under the express terms of the agreement of reference properly admit the evidence of Mr. Knowles?

Jowitt, K.C., and *S. P. J. Merlin* for the respondents. A
Neilson, K.C., and *F. van den Berg* for the claimant.

LORD HEWART, C.J.—This is a Case Stated for the opinion of the court under s. 19 of the Arbitration Act, 1889. It is not necessary that I should re-read the Case or re-state the facts which are set out in it. The question which emerges is whether, in the particular circumstances set out in the Case, it was possible to call B as a witness in the arbitration a gentleman who had been appointed one of the arbitrators. It is not necessary to enter into the particular circumstances because the argument which was made on behalf of the respondents was that the gentleman referred to had been appointed to act, and had purported to act, in a judicial capacity, and that he was on general principles disqualified from giving evidence in the arbitration, notwithstanding that he and the other arbitrator had disagreed C and had appointed an umpire. Counsel for the respondents says, and says very fairly, as one would expect, that he has to support that universal negative proposition based on general principles. In other words, his clients do not say that because of something specially appearing in this case this gentleman who is an arbitrator may not be called as a witness, but that he may not be called as a witness on the facts in issue in the arbitration because in no case can an arbitrator D be called as a witness.

It appears that it was not as an arbitrator that this gentleman obtained the knowledge of the facts to which it is desired that he should depose in the witness-box. The question which the court has to answer is this: "In the circumstances, and apart from any question of discretion arising under the express terms of the agreement of reference of Oct. 1, 1923, is the said Knowles a competent witness in E the arbitration?"

No question at present arises under the express terms of that agreement, but, speaking for myself, I am not satisfied that this gentleman is disqualified from being called as a witness by the mere circumstance that he was an arbitrator. It is not necessary to speak of a practice in this matter—the word "practice" involves, it may be, rather different considerations—but certainly there are many F cases in the books which show that, in some circumstances and for some purposes, a gentleman who has been an arbitrator may be called to give evidence about matters relating to the arbitration; and one knows from one's own experience that it does sometimes happen that an arbitrator is called to give evidence on matters relating to the issue in controversy between the parties. I am not aware of any rule of law which prevents this gentleman from being called to give evidence. G

LUSH, J.—I am of the same opinion. I confess I have come to this conclusion with some hesitation, because I think there is very great force in the contention of counsel for the respondents that, until a final and valid award has been made, an arbitrator does not cease to be an arbitrator, and that he is still clothed with the judicial authority that his appointment as arbitrator vests in him. My reason for H coming to this conclusion is this. There is no doubt that the view that is taken of the position of an arbitrator in commercial arbitrations and the duties which he allows himself to undertake, has altered very much in recent years, and there is no question that his duties and responsibilities are not viewed now with the same strictness as they were formerly. An arbitrator may act now in commercial arbitrations as an advocate and as an agent for the party who appoints him. I think I that the true view is that, when the arbitrators have differed and the umpire takes on himself the burden of adjudication, the arbitrators may be regarded, and are regarded, as no longer acting judicially but as persons who are entitled either to advocate the cause of the party who appointed them or to give evidence in support of that cause. I say I have come to this conclusion with hesitation because, speaking for myself, I think it would be very much better if the old rule as to an arbitrator's duty were still adhered to. But I think that the rules which govern this court are very clear and settled and have been already enforced and upheld. I

A think that the view expressed by my Lord is the right view, and I concur in his judgment.

SANKEY, J.—I agree with the judgment of my Lord. The modern system of arbitration has certainly made great inroads on what was thought to be the legal practice of arbitration and there is a great difference between arbitrations con-
B ducted as legal arbitrations and arbitrations conducted as commercial arbitrations. There are in the books cases which show that, in commercial arbitrations, an arbitrator may act sometimes as an agent and sometimes as an advocate on behalf of the person by whom he is appointed an arbitrator.

With regard to his being a witness, certainly in many cases the position is as follows. In the case, say, of perishable goods landed from a vessel on to the quay
C side, the arbitrators are selected; they go down and look at the goods; the goods may be then destroyed, and the only persons who can speak as to the quality of the goods are the two arbitrators. They may have got their knowledge before or after they were appointed as arbitrators; but I am unable to think that, if they unfortunately disagree, they should not be able to come as witnesses before the umpire and depose to the facts, as has happened in this case. It may be regret-
D table that the strict rule should be relaxed, but I think it is too late to question that, and I am of opinion that the first question asked us in this case ought to be answered in the affirmative.

Solicitors: *Charles H. Wright*; *Swepstone, Stone, Barber & Ellis.*

[*Reported by* J. F. WALKER, ESQ., *Barrister-at-Law.*]

E

F

Re STANFORD. CAMBRIDGE UNIVERSITY *v.* ATTORNEY-GENERAL

[CHANCERY DIVISION (Eve, J.), October 16, 1923]

G [Reported [1924] 1 Ch. 73; 93 L.J.Ch. 109; 130 L.T. 309; 40 T.L.R. 3; 68 Sol. Jo. 59]

Charity—Education—Cy-près doctrine—Gift for express purpose—Bequest to university to publish dictionary—Surplus funds after publication—No general charitable intention.

By his will, made in 1876, the testator gave a sum of Consols to the Uni-
H versity of Cambridge on trust to be applied for the purpose of carrying on to completion and publication his ETYMOLOGICAL DICTIONARY OF ANGLICISED FOREIGN WORDS AND PHRASES. The residue of the estate was given to R. The testator died in 1880. The university accepted the bequest and published the dictionary. After all payments in connection with the publication had been made, there remained a surplus, part of which was capital and part
I income. On a summons asking how the surplus should be applied,

Held: there was no conditional bequest to the university, and, therefore, they were not beneficially entitled to the surplus, nor was there any general charitable intention, and, therefore, there was no case for the application of the cy-près doctrine; accordingly, there was a resulting trust for the testator and those claiming through him of the surplus moneys which fell to be dealt with as part of his residuary estate.

Notes. Distinguished: *Re Robertson, Colin* v. *Chamberlin*, [1930] 2 Ch. 71; *Re Raine, Walton* v. *A.-G.*, [1956] 1 All E.R. 355. Referred to: *Re Monk, Giffen*

v. *Wedd*, [1927] All E.R.Rep. 157; *Re Strickland's Will Trusts National Guarantee and Suretyship Association, Ltd.* v. *Maidment*, [1936] 3 All E.R. 1027.

As to rules applicable to the creation of charitable trusts and as to the cy-près doctrine, see 4 HALSBURY'S LAWS (3rd Edn.) 295 et seq., 317 et seq.; and for cases see 8 DIGEST (Repl.) 383 et seq., 459 et seq.

Cases referred to in argument:

A.-G. v. *Trinity College, Cambridge* (1856), 24 Bear. 383; 53 E.R. 405; 8 Digest (Repl.) 445, *1357*.

Merchant Taylors' Co. v. *A.-G.* (1871), 6 Ch. App. 512; 40 L.J.Ch. 545; 25 L.T. 109; 35 J.P. 774; 19 W.R. 641, L.C. & L.JJ.; 8 Digest (Repl.) 444, *1354*.

Re King, Kerr v. *Bradley*, [1923] 1 Ch. 243; 92 L.J.Ch. 292; 128 L.T. 790; 67 Sol. Jo. 313; 8 Digest (Repl.) 315, *10*.

Re Packe, Sanders v. *A.-G.*, [1918] 1 Ch. 437; 87 L.J.Ch. 300; 118 L.T. 693; 62 Sol. Jo. 488; 8 Digest (Repl.) 447, *1400*.

A.-G. v. *Lawes* (1849), 8 Hare, 32; 14 Jur. 77; 68 E.R. 261; 8 Digest (Repl.) 460, *1602*.

Re Wilson, Twentyman v. *Simpson*, [1913] 1 Ch. 314; 82 L.J.Ch. 161; 108 L.T. 321; 57 Sol. Jo. 245; 8 Digest (Repl.) 422, *1132*.

Originating Summons.

By his will dated Sept. 30, 1876, the testator bequeathed £5,000 Consols free of all duties to the University of Cambridge on trust to be applied for the purpose of completing and publishing his ETYMOLOGICAL DICTIONARY OF ANGLICISED FOREIGN WORDS AND PHRASES. If they declined the bequest, it was to be offered to Oxford University, and if they declined, the testator's executors were to do the best they could to carry out his wishes. The residue of the estate was given to R. The testator died on Dec. 2, 1880. The bequest was accepted by the University of Cambridge who duly completed the dictionary and published it in 1892. After payment of all costs of the publication had been met, there remained a surplus over of £1,151 14s. 10d. capital and £230 accumulation of income. The plaintiffs, the University of Cambridge, took out an originating summons asking whether the surplus ought to be applied for similar purposes, or for carrying out the general purposes of the university, or were applicable cy-près for purposes analogous to those declared by the testator, or were to be held on trust for the residuary legatee.

Gover, K.C., and *W. J. Whittaker* for the plaintiffs.

Dighton Pollock for the Attorney-General.

Clayton, K.C., and *Vaisey* for the residuary legatee.

EVE, J., stated the facts, and continued: The University of Cambridge accepted the bequest, the fund was transferred to them, and in due course, after considerable labour and a very large expenditure of time, skill and money, the book was published in 1892. When the university came to make out the accounts of the undertaking, they found that the whole sum and the income had not been exhausted, and, in fact £1,100 odd being the surplus was retained by them and invested, and the question now arises, what is the proper destination of this surplus? On behalf of the university it is argued in the first place that the gift is a conditional gift to the university, involving, it might be, expenses sufficient to exhaust the fund, but involving this also, that, if the condition has been fulfilled at a less cost, then the university is beneficially entitled to any surplus that may remain, and in the alternative that, if the university was throughout a trustee of the fund for an express purpose, they are entitled, now that the purpose has been accomplished, to retain the surplus for the general purposes of the university, because the court ought so to construe the will as evidencing an intention to devote the whole fund to charitable purposes. If this alternative argument is accepted, it is suggested that the surplus should be applied cy-près for some purpose akin to the express purpose indicated by the testator. The respondents ask the court to reject both of these contentions. The university, they say, were obviously trustees, and the argument that they were in the position of beneficiaries is refuted by the direction

A that, if they were not willing to undertake the publication, the fund was to go to the sister university, and if neither was willing the trustees were to do their best to carry out the testator's wishes. According to the view put forward by the respondents, these directions negative the idea of any intention on the part of the testator to make either university a beneficiary or, indeed, to accomplish anything except the attainment of his own desires to have his work completed and published. B On similar grounds, it is argued that the court cannot construe the bequest as indicative of any general charitable intent, and accordingly there is no room here for the application of the cy-près doctrine.

In my opinion, it is impossible to hold that this is a conditional bequest to the university. The language of the bequest itself, the detailed directions as to the execution of the trust, and the substitution of other trustees all negative any idea C that the testator intended this to be a conditional legacy to the university, and their cumulative effect is, I think, conclusive against the soundness of the first argument advanced on behalf of the university. In the next place can I say, apart from the paramount wish to have this fund applied in the publication of his work, that the testator has indicated any intention as to its application? In particular, can I gather from his will any general intention that it should be applied for charitable D purposes? It is easy to appreciate why he wished that one or other of the universities should produce his work. One has only to look at it to see how important it was that the arrangement, printing and publishing of such a work should be under the direction and control of scholars. To put such a task into the hands of an ordinary publisher might be to court trouble and possible disaster. Moreover, for such a work the imprimatur of the university would be in itself a great ad- E vantage. There existed, therefore, very adequate grounds for making one or other of the universities trustees for carrying out his wishes. I cannot bring myself to hold that, in making this bequest, he had any general charitable intention or, indeed, any intention beyond the obvious one of getting one or other of the universities to produce the work. In these circumstances, I do not think there is any case for the application of the cy-près doctrine; there is a resulting trust for the F testator and those claiming through him of the surplus moneys, and they fall to be dealt with as part of his residuary estate. The trustees will retain their costs out of the fund in hand, and the balance will go to the residuary legatees.

Solicitors: *Bloxam, Ellison & Co.*, for *Francis & Co.*, Cambridge; *Treasury Solicitor*; *Field, Roscoe & Co.*, for *Bubb & Co.*, Cheltenham.

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

A

HARRODS, LTD. *v.* STANTON

[KING'S BENCH DIVISION (Bailhache and McCardie, JJ.), January 18, 1923]

[Reported [1923] 1 K.B. 516; 92 L.J.K.B. 403; 128 L.T. 685; [1923] B. & C.R. 70]

B

Bill of Sale—"True owner" of goods—Donee of goods—Deed of gift void as made to defeat donor's creditors—Bill of sale granted to bona fide purchaser for value—Rights of purchaser—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict.*, *c.* 43), *s.* 5.

In December, 1921, the defendant, who was indebted to the plaintiffs, executed a deed of gift in favour of his wife of his chattels and household effects. In January, 1922, the plaintiffs issued a writ against the defendant, and in July, 1922, they signed judgment against him for the amount of the debt. In August, 1922, the defendant's wife granted a bill of sale of the furniture contained in the deed of gift to W. In October, 1922, it was held that the deed of gift was void on the ground that it was made to defeat, hinder or defraud the defendant's creditors. The furniture and effects having been taken in execution by the plaintiffs, W. claimed them under the bill of sale. It was found that W. was a bona fide purchaser for value without notice of the fraud.

C

D

Held: until the deed of gift was set aside the donee of the deed of gift, the defendant's wife, was the true owner of the goods comprised in the deed within s. 5 of the Bills of Sale Act (1878) Amendment Act, 1882; therefore, W., being a bona fide purchaser for value without notice of the fraud before the deed of gift was set aside, obtained a good title under the bill of sale.

E

Notes. 13 Eliz., c. 5, was repealed by the Law of Property Act, 1925, s. 207 and Sched. VII. The provisions of that Act making void voluntary conveyances with intent to defraud creditors were replaced by s. 172 of the 1925 Act.

As to chattels of which the grantor is not the true owner, see 3 HALSBURY'S LAWS (3rd Edn.) 282 et seq.; and for cases see 7 DIGEST 118 et seq. For the Bills of Sale Act (1878) Amendment Act, 1882, s. 5, see 2 HALSBURY'S STATUTES (2nd Edn.) 576; and for the Law of Property Act, 1925, s. 172, see 20 HALSBURY'S STATUTES (2nd Edn.) 785.

F

Cases referred to:

(1) *Morewood* v. *South Yorkshire Railway and River Dun Co.* (1858), 3 H. & N. 798; 28 L.J.Ex. 114; 157 E.R. 690; 7 Digest 97, *575*.

G

(2) *Prodgers* v. *Langham* (1663), 1 Keb. 486; 1 Sid. 133; 83 E.R. 1068; 25 Digest 240, *667*.

(3) *George* v. *Milbanke* (1803), 9 Ves. 190; 32 E.R. 575, L.C.; 25 Digest 152, *31*.

(4) *Halifax Joint Stock Banking Co.* v. *Gledhill*, [1891] 1 Ch. 31; 60 L.J.Ch. 181; 63 L.T. 623; 39 W.R. 104; 7 T.L.R. 46; 25 Digest 159, *92*.

H

(5) *Bethell* v. *Stanhope* (1601), Cro. Eliz. 810; Owen, 132; 78 E.R. 1037; 25 Digest 203, *407*.

(6) *Shears* v. *Rogers* (1832), 3 B. & Ad. 362; 1 L.J.K.B. 89; 110 E.R. 137; 25 Digest 185, *264*.

Also referred to in argument:

I

Shee v. *French*, *French* v. *French* (1857), 3 Drew. 716; 3 Jur.N.S. 428; 61 E.R. 1076; sub nom. *Hue* v. *French*, 26 L.J.Ch. 317; 28 L.T.O.S. 365; 5 W.R. 386; 23 Digest (Repl.) 334, *4003*.

Appeal from the decision of a master on the trial of an interpleader issue.

In October, 1920, the defendant, Oscar Stanton, contracted a debt with the plaintiffs, Harrods, Ltd. In December, 1921, while still owing the plaintiffs £51, the defendant executed a deed of gift in favour of his wife of his chattels and household effects. In January, 1922, the plaintiffs issued a writ against the defen-

dant, and on July 15, 1922, they signed judgment against him for £51 odd and costs. On Aug. 4, 1922, Mrs. Stanton, the defendant's wife, granted a bill of sale of the furniture comprised in the deed of gift and certain other goods to the claimant, H. Winston, in consideration of £150 paid by him. On Aug. 15, the plaintiffs levied execution in respect of their judgment against the defendant, and the defendant's wife thereupon claimed the furniture under the deed of gift. On the trial of an issue in October, 1922, the master held that the deed of gift of December, 1921, was void under 13 Eliz., c. 5, on the ground that it was made to defeat, hinder or defraud the plaintiffs who were the creditors of the defendant, Oscar Stanton. Thereupon the claimant, Winston, claimed, under the bill of sale, the furniture and effects which had been seized by the sheriff, and an interpleader issue was ordered to be tried. In November, 1922, the master found that the claimant, Winston, was protected by s. 5 of 13 Eliz., c. 5, as being a bona fide purchaser for value without notice of the fraud, and that the defendant's wife, the grantor of the bill of sale, was the "true owner" of the goods and chattels at the time of the execution of the bill of sale within the meaning of s. 5 of the Bills of Sale Act (1878) Amendment Act, 1882. He accordingly held that the claimant was entitled to the goods and chattels comprised in the bill of sale. The plaintiffs appealed.

By 13 Eliz., c. 5, s. 1, it is, in effect, provided that every gift of goods and chattels devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent, to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, &c., shall be from thenceforth deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, whose actions, suits, debts, &c., are disturbed, hindered, delayed or defrauded), to be clearly and utterly void, frustrate and of none effect. By s. 5 of the same Act it is provided that

> "this Act or anything therein contained shall not extend to any estate or interest in . . . goods or chattels, had, made, conveyed or assured, or hereafter to be had, conveyed or assured, which estate or interest is, or shall be, upon good consideration and bona fide lawfully conveyed or assured to any person or persons, or bodies politick or corporate, not having at the time of such conveyance or assurance to them made, any manner of notice or knowledge of such covin, fraud or collusion as is aforesaid."

By the Bills of Sale Act (1878) Amendment Act, 1882, s. 5:

> "Save as hereinafter mentioned, a bill of sale shall be void, except as against the grantor, in respect of any personal chattels specifically described in the schedule thereto, of which the grantor was not the true owner at the time of the execution of the bill of sale."

Beecroft for the plaintiffs.
Barrington Ward, K.C., and *W. T. Monckton* for the claimant.

BAILHACHE, J.—This is an interpleader issue, and it raises a question, as between the execution creditor and the holder of a bill of sale, with regard to the ownership of the goods included in the bill of sale, and in respect of which the defendant, Stanton, had executed a deed of gift in favour of his wife. The defendant was in difficulties, and, desiring to protect his wife, he executed the deed of gift in her favour. The wife, shortly afterwards, granted a bill of sale of the goods comprised in the deed of gift to Winston, the claimant, who was a bona fide purchaser for value without notice. The sole question is whether the claimant obtained a good title under the bill of sale as against the execution creditor of the husband. The master came to the conclusion that the deed of gift to the wife was fraudulent and void under s. 1 of 13 Eliz., c. 5. But s. 5 of that statute provided that it should not extend to any estate or interest in goods or chattels had, made, conveyed or assured to any person or persons for good consideration bona fide without notice of the fraud, and, therefore, the title of the holder of the bill of sale

is preserved. It is, however, contended that a good bill of sale can only be granted by the true owner of the goods, and that Mrs. Stanton was not the true owner, because the deed of gift was void and had been subsequently set aside. It has been argued that the deed of gift, when set aside, was void at and from its initial date. But, in my opinion, until the deed is set aside the donee under the deed of gift is the true owner of the goods comprised in the deed. The donee, it is true, has a defeasible title, but, unless and until the deed of gift is set aside, the title of the donee is a good title. If the donee conveys to a purchaser for value without notice before the deed of gift is set aside, that makes a perfectly good title. In my opinion, therefore, the decision of the master was perfectly right, and the appeal must be dismissed.

McCARDIE, J.—I agree. The deed of gift is void only sub modo, and it is vital to remember that s. 1 of 13 Eliz., c. 5, must be read in conjunction with s. 5 of that Act, which was passed for the protection of bona fide purchasers for value without notice. It is not contended that the defendant, Stanton, made a transfer of his property to his wife of such a character that it could be called a colourable gift only or a mere pretence. It was an actual gift from himself to his wife. She, therefore, became the owner of the goods, though it is clear that her title was defeasible on an application by a creditor of her husband under 13 Eliz., c. 5, as being in fraud of creditors. But possessing this title, even though defeasible, she was, in my opinion, entitled to transfer the property to Winston as she did. He thereupon became a bona fide purchaser for value without notice, and, in my opinion, the master was fully warranted in coming to the conclusion which he did. *Morewood* v. *South Yorkshire Railway and River Dun Co.* (1) indicates the principle to be applied in interpreting the statute, and it strongly supports the master's decision in this case. In my view, having regard to the totality of the authorities, that decision is right. That case does not stand alone. It follows *Prodgers* v. *Langham* (2) and *George* v. *Milbanke* (3). *Halifax Joint Stock Banking Co.* v. *Gledhill* (4) is to the same effect. In my opinion, the decisions cited by counsel for the plaintiffs of *Bethell* v. *Stanhope* (5) and *Shears* v. *Rogers* (6) must be read in the light of the principle established by the cases which I have already mentioned. I, therefore, agree that the decision of the master was right. With regard to s. 5 of the Bills of Sale Act (1878) Amendment Act, 1882, Mrs. Stanton was, in my opinion, the "true owner" of the goods at the time the bill of sale was granted. If she was not the "true owner" then no true owner existed.

Appeal dismissed.

Solicitors: *McKenna & Co.*; *D. M. Phillips & Co.*

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

A

CIVIL SERVICE CO-OPERATIVE SOCIETY, LTD. *v.* McGRIGOR'S TRUSTEE

[Chancery Division (Russell, J.), April 10, 13, 26, 1923]

[Reported [1923] 2 Ch. 347; 92 L.J.Ch. 616; 129 L.T. 788]

B *Landlord and Tenant—Lease—Forfeiture —Notice—Length of notice—Validity —No claim for compensation—Waiver of forfeiture—Acceptance of rent—Rent accruing partly before writ in forfeiture action and partly after—Conveyancing Act*, 1881 (44 & 45 *Vict.*, *c.* 41), *s.* 14 (1), (2).

Under a lease, dated Nov. 6, 1914, the lessees were not to assign, underlet, demise or otherwise part with the premises without the licence in writing of the lessors, and there was a proviso for re-entry by the lessors in the event of the lessees becoming bankrupt or having a receiving order made against them. On Oct. 24, 1922, on the application of the official receiver and with their consent, the lessees were adjudicated bankrupt. A trustee in bankruptcy was appointed and he entered into possession of the premises without any opposition on the part of the bankrupts and without having to obtain any order ordering them to give up possession to him. On Nov. 13, 1922, the lessors served on the bankrupts and their trustee a notice that, on the expiration of fourteen days, they intended to enforce their right of re-entry or forfeiture under the proviso. No claim for compensation for breach of covenant was made. On Nov. 28, 1922, the lessors issued a writ claiming that they were entitled to recover possession of the premises as on a forfeiture. On Dec. 28, 1922, the lessors made a demand for and accepted rent due on Dec. 25, 1922.

Held: (i) the lessors were entitled to enforce their right of re-entry or forfeiture on the bankruptcy of the lessees subject to the Conveyancing Act, 1881, s. 14 (1) and (2); (ii) fourteen days was sufficient notice and the notice was valid even though it contained no claim for compensation; (iii) the demand for rent accrued due in part before the bankruptcy, in part between the bankruptcy and the writ, and in part subsequent to the writ, followed by payment and acceptance, did not operate as a waiver of the forfeiture.

Notes. The Conveyancing Act, 1881, and the Conveyancing and Law of Property Act, 1892, have been repealed by the Law of Property Act, 1925, s. 207 and Sched. VII. For s. 14 (1), (2) and (6) of the 1881 Act and s. 2 (2) of the 1892 Act, see s. 146 (1), (2) and (8), and s. 146 (10) of the 1925 Act respectively.

Considered: *Governors of Rugby School* v. *Tannahill*, [1934] All E.R. 187. Referred to: *Gee* v. *Harwood* (1932), 48 T.L.R. 606; *Hoffman* v. *Fineberg*, [1948] 1 All E.R. 592; *Hartley* v. *Larkin* (1950), 66 (pt. 1) T.L.R. 896.

As to forfeiture of a lease, see 23 Halsbury's Laws (3rd Edn.) 665 et seq.; and for cases see 31 Digest (Repl.) 512 et seq. For the Law of Property Act, 1925, s. 146, see 20 Halsbury's Statutes (2nd Edn.) 739.

Cases referred to:

(1) *Horsey Estates, Ltd.* v. *Steiger*, [1899] 2 Q.B. 79; 68 L.J.Q.B. 743; 80 L.T. 857; 47 W.R. 644; 15 T.L.R. 367, C.A.; 31 Digest (Repl.) 541, *6639*.

(2) *Ewart* v. *Fryer*, [1901] 1 Ch. 499; 82 L.T. 415; 48 W.R. 443; affirmed [1901] 1 Ch. 499; 70 L.J.Ch. 138; 83 L.T. 551; 17 T.L.R. 145; 49 W.R. 145, C.A.; affirmed, [1902] A.C. 187; 71 L.J.Ch. 433; 9 Mans. 281; sub nom. *Watney, Comb, Reid & Co.* v. *Ewart*, 86 L.T. 242; 18 T.L.R. 426, H.L.; 31 Digest (Repl.) 549, *6708*.

(3) *Lock* v. *Pearce*, [1893] 2 Ch. 271; 62 L.J.Ch. 582; 68 L.T. 569; 41 W.R. 369; 9 T.L.R. 363; 37 Sol. Jo. 372; 2 R. 403, C.A.; 31 Digest (Repl.) 539, *6626*.

(4) *Dendy* v. *Nicholl* (1858), 4 C.B.N.S. 376; 27 L.J.C.P. 220; 31 L.T.O.S. 134; 22 J.P. 625; 6 W.R. 502; 140 E.R. 1130; 31 Digest (Repl.) 562, *6821*.

(5) *Keith Prowse & Co.* v. *National Telephone Co.*, [1894] 2 Ch. 147; 63 L.J.Ch. 373; 70 L.T. 276; 58 J.P. 573; 42 W.R. 380; 10 T.L.R. 263; 8 R. 776; 31 Digest (Repl.) 507, *6323.*

(6) *Jones* v. *Carter* (1846), 15 M. & W. 718; 153 E.R. 1040; 31 Digest (Repl.) 530, *6527.*

(7) *Doe d. Morecraft* v. *Meux* (1824), 1 C. & P. 346, N.P.; 31 Digest (Repl.) 564, *6846.*

(8) *Grimwood* v. *Moss* (1872), L.R. 7 C.P. 360; 41 L.J.C.P. 239; 27 L.T. 268; 36 J.P. 663; 20 W.R. 972; 31 Digest (Repl.) 564, *6852.*

(9) *R.* v. *Paulson*, [1921] 1 A.C. 271; 90 L.J.P.C. 1; 124 L.T. 449, P.C.; 31 Digest (Repl.) 559, *6801.*

(10) *Evans* v. *Enever*, [1920] 2 K.B. 315; 89 L.J.K.B. 845; 123 L.T. 328; 36 T.L.R. 441; 64 Sol. Jo. 464; 31 Digest (Repl.) 564, *6848.*

Also referred to in argument:

Re Amherst's Trusts (1872), L.R. 13 Eq. 464; 41 L.J.Ch. 222; 25 L.T. 870; 20 W.R. 290; 5 Digest (Repl.) 714, *6217.*

Re Cotgrave, Mynors v. *Cotgrave*, [1903] 2 Ch. 705; 72 L.J.Ch. 777; 89 L.T. 433; 52 W.R. 411; 10 Mans. 377; 5 Digest (Repl.) 718, *6242.*

Doe d. Cheny v. *Batten* (1775), 1 Cowp. 243; 98 E.R. 1066; 31 Digest (Repl.) 507, *6324.*

Evans v. *Wyatt* (1880), 43 L.T. 176; 44 J.P. 767; 31 Digest (Repl.) 564, *6850.*

Quilter v. *Mapleson* (1882), 9 Q.B.D. 672; 52 L.J.Q.B. 44; 47 L.T. 561; 47 J.P. 342; 31 W.R. 75, C.A.; 31 Digest (Repl.) 546, *6678.*

Re Riggs, Ex parte Lovell, [1901] 2 K.B. 16; 84 L.T. 428; sub nom. *Re Riggs, Ex parte Trustee*, 70 L.J.K.B. 541; 49 W.R. 624; 45 Sol. Jo. 408; 8 Mans. 233; 31 Digest (Repl.) 548, *6700.*

Rogers v. *Rice*, [1892] 2 Ch. 170; 61 L.J.Ch. 573; 66 L.T. 640; 40 W.R. 489; 8 T.L.R. 511; 36 Sol. Jo. 445, C.A.; 31 Digest (Repl.) 545, *6667.*

Witness Action.

Action brought by the plaintiffs, the Civil Service Co-operative Society, for a declaration that they were entitled to recover premises demised to Sir James McGrigor and Edward Biss as on a forfeiture of the lease, delivery up of the premises, and mesne profits. The facts are set out in the judgment.

By the Conveyancing Act, 1881, s. 14:

"(1) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach. (2) Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the court for relief; and the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court, in the circumstances of each case, thinks fit. . . . (6) This section does not extend—(i) to a covenant or condition against the assigning, underletting, parting with the possession, or disposing of the land leased; or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest. . . ."

By the Conveyancing and Law of Property Act, 1892, s. 2 (2):

"Subsection (6) of s. 14 of the Conveyancing and Law of Property Act, 1881, is to apply to a condition for forfeiture on bankruptcy of the lessee, or on taking in execution of the lessee's interest only after the expiration of one year from the date of the bankruptcy, or taking in execution, and provided the lessee's interest be not sold within such one year, but in case the lessee's interest be sold within such one year, sub-s. (6) shall cease to be applicable thereto."

H. S. Preston, K.C., and *Turnbull* for the plaintiffs.
E. W. Hansell and *Bovill* for the defendant.

Cur. adv. vult.

April 26. **RUSSELL, J.**—By a lease dated Nov. 6, 1914, the plaintiffs demised certain premises in Panton Street to Sir James McGrigor and Edward Biss (who carried on business as bankers and army agents under the style or firm of Sir Charles R. McGrigor, Baronet, & Co.) for a term of thirty-five years at the yearly rent of £700, payable quarterly on the usual quarter days. The lessees were bound also to pay by way of further or additional rent the sum of £36 15s. in each year towards the cost of supply of hot water to the lavatories and heat to the radiators. The lessees' covenants included the following:

No. 2. "To bear, pay, and discharge all existing and future rates, taxes, assessments, duties, impositions, and outgoings whatsoever which now are or hereafter shall be assessed, imposed, or charged upon the demised premises or upon the landlord, lessee, or occupier in respect thereof, except landlord's property tax."

No. 11. "Not at any time during the term hereby granted to assign, underlet, demise, or otherwise part with this indenture of the premises hereby demised or any part thereof, or any estate or interest therein for all or any part of the said term to any person or persons whomsoever without the licence in writing of the lessors first had and obtained, such licence not to be unreasonably withheld in the case of a respectable and responsible assignee or tenant."

The proviso for re-entry was in the following terms:

"Provided always and these presents are upon this condition that if the said yearly rents hereby reserved, or any part thereof, shall at any time be in arrear and unpaid for twenty-one days after the same shall have become due (whether any formal or legal demand thereof shall have been made or not), or if the lessees shall at any time fail or neglect to perform or observe any of the covenants or agreements herein contained and on their part to be performed and observed, or if the lessees shall at any time during the said term and whilst the same shall be vested in them or their said assigns as the case may be, become bankrupt or have a receiving order in bankruptcy made against them, then and in any such case it shall be lawful for the lessors or any person or persons duly authorised by them in that behalf into and upon the said demised premises or any part thereof in the name of the whole to re-enter, and the said premises peaceably to hold and enjoy thenceforth as if these presents had not been made, without prejudice to any right of action or remedy by the lessors in respect of any antecedent breach of any of the covenants by the lessees hereinbefore contained."

The lessees entered into possession and carried on their business on the premises. On Oct. 18, 1922, the lessees presented their petition in bankruptcy, and on the same day a receiving order was made thereon. On Oct. 24, 1922, on the application of the official receiver, and with the consent of the debtors, they were adjudicated bankrupts. On Nov. 6, 1922, a trustee in bankruptcy was duly appointed. The trustee entered into possession of the demised premises without any opposition

on the part of the bankrupts, and without having to obtain any order ordering them to give up possession to him. A

On Nov. 13, 1922, the plaintiffs served a notice in the following terms. It was addressed: "To Sir James Roderick Duff McGrigor, Bart., and Edward Albert Biss," and "To their trustee in bankruptcy and to all other the person or persons (if any) interested in the premises hereinafter more particularly described. We the undersigned as solicitors for and on behalf of the Civil Service Co-operative Society, Ltd. (hereinafter called 'the company') give you notice as follows." Then para. 1 set out the terms of the lease. Paragraph 2 sets out, in particular, the proviso as to re-entry. Paragraph 3 sets out the receiving order, and the adjudication in bankruptcy, and para. 4 is in these words: B

> "Now take notice that upon the expiration of fourteen days from the date of this notice the company intends to enforce the right of re-entry or forfeiture under the proviso or stipulation in that behalf hereinbefore mentioned by action or otherwise as the company may be advised." C

On Nov. 28, 1922, the writ in the present action was issued. The plaintiffs claim that they are entitled to recover possession as on a forfeiture of the lease, and they ask for delivery up of possession and mesne profits. They based their claim to re-enter on two grounds, namely, (i) breach of the covenant (No. 11) against assignment or otherwise parting with the demised premises, or any estate or interest therein; and (ii) the bankruptcy of the lessees. The defendant, who is the trustee in bankruptcy, raised various defences. As to the first ground, he says there has been no breach of the covenant; as to the second ground, he relies on the provisions of the Conveyancing Act, 1892, the effect of which, he says, is to deprive a landlord of all right of re-entry on the ground of the tenant's bankruptcy for the space of one year from the date of the bankruptcy, and to deprive him of such right altogether if within that year the lessee's interest be sold. He also says that, even if the landlord is entitled to re-enter during the year, he can only do so after service of a valid notice under s. 14 (1) of the Conveyancing Act, 1881, and that the notice of Nov. 13, 1922, was an invalid notice. Finally (and this applies to both the grounds of the plaintiffs' claim), the defendant relies on a demand for, and payment and acceptance of, rent as a waiver since action brought of the causes of forfeiture. Assuming that the plaintiffs are entitled to recover possession of the premises, the defendant makes no claim to relief from the forfeiture. D E F

It will be convenient to deal first with the plaintiffs' claim, so far as it is founded on the bankruptcy of the tenants. But for the Conveyancing and Law of Property Act, 1892, there could (subject to the waiver point) be no defence to this claim. This is clear from a consideration of s. 14 of the Conveyancing Act, 1881. The section (by sub-s. (1)) imposes a fetter on a landlord's exercise of the right conferred on him by a lease to re-enter for breach of any covenant or condition in the lease; by sub-s. (2) it empowers the court to grant relief to the tenant. These two subsections are general in their terms and would apply to all covenants and conditions, on the breach of which, or in pursuance of which, the landlord was, by the terms of the lease, entitled to re-enter. By sub-s. (6) there is taken out of the section (among other cases) the case of a landlord's right to re-enter in pursuance of a condition for forfeiture on the bankruptcy of the lessee. In other words, sub-s. (1) and sub-s. (2) impose a fetter on the right of re-entry in general terms; sub-s. (6) removes the fetter from a right of re-entry arising from the bankruptcy of the tenant. If the Act of 1881 stood alone the position in this case would be clear. The Conveyancing and Law of Property Act, 1892, introduces a complication. The provision relevant to this action is s. 2 (2), which runs thus: [His Lordship read s. 2 (2), and continued:] Counsel for the defendant contended that the effect of s. 2 (2) of the Act of 1892 was to deprive the landlord altogether of his right of re-entry or forfeiture on bankruptcy of the lessee for the space of a year from the date of the bankruptcy. For that period his right, he says, is completely taken away; it is not merely fettered, it is abrogated. I can G H I

find no foundation for this in the words of the legislature; and it would be strange if words which purport merely to suspend an exemption from the provisions of a previous statute should operate to impose a total disability which that statute did not pretend to impose.

In my opinion, the operation of s. 2 (2) of the Act of 1892 is this: The right of entry or forfeiture on bankruptcy of the lessee, or on taking in execution of the lessee's interest is fettered; if the lessee's interest be not sold within the one year, the fetter is removed at the end of the year; if the lessee's interest be sold within the one year, the fetter is not removed, but continues. In the present case the lessee's interest has not been sold; a conditional contract for sale has been entered into conditional on the defendant succeeding in the present action. If the contention that the landlord is during the year deprived altogether of his right of re-entry or forfeiture on bankruptcy of the lessee is well founded, *Horsey Estates, Ltd.* v. *Steiger* (1) and *Ewart* v. *Fryer* (2) might have been shortly disposed of on that ground. In my opinion, the contention is not well founded; and I hold that the landlord is entitled to enforce his right of re-entry or forfeiture on bankruptcy of the lessee, but subject to the provisions of s. 14 (1) and (2) of the Act of 1881.

The result is that the plaintiffs here were bound to serve a valid notice under s. 14 (1) of the Act of 1881. It is said that the notice of Nov. 13, 1922, is invalid on two grounds; first, because the fourteen days therein named was an unreasonably short time in the circumstances of the case, and, secondly, because the lessee was not thereby required to make compensation for the breach. As to the first ground, no evidence was given of any special circumstances rendering this case one which required exceptional treatment. As was stated by the court in *Horsey Estates, Ltd.* v. *Steiger* (1), the notice is intended to give the person whose interest it is sought to forfeit an opportunity of considering his position, and acting before an action is brought against him. It appears to me that fourteen days was a sufficient time for this purpose. The second ground raises a curious question. It is difficult to see what compensation for the breach could be asked for in the case of bankruptcy. The breach is irremediable. The only compensation suggested in argument before me was the payment of a sum of money in respect of increase in value of the property since the date of the lease. This would not be compensation for the breach, but a payment to compensate for the non-exercise of the right of re-entry. It would rather be a term of relief from forfeiture under sub-s. (2). In truth, the provisions of sub-s. (1) do not fit the right of re-entry or forfeiture on bankruptcy of the lessee; they were not intended to deal with that case, which is specifically excluded from them by sub-s. (6). Eleven years later that case is brought within them by the Act of 1892; and I must deal with the section accordingly. I confess that, unassisted by authority, the wording of the section causes me trouble. The words "in any case" appear to me to mean "whether the breach is capable of remedy or not"; and the section would seem to call for a notice which requires the lessee to make compensation for the breach both where the breach is capable of remedy, and where it is incapable of remedy. However, the Court of Appeal has held, in general terms, that, if the landlord does not desire compensation, he need not require it, and that the absence of a requirement for compensation does not invalidate a notice under sub-s. (1): see *Lock* v. *Pearce* (3). I am content to follow the views there expressed. As LINDLEY, L.J., said ([1893] 2 Ch. at p. 279):

> "Supposing the lessor does not want compensation, is the notice to be held bad because he does not ask for it? There is no sense in that."

A similar question may be asked, and a similar answer given, in a case where not only does the lessor not desire compensation, but where no compensation for the breach is possible. I decide that the notice here given was a valid notice.

There remains for consideration the point as to waiver. The facts are these. On Dec. 28, 1922, the defendant received from the plaintiffs a written demand for £203 15s. addressed to "The Liquidators, Sir Charles McGrigor & Co." The

£203 15s. was made up of three items as follows: Dec. 25, 1922. To rent: £175. To rent radiators, £9 3s. 9d. To water rate, £19 11s. 3d.: Total, £203 15s. A cheque for £203 15s., dated Dec. 28, 1922, payable to the Haymarket Stores, the plaintiffs' trade name, and signed by the trustee in bankruptcy, and a member of the committee of inspection (each described as such) was sent to and cashed by the plaintiffs. On Dec. 29, 1922, a receipt was sent by the plaintiffs: "Received of the Liquidators, Sir Charles McGrigor, Bart., & Co., the sum of £203 15s. for rent account Christmas." This amounts to a demand by the plaintiffs (with knowledge of the bankruptcy) for rent (accrued in part before the bankruptcy, in part between the bankruptcy and the writ, and in part subsequent to the writ) followed by payment and acceptance. Does this operate as a waiver of the forfeiture? On a consideration of the authorities, I am of opinion that it does not. The defendant relied on *Dendy* v. *Nicholl* (4) and *Keith Prowse* v. *National Telephone Co.* (5). In *Dendy* v. *Nicholl* (4) the landlord, with knowledge of an underletting in breach of covenant, sued the tenant for arrears of rent accruing subsequently to the underletting, and obtained payment thereof. After the issue of the writ for rent, but before actual payment of the amount claimed, the landlord commenced an ejectment action based on non-payment of rent and the underletting. It was held that the bringing the action for rent, and acceptance of the rent in that action, was a waiver of the right of re-entry. The waiver occurred before ejectment brought. *Keith Prowse* v. *National Telephone Co.* (5) was not strictly a case of landlord and tenant. It was a case of a telephone company having given notice determining a telephone agreement on Dec. 30, and subsequently claiming and receiving payment of "rent" up to Dec. 31. It was held that by so doing they had waived their notice determining the contract. Neither of those cases touches the real question, namely, whether the issue and service of a writ in ejectment is such a final election by the landlord to determine the tenancy that a subsequent receipt of rent is no waiver of the forfeiture. In my opinion, the authorities establish that this is so. In *Jones* v. *Carter* (6), PARKE, B., held that, after ejectment brought, there being no evidence of actual re-entry by the landlord, the landlord could not sue for rent; and he cites with approval a decision of LORD TENTERDEN that the receipt of rent after ejectment brought for a forfeiture was no waiver of such forfeiture: *Doe d. Morecraft* v. *Meux* (7). To the same effect is *Grimwood* v. *Moss* (8), where it is definitely stated that the bringing of an ejectment action is an irrevocable election to determine the tenancy: see also *R.* v. *Paulson* (9) and *Evans* v. *Enever* (10). I adopt the words of LORD COLERIDGE, J., in *Evans* v. *Enever* (10), when he says ([1920] 2 K.B. at p. 320):

> "There is a series of cases which establish that if an action is brought for recovery of possession for breaches of covenants in the lease that is an irrevocable election to determine the lease, and that no subsequent acts of the plaintiff can be relied on as qualifying that position."

The plaintiffs are, accordingly, entitled to recover possession on the ground of the bankruptcy of the tenants. This renders it unnecessary to decide whether the plaintiffs are entitled to recover possession on the ground of breach of the lessee's covenant No. 11, and I need say nothing about it. The plaintiffs are entitled to the relief claimed by them. The mesne profits will be at the rate of the sums payable under the lease, credit being given for the £203 15s. If the parties can agree, the amount of the sum can be inserted in the judgment. The defendants must pay the costs of the action.

Solicitors: *Nicholson, Freeland & Shepherd*; *Piesse & Sons.*

[*Reported by* J. L. DENISON, ESQ., *Barrister-at-Law.*]

THE PORTREATH

[Probate, Divorce and Admiralty Division (Hill, J., and Elder Brethren), March 23, 1923]

[Reported [1923] P. 155; 92 L.J.P. 116; 129 L.T. 475; 39 T.L.R. 356; 16 Asp.M.L.C. 227]

Shipping — Salvage — Remuneration — Abandonment of ship — Subsequent re-boarding by volunteers from crew—Right to remuneration.

A vessel was in collision with another vessel and was damaged in such a manner that the master formed the opinion that she was sinking and ordered her to be abandoned, her crew being taken on board by a pilot cutter. Shortly afterwards he realised that his opinion was wrong and called for volunteers from his crew to return to her. Several of them agreed to do so, and the ship was eventually safely beached with the assistance of the pilot cutter and another vessel. In a consolidated action for salvage remuneration brought by the owners, master and crew of the pilot cutter and volunteers from the crew of the damaged ship,

Held: (i) the owners, master and crew of the pilot cutter were entitled to be paid for their services; (ii) in the case of the volunteers, the crew of a vessel who rendered services to that vessel after she had been abandoned were entitled to salvage remuneration for such services only if the abandonment was final and their contracts of service were thus determined; the abandonment in the present case was not final, and so the crew's contracts of service were not determined; the fact that the master called for volunteers instead of giving an order to the crew to return had no bearing on the question whether or not an end had been put to their contracts of service; and, therefore, their claim failed.

The Florence (1) (1852), 16 Jur. 572, and *The Warrior* (2) (1862), Lush. 476, followed.

Notes. Referred to: *The Albionic* (1941), 111 L.J.P. 1.

As to crew's right to salvage remuneration, see 30 Halsbury's Laws (2nd Edn.) 891; and for cases see 41 Digest 846–848.

Cases referred to:

(1) *The Florence* (1852), 19 L.T.O.S. 304; 16 Jur. 572; 41 Digest 846, *7091*.

(2) *The Warrior* (1862), Lush. 476; 6 L.T. 133; 1 Mar.L.C. 204; 167 E.R. 214; 41 Digest 847, *7099*.

(3) *The Neptune* (1824), 1 Hag. Adm. 227; 166 E.R. 81; 41 Digest 845, *7078*.

Consolidated Actions for salvage remuneration brought by the plaintiffs who were (i) the owners, master, pilots on station duty, and crew of the steam pilot cutter *Ilona*; (ii) the second officer and seven members of the crew of the steamship *Portreath*. The defendants were the owners of the *Portreath*, her cargo and freight. Shortly before midnight on Oct. 25–26, 1922, when the *Portreath*, a vessel of 3,726 tons, in the course of a voyage from Buenos Aires to Avonmouth with a cargo of grain, was lying at anchor in the Bristol Channel about one mile from the Breaksea Light vessel, she was run into by the American steamer *Remus* and extensively damaged, a huge hole being made in her starboard side from about the break of the forecastle head leading aft. A quantity of her cargo was washed out and the remaining grain absorbed water. From about 5.30 a.m. a Dutch vessel stood by, and about daybreak the *Ilona* arrived. The master of the *Portreath* then noticed that his vessel was taking a list, and he accordingly gave orders to lower the boats and abandon her, saying, as the plaintiffs alleged: "Abandon her; she's sinking fast." The *Portreath* was then much down by the head, and the master and crew accordingly, after rowing round for a time, went on board the *Ilona*. Shortly afterwards the master, realising that his apprehensions were unfounded, determined to return to the *Portreath*, and called for volunteers to return to her with him. The second officer and fifteen out of twenty-eight members of her crew,

including the seven plaintiffs in addition to the second officer, agreed to return. They did so, and, with the assistance of the *Ilona* and the Dutch vessel, the *Portreath* was subsequently beached in safety.

Stephens, *K.C.*, and *G. P. Langton* for the plaintiffs, the owners, master, pilots on station duty, and crew of the *Ilona*.

Dumas for the plaintiffs, the second officer and seven members of the crew of the *Portreath*.

Bateson, *K.C.*, and *Noad*, for the defendants, were stopped.

HILL, J. [after stating the facts and dealing with the services of the pilot cutter *Ilona*, in respect of which he awarded £1,260, continued:] The claim by the eight members of the crew of the *Portreath* raises important and quite distinct issues. In my opinion there is no foundation for this claim. The plaintiffs are members of the crew, and their counsel, who has argued the case with his usual ability, recognised that they can only claim as salvors if the circumstances were such as to put an end to their contract of service. He contended that the contract of service was at an end when the master, apprehensive that the ship would sink, gave orders to "abandon ship." He said that his contention was further borne out by the fact that ten or fifteen minutes later, when the master was minded to return to the ship, he did not order the crew to go back but called for volunteers. In my view it would be most dangerous to regard seamen, owing a duty under a contract, as entitled in such circumstances to convert themselves into salvors, and I have come to the conclusion, dealing with the case without any reference to the authorities, that there is no justification for saying that there was anything which determined the plaintiffs' contract of service. But I have a better guide than my own view on the matter, because the case seems to me absolutely covered by the authorities cited.

In the first place, there is the old general principle of a seaman's duty, for which I was referred to the judgment of Lord Stowell in *The Neptune* (3). His Lordship said (1 Hag. Adm. at p. 236):

> "What is the obligation which a mariner contracts with the ship in which he engages to serve? It is not only to navigate her in favourable weather, but likewise in adverse weather inducing shipwreck, to exert himself . . . to save as much of the ship and cargo as he can. It is part of his bounden duty, in his character of a seaman of that ship. It is certainly laborious, and probably a dangerous portion of his service, but certainly not less a service, and a meritorious service on those accounts. In performing that duty he assumes no new character. He only discharges a portion of that covenanted allegiance to that vessel which he contemplated, and pledged himself to give in the very formation of that contract which gave him his title to the stipulated wages. I ask, is he to have no recompense for this continuation of his service in its most formidable shape, which that service to that ship can assume? Nobody, I think, ventures to say that. But, say they, he should have it by way of salvage, or on quantum meruit. There are, I think, decisive objections to both these views of the matter. The doctrine of this court is justly stated by Mr. Holt—that the crew of a ship cannot be considered as salvors. What is a salvor? A person who, without any particular relation to a ship in distress, proffers useful service, and gives it as a volunteer adventurer, without any pre-existing covenant that connected him with the duty of employing himself for the preservation of the ship; not so the crew, whose stipulated duty it is (to be compensated by payment of wages) to protect that ship through all perils, and whose entire possible service for this purpose is pledged to that extent. Accordingly we see in the numerous salvage cases that come into this court the crew never claim as joint salvors, although they have contributed as much as, and perhaps more than, the volunteer salvors themselves. I will not say that in the infinite range of possible events that may happen in the intercourse of men, circumstances might not present themselves that might induce

A the court to open itself to their claim of a persona standi in judicio. But they must be very extraordinary circumstances indeed, for the general rule is very strong and inflexible, and they are not permitted to assume that character."

Then I come to the consideration of the application of that principle by DR. LUSHINGTON in two cases. In *The Florence* (1) he said (16 Jur. at p. 573) that the question is

B "whether, when a merchant ship is abandoned at sea sine spe revertendi aut recuperandi, in consequence of damage received and the state of the elements, such abandonment taking place bona fide and by order of the master, for the purpose of saving life, the contract entered into by the mariners is by such circumstances entirely put an end to, or whether it is merely interrupted, and C capable, by the occurrence of any and what circumstances, of being again called into force."

He then considers the various circumstances under which the contract can be determined, and says that in the first place the abandonment must take place at sea and not upon the coast. I am satisfied that in this case what occurred was "at sea" within the meaning of DR. LUSHINGTON's judgment. Then the learned D judge says:

"Secondly, the abandonment must be sine spe revertendi; for no one would contend that a temporary abandonment, such as frequently occurs in collisions, from immediate fear, before the state of the ship is known, would vacate the contract. Thirdly, the abandonment must be bona fide for the purpose of saving life. Fourthly, it must be by order of the master, in consequence of E danger by reason of damage to the ship and the state of the elements."

DR. LUSHINGTON contemplates precisely this case. It was not, it is true, an abandonment, a leaving of the ship in the moment immediately after the collision, but it was in consequence of the collision, at a time when the master supposed that the ship was exposed to risk of sinking; and in order to save himself and his F crew he gave the order to take to the boats. In *The Warrior* (2), in discussing the ways in which a seaman's contract of service may be dissolved, and leaving aside the question when it is dissolved by warlike capture, the learned judge says (Lush, at p. 482):

"It may be dissolved by final abandonment of the ship or by the act of the master giving the seaman a discharge. . . . With respect to the abandonment G I should be sorry to go the length of saying, looking at the facts, that there was such an abandonment of the ship as would have justified the seamen in saying that their contract was at an end, and that they were not bound to render further assistance. If the case rested entirely upon the ship having been finally abandoned, I should be inclined to come to the conclusion that the abandonment has not been proved. Where the circumstances are doubtful, H the court will be slow to infer that property of great value has been abandoned, unless it is proved that there was no reasonable hope of recovery. Abandonment is abandonment sine spe recuperandi."

In my view, when one finds a master giving orders to his crew to abandon ship and go on board another vessel because he thinks his ship is sinking, and then, within a short time, on maturer judgment, he arrives at the conclusion that the I ship is not sinking, there is no foundation for saying that there was any final abandonment of the ship. There was no dissolution, no determination of the contract of service. The fact that the master called for volunteers instead of ordering the crew to go back appears to me to have no bearing on the question. The claim of these plaintiffs will be dismissed with costs.

Solicitors: *Wm. A. Crump & Son*, for *Gilbert Robertson & Co.*, Cardiff; *Downing, Middleton & Lewis*, for *Downing & Handcock*, Cardiff.

[*Reported by* GEOFFREY HUTCHINSON, ESQ., *Barrister-at-Law.*]

A

PALMER *v.* PALMER

[Court of Appeal (Sir Henry Duke, P., Warrington and Atkin, L.JJ.), June 26, 1923]

[Reported [1923] P. 180; 92 L.J.P. 129; 129 L.T. 665; 39 T.L.R. 609; 67 Sol. Jo. 748] B

Restitution of Conjugal Rights—Separation deed—Covenant by wife not to compel husband to cohabit with her—Bona fide wish by wife for husband to return to her—Deed no bar to action.

By a deed of separation, dated Dec. 4, 1920, provision was made for the wife's maintenance, and the wife then covenanted that she would not molest the husband "or by any means either by taking out citation or process or by instituting any action . . . or in any other manner compel the husband to cohabit with the wife or endeavour to enforce any restitution of conjugation rights." Subsequently, the wife wrote to the husband asking him to resume cohabitation, but he refused to do so, whereupon she presented a petition for a decree of restitution of conjugal rights. C D

Held: where the court was satisfied with the bonâ fides of the wife and that her desire to return to her husband was genuine, a deed of separation was no bar to an action by her for restitution of conjugal rights; the fact that she might, if the decree were disobeyed, institute proceedings for divorce, did not deprive her of her right to such a decree; in the present case no absence of bona fides was found; and, therefore, the petitioner was entitled to the decree. E

Notes. Followed: *Harnett* v. *Harnett*, [1924] P. 126. Considered: *Gatward* v. *Gatward*, [1942] 1 All E.R. 477.

As to restitution of conjugal rights, see 12 Halsbury's Laws (3rd Edn.) 283–285; and for cases see 27 Digest (Repl.) 284 et seq.

Appeal from a decision of Shearman, J., at Birmingham Assizes refusing to grant the wife a decree of restitution of conjugal rights. F

The facts are set out in the headnote.

W. O. Willis for the wife.

The husband did not appear.

SIR HENRY DUKE, P.—This is an appeal in a class of case which is of frequent occurrence in the divorce division. The petitioner sought a decree for restitution of conjugal rights, on the ground of refusal of cohabitation. If she had gone to the court and had concealed the existence of the deed of separation she would have presented a false case, and would have been liable to the intervention of the King's Proctor. But she revealed the deed, and, contrary to its provisions, she claimed a decree for restitution. The question whether the existence of the deed constitutes a bar against the granting of a decree for restitution has often been discussed, and in the ecclesiastical courts it was not treated as a bar. Section 22 of the Matrimonial Causes Act, 1857 [now s. 15 of the Matrimonial Causes Act, 1950] provides for the grant of a decree for the restitution of conjugal rights upon the principles of the ecclesiastical courts, so I think the petitioner has a right to have her cause tried upon that footing. The husband did not appear nor set up the deed. The wife appeared, and revealed it, and said that she had been coerced into signing it, and that she had made an appeal to her husband to return to her. In these circumstances, if the court is satisfied of good faith on her part, and there is evidence that she is really desirous that her husband should return to her, I think she is entitled to the decree for which she asks. What is said by the learned judge in refusing to grant a decree is this: G H I

"It is not the law that when people enter into a separation agreement they can then have what is called an artificial desertion. I am not going to grant a

A decree in the circumstances unless it can be shown that there is real desertion. I am quite convinced that the object is to get a divorce."

I thought at first that the learned judge had come to the conclusion that the petitioner was not acting in good faith, but on consideration I think there is strong evidence to the contrary, and the judge does not say that he does not believe that evidence. The making of the decree, if it has its proper legal effect, will be no B impediment to her right subsequently to apply for a divorce. I fail to see that it is any disqualification of her right to a decree for restitution that she should have it in her mind that she may, if the decree is disobeyed, have recourse to proceedings for a divorce. In that respect I differ from the learned judge. If I have been persuaded that the learned judge found an absence of bona fides on the part of the wife, I should have agreed with him that there could be no decree. As has been C often said, bona fides is of the essence of the right to relief, but the fact that, if the husband should not obey the decree, she will take proceedings for a divorce is no disqualification of her right to a decree for restitution of conjugal rights. The appeal must be allowed.

WARRINGTON, L.J.—I am of the same opinion. With all respect I think D the learned judge has failed to see that the position which he has taken up is inconsistent with the desire of the wife that her husband should return to her. The appeal must be allowed.

ATKIN, L.J.—I think there is no good ground for refusing a decree in this case. If the judge had been satisfied that there was no desire upon the part of the wife to E return to her husband that would have been a ground for refusing to grant a decree; but here there is evidence by the wife of a genuine desire that her husband should return to her, and that evidence is corroborated by the evidence of her mother, and the judge does not find against it. All that he says is that the object of the wife is to obtain a divorce. Even if the wife were anxious to get a divorce, and to prove desertion in order to obtain it, it seems to me that that does not disentitle F her to the relief she now seeks. She might well say, "If he obeys, I shall go back to him and make him happy; if he does not, I may be compelled to sue for a divorce." It seems to me that that is not an inconsistent attitude, or lacking in bona fides, or one which disentitles her to the order asked for.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, for *Howard Cant & Cheatle*, Birmingham.

[*Reported by* G. P. Langworthy, Esq., *Barrister-at-Law.*]

A

SMITH *v.* SMITH

[Probate, Divorce and Admiralty Division (Hill, J.), March 19, 1923]

[Reported [1923] P. 128; 92 L.J.P. 107; 129 L.T. 187; 39 T.L.R. 294]

Divorce—Costs—Wife's costs—Petition by wife—Act on petition filed by husband—Right of wife to costs up to act on petition—Right to security for costs of act on petition—Matrimonial Causes Rules, 1865, *r.* 158. B

On a petition for divorce by the wife the husband entered an appearance under protest and filed an act on petition alleging that he was domiciled in Scotland. The wife applied to the registrar for an order for payment of her costs of the suit up to the setting down of the act on petition and submitted a bill of costs for taxation. The registrar taxed the costs and ordered the husband to give security for the wife's costs of the hearing of the act on petition. C

Held: the Divorce Court had jurisdiction to order a husband who appeared under protest to a wife's petition and disputed the jurisdiction on the ground of his foreign domicil to pay the wife's costs up to the setting down of the issue of domicil and to give security for her costs attendant on that issue since that issue was a stage in the proceeding and came within the general rule as to costs. D

Notes. Rule 158 of the Matrimonial Causes Rules, 1865, has been replaced by r. 67 of the Matrimonial Causes Rules, 1957.

Approved: *Johnstone* v. *Johnstone*, [1929] All E.R.Rep. 566. Referred to: *Shearn* v. *Shearn*, [1930] All E.R.Rep. 310. E

As to security for costs, see 12 Halsbury's Laws (3rd Edn.) 357–361; and for cases see 27 Digest (Repl.) 504–510. For the Matrimonial Causes Rules, 1957, r. 67, see 10 Halsbury's Statutory Instruments.

Cases referred to:

(1) *Gran* v. *Gran* (1921), The Times, Feb. 15, Mar. 1, 19, unreported.

(2) *Graham* v. *Graham*, [1923] P. 31; 92 L.J.P. 26; 128 L.T. 639; 39 T.L.R. 139; 67 Sol. Jo. 316; 27 Digest (Repl.) 468, *4032*. F

Interlocutory Appeal by the husband from an order as to costs made by a registrar.

The wife petitioned for the dissolution of her marriage on the ground of desertion for two years or upwards and adultery, the petition being filed on Oct. 12, 1922, and served on the husband on Nov. 4 at Edinburgh. The husband entered an appearance under protest, and on Nov. 21 filed an act on petition, claiming that he was domiciled in Scotland, and that the English court therefore had no jurisdiction. The petitioner's solicitors on Nov. 28 filed on her behalf an answer to the act on petition, and on Dec. 6, 1922, the respondent delivered a reply joining issue. Affidavit evidence was filed, and the respondent's solicitors gave notice that they had set down the act on petition for hearing in the defended list. The petitioner's solicitors thereupon submitted a bill of costs for taxation, and on Feb. 21, 1923, it came before the registrar for taxation. The respondent's solicitors contended that the registrar had in the circumstances no jurisdiction to tax costs. The registrar, however, taxed the costs, and ordered the respondent to give security for £17 as the wife's costs of the hearing of the act on petition, but directed that the order should not be drawn up for fourteen days to allow an opportunity of appeal to the judge. The respondent appealed by summons argued in chambers. G H I

Frampton for the husband.

D. Cotes Preedy for the wife.

The case was adjourned into court for judgment.

HILL, J., stated the facts and said: The husband's contention is that, as he has appeared under protest he cannot be ordered to pay or secure costs until the

question of the court's jurisdiction to entertain the suit has been decided against him. I am informed that the practice has been to order security to be given for a wife's costs in the circumstances in question, and I am reminded that I assumed jurisdiction to do so in the recent case of *Gran* v. *Gran* (1), in which, indeed, I made an order of attachment against the respondent for having failed to comply with an order for security, and HORRIDGE, J., in *Graham* v. *Graham* (2) ([1923] P. at p. 38) gave the wife her costs up to the amount of the security, though he had allowed the act on petition, and dismissed the petition. These authorities satisfy me that the court has jurisdiction as to costs, though the husband is raising a controversy as to its jurisdiction to hear the suit. An act on petition is a stage of the cause within r. 158 of the Matrimonial Causes Rules, 1865, and comes within the general rule about costs. The husband's summons appealing against the order of the registrar must be dismissed with costs.

Solicitors: *Kimber, Bull, Holland, Clappé & Co.*; *W. L. Dell & Co.*

[*Reported by* J. A. C. SKINNER, ESQ., *Barrister-at-Law.*]

Re CLARKE (DECEASED). BRACEY *v.* ROYAL NATIONAL LIFEBOAT INSTITUTION

[CHANCERY DIVISION (Romer, J.), March 22, 23, April 23, 1923]

[Reported [1923] 2 Ch. 407; 92 L.J.Ch. 629; 129 L.T. 310; 39 T.L.R. 433; 67 Sol. Jo. 680]

Charity—Relief of poverty—"Poverty"—Moderate means—Inability to pay for surgical and medical treatment—Apportionment of fund to objects of trust—Charitable and non-charitable objects—Power of executors to appoint whole fund for non-charitable object—Vesting of fund in objects of trust—Apportionment by court.

By his will a testator provided: "I give and bequeath all the residue and remainder of my estate not otherwise disposed of by this my will to: (a) such institution society or nursing home or nursing homes or similar institutions as assist or provide for persons of moderate means such as clerks governesses and others who may not be able or eligible to benefit under the National Health Insurance Act, Old Age Pensions or other Act of a like character to have either surgical operations performed together with medical treatment or medical treatment alone on payment of some moderate contribution (b) the Royal National Lifeboat Institution (c) the Lister Institute of Preventive Medicine (d) and such other funds charities and institutions as my executors in their absolute discretion shall think fit, and I direct that such residue shall be divided among the legatees named in the paragraphs (a) (b) (c) and (d) lastly hereinbefore contained in such shares and proportions as my trustees shall determine." It was admitted that the objects under (b) and (c) were charitable. On the question whether the residue was validly disposed of by the will or failed in whole or in part for uncertainty,

Held: (i) the poverty in relation to which a gift intended for its relief thereby became a good charitable gift need not be absolute destitution, but could be a condition resulting from limited means; in the present case the "moderate means" to which the testator referred were presumably means so moderate as to necessitate some contribution from the bounty of the testator before the recipient could procure the surgical or medical treatment he needed; and, therefore, the objects under (a) were charitable objects: (ii) the objects

under (d) were not exclusively charitable; the executors had a "non-exclusive power of appointment" and could appoint the whole fund for non-charitable objects which would result in the appointment being invalid; accordingly, the residue vested in all the four objects without the executors having any power to direct it, and, in accordance with the principle that equality was equity, the objects must take in equal shares.

Notes. Applied: *Re De Carteret, Forster* v. *De Carteret*, [1932] All E.R.Rep. 355. Referred to: *Lord Nuffield* v. *I.R.Comrs., Goodenough* v. *I.R.Comrs.* (1946), 175 L.T. 465.

As to charitable purposes and apportionment of a gift between charitable and non-charitable objects, see 4 HALSBURY'S LAWS (3rd Edn.) 213–218, 273–275. For cases see 8 DIGEST (Repl.) 316–326, 403–405.

Cases referred to:

(1) *Mary Clark Home, Trustees* v. *Anderson*, [1904] 2 K.B. 645; 73 L.J.K.B. 806; 91 L.T. 457; 20 T.L.R. 626; 5 Tax Cas. 48; 28 Digest (Repl.) 16, *61*.

(2) *A.-G.* v. *Wilkinson* (1839), 1 Beav. 370; 3 Jur. 358; 48 E.R. 983; 8 Digest (Repl.) 430, *1195*.

(3) *Re Gardom, Le Page* v. *A.-G.*, [1914] 1 Ch. 662; 83 L.J.Ch. 681; 108 L.T. 955; reversed sub nom. *Le Page* v. *Gardom* (1915), 84 L.J.Ch. 749, H.L.; 8 Digest (Repl.) 324, *78*.

(4) *Re Estlin, Prichard* v. *Thomas* (1903), 72 L.J.Ch. 687; 89 L.T. 88; 47 Sol. Jo. 691; 8 Digest (Repl.) 323, *77*.

(5) *Morice* v. *Bishop of Durham* (1804), 9 Ves. 399; on appeal (1805), 10 Ves. 522; 32 E.R. 947, L.C.; 8 Digest (Repl.) 390, *836*.

(6) *Hunter* v. *A.-G.*, [1899] A.C. 309; 68 L.J.Ch. 449; 80 L.T. 732; 47 W.R. 673; 15 T.L.R. 384; 43 Sol. Jo. 530, H.L.; 8 Digest (Repl.) 340, *227*.

(7) *Re Macduff, Macduff* v. *Macduff*, [1896] 2 Ch. 451; 65 L.J.Ch. 700; 74 L.T. 706; 45 W.R. 154; 12 T.L.R. 452; 40 Sol. Jo. 651, C.A.; 8 Digest (Repl.) 395, *879*.

(8) *Vezey* v. *Jamson* (1822), 1 Sim. & St. 69; 57 E.R. 27; 8 Digest (Repl.) 394, *864*.

(9) *Salusbury* v. *Denton* (1857), 3 K. & J. 529; 26 L.J.Ch. 851; 30 L.T.O.S. 63; 21 J.P. 726; 3 Jur.N.S. 740; 5 W.R. 865; 69 E.R. 1219; 8 Digest (Repl.) 404, *953*.

(10) *Down* v. *Worrall* (1833), 1 My. & K. 561; 39 E.R. 793; 8 Digest (Repl.) 395, *870*.

(11) *Doyley* v. *Doyley, A.-G.* v. *Doyley* (1735), 7 Ves. 58, n.; 2 Eq. Cas. Abr. 194; 32 E.R. 35; 8 Digest (Repl.) 404, *952*.

(12) *Hoare* v. *Osborne* (1866), L.R. 1 Eq. 585; 35 L.J.Ch. 345; 14 L.T. 9; 30 J.P. 309; 12 Jur.N.S. 243; 14 W.R. 383; 8 Digest (Repl.) 332, *134*.

(13) *Lambert* v. *Thwaites* (1866), L.R. 2 Eq. 151; 35 L.J.Ch. 406; 14 L.T. 159; 14 W.R. 532; 37 Digest 478, *756*.

Also referred to in argument:

Caldwell v. *Caldwell* (1921), 91 L.J.P.C. 95; 37 T.L.R. 953; 65 Sol. Jo. 765, H.L.; 8 Digest (Repl.) 398, *897*.

Re Douglas, Obert v. *Barrow* (1887), 35 Ch.D. 472; 56 L.J.Ch. 913; 56 L.T. 786; 35 W.R. 740; 3 T.L.R. 589, C.A.; 8 Digest (Repl.) 399, *906*.

Houston v. *Burns*, [1918] A.C. 337; 87 L.J.P.C. 99; 118 L.T. 462; 34 T.L.R. 219, H.L.; 8 Digest (Repl.) 396, *889*.

Originating Summons issued by the executors and trustees of a will to determine whether the residuary estate of the testator was validly disposed of by his will or whether the gift of such residuary estate failed in whole or in part for uncertainty, and, consequently, passed as in an intestacy.

William Henry Clarke, who died in October, 1921, by his will gave and bequeathed the residue of his estate

A "to (a) such institution society or nursing home or nursing homes or similar institutions as assist or provide for persons of moderate means such as clerks governesses and others who may not be able or eligible to benefit under the National Health Insurance Act Old Age Pensions or other Act of a like character to have either surgical operations performed together with medical treatment or medical treatment alone on payment of some moderate contribution B (b) the Royal National Lifeboat Institution (c) the Lister Institute of Preventive Medicine (d) and such other funds, charities and institutions as my executors in their absolute discretion shall think fit and I direct that such residue shall be divided among the legatees named in the paragraphs (a) (b) (c) and (d) lastly hereinbefore contained in such shares and proportions as my trustees shall determine."

C *J. Tanner* for the plaintiffs.
Dighton Pollock for the Attorney-General.
J. W. Manning, K.C., and *W. J. Byrne* for the next-of-kin.
W. R. Sheldon for the Royal National Lifeboat Institution.
J. W. F. Farwell, K.C., K. Wood, and *Wilfred M. Hunt* for other parties interested.

D *Cur. adv. vult.*

April 23. **ROMER, J.,** read the following judgment. The question remaining to be determined upon this summons is whether the residuary estate of the testator, William Henry Clarke, is validly disposed of by his will or whether the gift of such residuary estate fails in whole or in part for uncertainty and passes as on E an intestacy. That gift is in these terms:

"I give and bequeath all the residue and remainder of my estate not otherwise disposed of by this my will to (a) such institution society or nursing home or nursing homes or similar institutions as assist or provide for persons of moderate means such as clerks, governesses and others who may not be able or eligible to benefit under the National Health Insurance Act Old Age Pensions F or other Act of a like character to have either surgical operations performed together with medical treatment or medical treatment alone on payment of some moderate contribution (b) the Royal National Lifeboat Institution (c) the Lister Institute of Preventive Medicine (d) and such other funds charities and institutions as my executors in their absolute discretion shall think fit and I G direct that such residue shall be divided among the legatees named in the paragraphs (a) (b) (c) and (d) lastly hereinbefore contained in such shares and proportions as my trustees shall determine."

It is admitted that if all the objects referred to under the headings (a), (b), (c), and (d) are charitable objects the residue is validly disposed of. But, while admitting that the Royal National Lifeboat Institution and the Lister Institute of H Preventive Medicine are charitable objects, it is contended on the part of the next-of-kin that the objects referred to under the headings (a) and (d) are not exclusively charitable.

Whether this contention is well founded or not is the first question that I have to determine. It was contended on behalf of the next-of-kin that the objects designated under heading (a) are not charitable because the persons to be benefited I by the institution, society, or nursing homes are not poor persons but persons of moderate means, and because such persons can only benefit on payment by themselves of some moderate contribution. But in *Mary Clark Home, Trustees* v. *Anderson* (1), a home for ladies in reduced circumstances, of which the inmates were to be ladies of fifty years old or upwards possessed or in the actual enjoyment of a fixed yearly income of not less than £25 and not more than £55, was held to be exempt from landlord's property tax and inhabited house duty as being a "house provided for the reception or relief of poor persons." CHANNELL, J., in the course of his judgment, after referring to *A.-G.* v. *Wilkinson* (2), said

"that seems to lead to the conclusion that the expression 'poor person' in a trust for the benefit of poor persons does not mean the very poorest, the absolutely destitute; the word 'poor' is more or less relative. . . . I do not know any standard of poverty, nor how I can lay down any rule; the only thing to guide me is this—those ladies go to the institution for the sole reason that they are poor, and the institution is absolutely charitable."

In *Re Gardom, Le Page* v. *A.-G.* (3), it was held that a gift for the maintenance of a temporary house of residence for ladies of limited means was a good charitable gift. EVE, J., in giving judgment, said:

"It is true that ladies of limited means are not destitute, and that the expression 'limited means' may vary in its signification according to the standard by which the means are measured, but these arguments provoke the rejoinder that there are degrees of poverty less acute than abject poverty or destitution, but poverty nevertheless, and, further, that in this case the limitation of means contemplated is presumably a limitation such as will necessitate some contribution from the bounty of the testatrix before the recipient would be able to defray the expense of a temporary sojourn in the home. In other words the objects to be benefited by the bequest are ladies too poor to provide themselves with a temporary home without outside assistance. I think it is a good charitable trust, and am fortified in this view by some observations of CHANNELL, J., in the case of *Mary Clark Home, Trustees* v. *Anderson* (1)."

After citing the passage from the judgment of CHANNELL, J., to which I have just referred, he added:

"I think those words apply exactly to the section of the public and to the institution which the testatrix here intended to benefit and to subsidise."

In the present case I think that the words of CHANNELL, J., and the words of EVE, J., which I have quoted, apply exactly to the section of the public and to the institutions which the testator intended to benefit and to subsidise. The "moderate means" to which he refers are presumably means so moderate as to necessitate some contribution from the bounty of the testator before the recipient would be able to procure the surgical operation or medical treatment of which the recipient might stand in need. In *Re Estlin, Prichard* v. *Thomas* (4) it was, moreover, held by KEKEWICH, J., that a bequest for the purpose of establishing a home of rest for lady teachers was none the less charitable because each lady was required to contribute 10s. a week for board and lodging. I, therefore, hold that the objects under heading (a) are charitable objects.

On the other hand, I am of opinion that the objects under heading (d) are not exclusively charitable. I can find nothing in the will to prevent the executors from selecting under this heading non-charitable funds and institutions. In a later part of his will the testator, no doubt, refers to certain charitable institutions as "funds, charities, or institutions," but I cannot infer from this or any other words of the will that he contemplated this expression as one that excluded non-charitable objects.

If I am right so far the testator has, therefore, given his residue to (i) indefinite charitable objects; (ii) a definite charitable object; (c) another definite charitable object; (iv) such indefinite charitable and non-charitable objects as his executors think fit, and has directed that the residue shall be divided among those legatees in such shares and proportions as his trustees (by which presumably he meant his executors) should determine. It is contended on behalf of the next-of-kin that such a disposition of the residue fails for uncertainty in accordance with the principle enunciated and applied in *Morice* v. *Bishop of Durham* (5) and many other similar cases. That principle is stated by LORD DAVEY in *Hunter* v. *A.-G.* (6) ([1899] A.C. at p. 323) in these words:

"There is a long series of cases extending from *Morice* v. *Bishop of Durham* (5) decided by SIR WILLIAM GRANT and LORD ELDON to in *Re Macduff, Macduff*

A v. *Macduff* (7) decided by the Court of Appeal in 1896 and including two decisions of LORD COTTENHAM. In these cases it has been held that where charitable purposes are mixed up with other purposes of such a shadowy and indefinite nature that the court cannot execute them (such as 'charitable or benevolent' or 'charitable or philanthropic' or 'charitable or pious' purposes) or where the description includes purposes which may or may not be charitable B (such as 'undertakings of public utility') and a discretion is vested in the trustees, the whole gift fails for uncertainty. In *Vezey* v. *Jamson* (8) the trust was to dispose of the residue in such charitable or public purposes as the laws of the land would admit or to any persons as the trustees in their discretion should think fit or as they should think would have been agreeable to him if living and as the laws of the land did not prohibit. SIR JOHN LEACH said:

C 'The testator has not fixed upon any part of this property a trust for a charitable use; I cannot therefore devote any part of it to charity. . . . The necessary consequence is, that the purposes of the trust being so general and undefined that they cannot be executed by this court, they must fail altogether, and the next-of-kin become entitled to the property.' ''

D But, as I understand this principle, it only applies to cases where, upon the words of the will, the executors in the exercise of their discretion could apply the whole fund to non-charitable indefinite objects. In such cases the testator has not, in the words of SIR JOHN LEACH, ''fixed upon any part of his property a trust for a charitable use.'' It is, of course, obvious that if a testator gives a definite proportion of his property to such charitable objects as his executors may select, and the rest of his property to such non-charitable indefinite objects as his executors E may select, the gift of the definite proportion would be a valid charitable gift and it would only be the gift of the rest of his property that would fail. But suppose that instead of himself fixing the definite proportion to be applied for charitable objects the testator should give to charity a part of his property without saying what part, and the rest to non-charitable indefinite objects. In such a case the executors could not, I apprehend, devote the whole of the property to the non- F charitable objects, and if once the court can ascertain what is the part to be devoted to charity, I see no reason why the gift of such part should be invalid.

In *Salusbury* v. *Denton* (9) there was a bequest of a fund to be at the disposal of the testator's widow by her will, therewith to apply a part for the foundation of a charity school or such other charitable endowment for the benefit of certain G poor as she might prefer and the remainder to be at her disposal among the testator's relatives as she might direct. It was held that, although the fund was to be applied as to a part, without saying what part, for one set of objects, and as to the remainder for another, and the widow died without exercising her power of determining the proportions in which each were to take, the bequest was not void for uncertainty, but the court would divide the fund in equal moieties, and give one of such moieties to charitable purposes and the other to the testator's relatives. H In giving judgment PAGE WOOD, V.-C., clearly recognises the distinction between such a case and one where the trustees could give the whole of the fund to non-charitable objects. Referring to *Down* v. *Worrall* (10) he says (1 My. & K. at p. 538):

I ''In *Down* v. *Worrall* (10) the testator left part of his residuary personal estate to his trustees to settle it either to or for charitable or pious purposes, at their discretion, or otherwise for the separate benefit of his sister and all or any of her children, in such manner as his trustees should think fit. And there it was held that a sum which remained at the decease of the surviving trustee, and which had not been applied either to charitable purposes or for the benefit of the testator's sister and her children, was undisposed of, and belonged to the testator's next-of-kin. Now, whether that case can or cannot be reconciled with all the others on this subject, it is very clearly distinguished from the present; for it is one thing to direct a trustee to give a part of a fund

to one set of objects, and the remainder to another, and it is a distinct thing to direct him to give 'either' to one set of objects 'or' to another. *Down* v. *Worrall* (10) was a case of the latter description. There the trustees could give all to either of the objects. This is a case of the former description. Here the trustee was bound to give a part to each. I am therefore of opinion, that even if the case of *Down* v. *Worrall* (10) can be reconciled with the other authorities on this subject, it cannot affect my decision in the case before me. Here there is a plain direction to the widow to give a part to the charitable purposes referred to in the will as she may think fit, and the remainder among the testator's relatives as she may direct. And the widow having died without exercising that direction, the moiety in question must be divided equally."

If, therefore, in any case the executors cannot refuse to allocate a part of the fund to charitable purposes they must either fix the part to be given to those purposes, or, if they do not exercise their discretion, the court will itself divide the fund between the charitable and the non-charitable objects. The court is, therefore, able, either through the exercise by the executor of his discretion, or by itself dividing the fund, to ascertain the proportion of the fund to be devoted to charitable purposes, and, when once that has been done, it appears to me that there is no difficulty in the court giving effect to the trusts affecting the parts so allocated to charitable objects. It is true that in *Hunter* v. *A.-G.* (6) Lord Davey, in referring to *Salusbury* v. *Denton* (9) and *A.-G.* v. *Doyley* (11), referred to them as authorities for the proposition that where trustees have a discretion to apportion between charitable objects and definite and ascertainable objects non-charitable the trust does not fail. I think, however, that Lord Davey was merely contrasting cases where the trustees have an option to apply the whole fund to charitable or non-charitable indefinite objects as they think fit and cases where they have a discretion to apply the whole fund to charitable or definite and ascertainable non-charitable objects, and that he did not intend to intimate that the distinction drawn by Page Wood, V.-C., in the passage to which I have referred, was only applicable to cases where the non-charitable objects were definite and ascertainable.

The principle of the matter appears to me to be this. Where a fund is directed to be held upon trust for charitable and non-charitable indefinite purposes indiscriminately the trust fails by reason of the uncertainty as to the non-charitable objects of the trust and the consequent inability of the court to control its administration. In *Morice* v. *Bishop of Durham* (5), where a fund was given upon trust for such objects of benevolence and liberality as the Bishop of Durham should approve of, Sir William Grant in holding the gift to be invalid expressed himself as follows:

"That it is a trust, unless it be of a charitable nature too indefinite to be executed by this court, has not been, and cannot be, denied. There can be no trust over the exercise of which this court will not assume a control; for an uncontrollable power of disposition would be ownership and not trust. If there be a clear trust, but for uncertain objects, the property that is the subject of the trust is undisposed of; and the benefit of such trust must result to those to whom the law gives the ownership in default of disposition by the former owner. But this doctrine does not hold good with regard to trusts for charity. Every other trust must have a definite object. There must be somebody in whose favour the court can decree performance. But it is now settled upon authority, which it is too late to controvert, that, where a charitable purpose is expressed, however general, the bequest shall not fail on account of the uncertainty of the object: but the particular mode of application will be directed by the King in some cases, in others by this court."

Where, on the other hand, a fund is to be held upon trust for charitable and for non-charitable definite purposes there is no uncertainty as to the non-charitable objects of the trust and the trust is a valid one. In both these cases the question that has to be considered is whether the objects of the trust can or cannot be

ascertained by the court. But in a case where a part of a fund is given for charitable purposes and the other part is given for non-charitable purposes, the first question that has to be considered is whether the court can ascertain what are the two parts. In such a case the court finds no difficulty where the non-charitable purposes are definite, as appears from *Salusbury* v. *Denton* (9), and I cannot see that there is any greater difficulty where the non-charitable purposes are indefinite. It is true, of course, that where such purposes are indefinite it is impossible to say how much is required for those purposes since the purposes cannot be ascertained. But the same impossibility occurred in *Hoare* v. *Osborne* (12), where a fund was given upon trust out of the income thereof to keep in repair a monument in a church, a vault in the churchyard, and an ornamental window in the church. It was held that the trust for the repair of the vault was not charitable and was void, but that the trusts for the repair of the monument and window were valid as being charitable. The question then arose as to how the fund should be divided, and the court directed the fund to be equally divided into three parts on the ground of the impracticability, from the nature of the gift, of ascertaining the proportions that would be required for the three objects respectively. If the difficulty of ascertaining how much is required for any particular object does not deter the court from dividing the fund, it appears to me to be immaterial whether that object is a definite or an indefinite one. It is, moreover, to be observed that, though for the purpose of the rule as to uncertainty of the objects of a trust, the court treats charitable indefinite objects as being certain, owing to the favour always extended by the court to charities, the impossibility of ascertaining how much of a fund is required for indefinite objects is just as great a practical difficulty where the objects are charitable as where they are non-charitable. And yet, both in *Salusbury* v. *Denton* (9) and *A.-G.* v. *Doyley* (11) the court was able to make a division of the fund between charitable indefinite objects and definite non-charitable objects.

It only remains for me to apply these principles to the present case. The effect of the residuary gift appears to me to be that the testator has given his residue to the four objects or sets of objects (a), (b), (c), and (d) with power to his executors to determine in what shares and proportions the residue is to be divided between the four. There is no express gift in default of the executors so determining, but the rule of the court in such a case has been laid down as follows:

> "If the instrument itself gives the property to a class, but gives a power to A. to appoint in what shares and in what manner the members of that class shall take, the property vests, until the power is exercised, in all the members of the class and they will all take in default of appointment": see *Lambert* v. *Thwaites* (13), L.R. 2 Eq. at p. 155.

It is said on behalf of the next-of-kin that the executors in this case have a power of appointment among the four objects or sets of objects. I think that they are right in this contention. Although it is in terms a power of distribution and not of selection, it is what used to be called a "non-exclusive" power of appointment. The next-of-kin then contend that, having regard to Lord Selborne's Act (The Powers of Appointment Act, 1874), the executors can, in exercise of such power, appoint the whole fund to the set of objects (d). Again, I think that they are right, assuming that such power is a valid one. But if the power be one that enables the executors to appoint the whole fund to those objects such a power must be invalid on the principles already referred to. For a power to appoint to charitable and non-charitable indefinite objects is just as invalid as a direct gift to such objects. There is, therefore, a gift to the four objects or sets of objects with a super-added power of appointment that I hold to be invalid. The property, accordingly, remains vested in all the four without the executors' having any power to divest it. I, therefore, arrive at the conclusion that each one of the four objects or sets of objects takes a share in the residue, and in accordance with the principle that equality is equity (of which *Salusbury* v. *Denton* (9) is an example) they take it in equal shares. The result is that one-fourth of the residue is held

upon trust for the charitable objects specified in heading (a), one-fourth each for the Royal National Lifeboat Institution and the Lister Institute of Preventive Medicine, and the remaining one-fourth in trust for the persons entitled to the testator's estate as upon an intestacy. The costs had better come in equal shares out of the estates.

Solicitors: *Hiscott, Troughton & Grubbe*; *Pennington & Son*; *Clayton, Sons & Fargus.*

[*Reported by* G. P. Langworthy, Esq., *Barrister-at-Law.*]

RICHARDS *v.* DUFFRYN ABERDARE COLLIERY CO., LTD., AND OTHERS

[Chancery Division (Sargant, J.), July 6, 1923]

[Reported [1923] 2 Ch. 520; 93 L.J.Ch. 58; 130 L.T. 181; 39 T.L.R. 634; 68 Sol. Jo. 13]

Coal Mine—Check weigher—Appointment—Interference by owner—Re-appointment after lock-out—Refusal to re-open mine if particular check weigher be re-appointed—Coal Mines (Check Weigher) Act, 1894 (57 & 58 *Vict.*, *c.* 52), *s.* 1.

Section 1 of the Coal Mines (Check Weigher) Act, 1894, which renders it an offence for the owner of a mine to interfere with the appointment of a check weigher or to induce the persons entitled to appoint a check weigher not to re-appoint a check weigher, applies only to the mine as a going concern. It would operate to prevent a mine owner dismissing the miners and closing the mine to get rid of a certain check weigher, but where, after a lock-out during which all work at the colliery had ceased for more than three months, the owners of the mine refused to re-open it if the plaintiff was re-appointed a check weigher, the ground for the refusal being that he had advised the miners that, if they returned to work on the terms that were then being negotiated, they should "go ca' canny" and do as little work as possible, **held,** that at the date of the refusal the mine had ceased to function and no contractual relations existed between the mine owners and the men; the owners' real objection to the plaintiff was his influence over the workers, and his position was altogether a secondary matter; and, therefore, the owners were not in breach of the section.

Notes. As to check weighers, see 26 Halsbury's Laws 613–617; and for cases see 34 Digest 732, 733. For Coal Mines (Check Weigher) Act, 1894, see 16 Halsbury's Statutes (2nd Edn.) 84.

Cases referred to:

(1) *Whitehead* v. *Holdsworth* (1878), 4 Ex.D. 13; 48 L.J.Q.B. 254; 39 L.T. 638; 43 J.P. 400; 27 W.R. 94, D.C.; 34 Digest 732, *1118.*

(2) *Merryton Coal Co.* v. *Anderson* (1890), 18 R. (Ct. of Sess.) 203; 28 Sc.L.R. 142.

Also referred to in argument:

Phillips v. *Britannia Hygienic Laundry Co.*, [1923] 2 K.B. 832; 93 L.J.K.B. 5; 129 L.T. 777; 39 T.L.R. 530; 68 Sol. Jo. 102; 21 L.G.R. 709, C.A.; 42 Digest 870, *197.*

Witness Action in which the plaintiff alleged that the defendants had conspired, wrongfully and maliciously, and with intent to injure him in (a) attempting to obtain and procuring breaches of his contract of employment with the workmen at the defendants' colliery as check weigher; (b) preventing or attempting to prevent him from acting as check weigher and receiving the emoluments of that office; and (c) interfering with or attempting to exercise improper influence in respect of him as check weigher, and inducing or attempting to induce the persons entitled to appoint or re-appoint a check weigher not to appoint or re-appoint him to this office.

In November, 1918, the plaintiff was elected by ballot of the miners at the Tower Colliery, Hirwain, in accordance with the provisions of the Coal Mines Regulation Acts, 1887 to 1905, to be their check weigher. In May, 1919, the colliery was acquired by the defendants, the Duffryn Aberdare Colliery Co. At all material times the defendant, Sir David R. Llewellyn, was the chairman and managing director of the defendant company, and the defendant, Richard Buxton, was the agent of the colliery. The remaining eleven defendants were workmen employed at the colliery. On Mar. 14, 1921, notices were served on behalf of the company on all the workmen at the Tower Colliery, terminating their individual contracts as from Mar. 28, 1921, when a national stoppage of coal mines commenced. During the stoppage all work at the colliery ceased. Towards the end of June, 1921, the plaintiff wrote a letter for publication in the "Aberdare Leader," urging the miners, if they returned to work on the terms then being negotiated—which he described as slavery conditions—to adopt what was commonly known as the "ca' canny" policy of "going slow" and doing as little work as possible. Those terms of settlement were adopted, and a deputation from the local lodge of the South Wales Miners' Federation went to the defendant Buxton to ask about the re-opening of the Tower Colliery. A meeting was arranged to take place on July 2, 1921, between the committee of the lodge and the defendants, Llewellyn and Buxton. At the meeting the defendant Llewellyn referred to the plaintiff's letter in the "Aberdare Leader," and said that he and his co-directors were of opinion that it was impossible to re-open the colliery while the men were advised to do as little work as they could. He told the defendant Buxton and the other officials not to negotiate with the plaintiff on any point regarding the workmen. He continued, according to a note taken at the time: "I have given every consideration to the poverty and suffering it will mean to the people, but I have also given you the conditions under which the colliery is open. It is for you to decide. If you like you can keep G. R. (the plaintiff) in retirement, but on no account is he to have anything to do with my collieries, and I don't think the development of Hirwain is possible while G. R. is here." The plaintiff then spoke and said: "I warn everybody that the men, through their suffering, are forced back under slavery conditions. I advise the men to do as little as possible." He then went on to urge them to fight the defendant Llewellyn. In consequence the following resolution was passed on July 14, 1921, by the workmen of the Tower and adjoining collieries:

> "That this meeting of the workmen of the Tower Tir, Herbert, and New Drift Collieries, after due consideration to the report of the joint committee of the above collieries, do hereby agree that we earnestly appeal to Mr. D. R. Llewellyn to re-consider his decision re closing down the mines, and allow the charge brought against Gwilyn Richards to be dealt with in a constitutional manner, and that in the meantime the works be thrown open for employment, and that Gwilyn Richards shall refrain from presenting himself at the collieries until the conciliation board gives its decision."

This suggestion was accepted and the colliery was re-opened next day. The case of the plaintiff was referred to the Board of Conciliation for the coal trade of Monmouthshire and South Wales, and the Conciliation Board referred the matter to two arbitrators, representing employers and workmen respectively. On Nov. 29, 1921, they made an award that the colliery company "cannot dictate to their

workmen as to whom they shall appoint as their check weigher. . . ." Soon afterwards, the plaintiff resumed work as check-weigher, but without re-election. Between July, 1921, and February, 1922, working at the colliery was from time to time suspended for reasons connected with the industry. One of the suspensions of working was on Dec. 5, and the defendant workmen then formed themselves into a committee and got up a petition for signature by the workmen expressing their willingness to work without the plaintiff. In January a second petition was originated by the same persons, and was signed by the great majority of the workmen. This petition expressed a willingness to work without the plaintiff, and a desire to co-operate with the management. It was handed to the defendant Buxton, and sent by him to the defendant Llewellyn early in February, when there was a stoppage of work at the time. The mine was re-opened on Feb. 13, 1922, but when the plaintiff presented himself on Feb. 13 and 14 for work, he was not allowed to do the work of a check weigher, and the management persisted in refusing this.

By s. 1 of the Coal Mines (Check Weigher) Act, 1894 (as now amended by the Mines and Quarries Act, 1954, Sched. 5):

> "If the owner . . . or manager of any mine, or any person employed by or acting under the instructions of and such owner . . . or manager, interferes with the appointment of a check weigher, or refuses to afford proper facilities for the holding of any meeting for the purpose of making such appointment, in any case in which the persons entitled to make the appointment do not possess or are unable to obtain a suitable meeting place, or attempts, whether by threats, bribes, promises, notice of dismissal, or otherwise howsoever, to exercise improper influence in respect of such appointment, or to induce the persons entitled to appoint a check weigher, or any of them, not to re-appoint a check weigher, or to vote for or against any particular person or class of persons in the appointment of a check weigher, such owner . . . or manager shall be guilty of an offence . . ."

Upjohn, *K.C.*, *Galbraith*, *K.C.*, and *Slesser* for the plaintiff.
Maugham, *K.C.*, *Green*, *K.C.*, and *A. T. James* for the defendants.

SARGANT, J. [after stating the facts, and determining that on those facts there had been no conspiracy such as was alleged, continued:] I have now to consider whether an offence was committed on July 2, 1921, under the Coal Mines (Check Weigher) Act, 1894. That is a very stringent statute and imposes certain penalties for doing certain acts. Under the Coal Mines Regulation Acts, 1887 to 1905, provisions were made for the appointment by the miners of check weighers whose duty was to check the minerals gotten on behalf of the men and to see that they were properly paid. The check weigher's remuneration was to be deducted from the wages of the persons on whose behalf he was employed. It was decided in *Whitehead* v. *Holdsworth* (1), the decision in which was followed by a Scottish court in *Merryton Coal Co.* v. *Anderson* (2), that if the contracts of the workmen at the mine were terminated by notice, then on the resumption of work at the mine the check weigher was not necessarily to remain there without a fresh appointment. The organisation had come to a stop for the time being, and when work was resumed it was necessary that there should be a fresh appointment. That no doubt, did open the door to the management's closing of the mine for the very purpose of getting rid of an obnoxious check weigher, and it was suggested in *Whitehead* v. *Holdsworth* (1) that the mine had been closed and notices to the workmen had been given for that purpose. Then the Act of 1894 was passed, and that strengthened the law. The section of that Act is rather curiously worded. It does not in terms prohibit anything, but it makes certain acts offences under the main Act of 1887. [His Lordship read the section.]

Does that section in terms apply to the position of the plaintiff on July 2, 1921? I think it does not. It is quite clear that the contracts of the workmen were terminated because of the national stoppage, which lasted for three months, and

not for any other reason. After the national stoppage fresh contracts had to be signed by the men. In my judgment, the terms of this Act apply to a mine as a going concern. They may apply if the owner of a mine, for the purpose only of getting rid of a check weigher, gives notice of dismissal and puts an end to the organisation of the men temporarily, intending to enter into new contracts with them at once—only to get a fresh check weigher. The colliery owner would then be attempting, by giving notices of dismissal, to interfere with the appointment of the check weigher. But I do not see how this Act can be treated as applying when the organisation has ceased to function and there are no contracts with the men, no relationship subsisting between them and the owners, and no check weigher. The Act, in my judgment, does not apply to a case of this sort. When, in July, 1921, Sir David Llewellyn made his announcement of the terms upon which he was going to re-open the mine, it was not, in my judgment, his object to get the plaintiff out of his position as check weigher. I think Sir David Llewellyn's immediate object was to displace the plaintiff from being the leader of the men able to exercise influence over the men, or some of them, and the question in regard to his position as check weigher was a secondary matter altogether. No doubt, the plaintiff's position as check weigher was bound up to a certain extent with his position as leader of the men, because as check weigher he was always at the mouth of the level. There is no reason to think that the plaintiff checked the minerals gotten by the men wrongly or anything of that kind. The real objection of the owners to the plaintiff was that they thought that he, being the leader of the men, influenced them and told them not to give a fair day's work in return for their wages. It was that to which Sir David Llewellyn was objecting. If my interpretation of the Act be correct, it follows that on July 2 Sir David Llewellyn did nothing which was in contravention of the Act. If that be so, it follows that he never did anything in contravention of the Act because after July 2 the initiative ceased to lie with Sir David and lay with the men alone. It may be that the men had some recollection of the attitude taken up before by Sir David Llewellyn—I should assume they had—but that does not make what he did an illegal act. For these reasons it appears to me that the claim of the plaintiff founded on the Act of 1894 fails. The result, therefore, is that this action must be dismissed with costs.

Solicitors: *Smith, Rundell, Dods & Bocket*, for *Morgan Bruce & Nicholas*, Pontypridd; *Bell, Brodrick & Gray*, for *Kensholes & Prosser*, Aberdare.

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law.*]

A

STOCKHAM *v.* EASTON

[King's Bench Division (Lush and Salter, JJ.), May 4, 10, 1923]

[Reported [1923] 2 K.B. 694; 92 L.J.K.B. 1086; 129 L.T. 773; 68 Sol. Jo. 82; 21 L.G.R. 679]

B

Rent Restriction—Apportionment—Part of house—Structural alteration of other parts of house—Benefit to part sought to be apportioned—Loss of identity of whole house—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (11 & 12 *Geo.* 5, *c.* 17), *s.* 12 (3).

In 1920 the landlord bought a house, which had been let as a whole on Aug. 3, 1914, at a rent within the Rent Restrictions Acts. He made substantial structural alterations and improvements in the lower part of the house at a cost of about £900, but he did not convert the different parts of the house into separate and self-contained flats, and the alterations and improvements which he made on the first floor were trivial. The tenant, however, who, when the alterations were complete, took the rooms on the first floor, derived substantial benefit from the improvements which had been made in the lower part of the house. On an application by the tenant for an apportionment of the standard rent of the whole house to ascertain the standard rent of the rooms on the first floor which he occupied,

C

D

Held: the whole of the house must be regarded and not merely the first floor; owing to the extent of the structural alterations to the house as a whole, it had changed its identity; in those circumstances the first floor must be taken also to have been substantially altered; and, therefore, the tenant was not entitled to an apportionment.

E

Notes. Section 12 (3) of the Increase of Rent, &c. (Restrictions) Act, 1920, has been amended by the deletion therefrom of references to "standard rent" and "rent": see Rent Act, 1957, Sched. 8, Part 1 (37 Halsbury's Statutes (2nd Edn.) 604).

F

Referred to: *Abrahart* v. *Webster*, [1925] 1 K.B. 563.

As to apportionment and change of identity, see 23 Halsbury's Laws (3rd Edn.) 724–726, 753–755. For cases see 31 Digest (Repl.) 685–688, 728, 729; and for Increase of Rent, &c. (Restrictions) Act, 1920, see 13 Halsbury's Statutes (2nd Edn.) 981.

G

Cases referred to:

(1) *Darrall* v. *Whitaker* (1923), 92 L.J.K.B. 882; 129 L.T. 672; 39 T.L.R. 447; 67 Sol. Jo. 727; 21 L.G.R. 505, D.C.; 31 Digest (Repl.) 686, *7781*.

(2) *Sinclair* v. *Powell*, [1922] 1 K.B. 393; 91 L.J.K.B. 220; 126 L.T. 210; 38 T.L.R. 239; 66 Sol. Jo. 235; 20 L.G.R. 73, C.A.; 31 Digest (Repl.) 673, *7691*.

(3) *Marchbank* v. *Campbell*, [1923] 1 K.B. 245; 92 L.J.K.B. 137; 128 L.T. 283; 39 T.L.R. 120; 67 Sol. Jo. 184; 21 L.G.R. 90, D.C.; 31 Digest (Repl.) 686, *7782*.

H

Appeal from Wandsworth County Court.

An application had been made to the county court by the tenant of the first floor of a dwelling-house for an order under s. 12 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, for the apportionment of the standard rent of the whole house with a view to fixing the standard rent of the rooms on the first floor occupied by the applicant. The deputy county court judge held that there must be an apportionment of the rent, and he made the order accordingly. The landlord appealed.

I

By the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (3):

"Where, for the purpose of determining the standard rent or rateable value of any dwelling-house to which this Act applies, it is necessary to apportion

the rent at the date in relation to which the standard rent is to be fixed, or the rateable value of the property in which that dwelling-house is comprised, the county court may, on application by either party, make such apportionment as seems just. . . ."

Boyd Merriman, *K.C.*, and *J. Ronald Walker* for the landlord.

Greaves-Lord, *K.C.*, and *H. C. Bickmore* for the tenant, applicant for apportionment.

LUSH, J.—This case raises a novel and important question under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The tenant applied to the Wandsworth County Court for an order for the apportionment of the rent under s. 12 (3) of the Act. Both the registrar and the learned judge, on the evidence, came to the conclusion that it was a proper case for apportionment. The learned judge apportioned the rent of the first floor of the house belonging to the landlord at 7s. 6d. a week. The tenant had taken the first floor some time before at the agreed rent of 25s. a week, so the apportioned rent works out at less than a third of the rent that the tenant agreed to pay. The landlord has appealed, and the question we have to decide is whether it was a case in which the tenant was entitled to have the rent apportioned. The whole house was let on Aug. 3, 1914, at £60 a year. In 1920 the landlord bought it with a view to making extensive alterations and improvements. He did so; he made structural alterations in a large part of the house, and spent no less than £900 upon these alterations. So extensive were they that the learned judge in his judgment said:

"If I had to look at the whole house, the alterations which I have mentioned would have been sufficient to remove the house from liability to apportionment."

In other words, he held that the house as a whole, to use a common expression, had lost its identity, and that it was so altered, and the alterations were so substantial, that it could not be said to be the same house as existed in 1914. The learned judge, however, went on to say that, as there had been no substantial structural alteration in respect of the tenant's dwelling-house, the first floor, part only of the house: "I hold that the learned registrar was right, and that the order for apportionment must stand."

The question is whether that view of the learned judge is right or wrong. The contentions on the two sides are these. It is said for the tenant that there is no difficulty, if this floor has not been substantially altered, in apportioning the rent, because one has only got to take the whole house, which was let at £60, and say what proportion of that £60 was, if I may use the expression, commanded by this floor. It was argued that unless part of the house, which is a separate dwelling-house under the Act, has itself been substantially altered, structurally altered, the landlord cannot let it except at the apportioned rent. The contention on the other side is that although the rooms on the floor—there were three rooms, I think—have not been themselves structurally or substantially altered (although if you look at the four walls and the floor and the ceiling you will see it is the same room as it was before), yet their character may have altered by reason of the alteration of the house of which they formed part. It is said that the learned judge was wrong in confining his attention to the question whether these particular rooms had been altered, and that he ought to have considered whether, owing to the structural alteration of the house, the rooms themselves had not been substantially altered so as to justify a landlord in taking a fair rent which does not represent a proportion of the rent of the whole house at which these rooms were let.

The Act of Parliament is so drawn as practically not to throw any light upon what is meant when it gave power to a county court judge to apportion rent. All that it says is in s. 12 (3), which is:

"Where, for the purpose of determining the standard rent or rateable value of any dwelling-house to which this Act applies, it is necessary to apportion the

rent at the date in relation to which the standard rent is to be fixed, or the rateable value of the property in which that dwelling-house is comprised, the county court may, on application by either party, make such apportionment as seems just. . . .''

It does not say when it is necessary to apportion the rent; it has left that to the courts to determine. There is, incidentally, a reference to it in sub-s. (9) of the same section. That subsection says:

''This Act shall not apply to a dwelling-house erected after or in course of erection on April 2, 1919, or to any dwelling-house which has been since that date or was at that date being bona fide reconstructed by way of conversion into two or more separate and self-contained flats or tenements.''

It has been held, I think, in more cases than one—it certainly was held by McCardie, J., and myself in the very recent case of *Darrall* v. *Whitaker* (1)—that that section was not required at all. It is only an instance of a case in which there is no right to have an apportionment. Even if the house had been bona fide reconstructed into flats or tenements that were not self-contained the right of apportionment would be lost. It might have been reconstructed and converted into something that would not be called a flat at all. It is a mere example of a class of case in which by reason of the loss of identity there is no right to apportionment. Therefore, we have to consider the following principles that have been laid down in many decided cases, whether this floor can be properly said for this purpose to have been so substantially altered as to allow the landlord to charge what rent he pleases, without regard to the question of what rent was originally paid for the whole house. Reference was made in the course of the argument to two cases, *Sinclair* v. *Powell* (2) and *Marchbank* v. *Campbell* (3). It was contended that those cases have decided this question adversely to the landlord. I do not think they have. I do not think those cases really bear upon the question that we have to decide, which is quite a new question. The only point considered in those cases was what sort of alteration or reconstruction is necessary in order to disentitle a tenant to have an apportionment. Neither case dealt with facts like those of the present case, so we have to consider the present case upon principle, and I do not think we are in any way fettered by authority in coming to a conclusion with regard to it. I want to say a word, because I think it is of assistance in helping one to come to a conclusion, as to the policy of the Act, because if one of the two views which are presented to us is in accordance with and is furthering the policy of the Act, it is not an unimportant matter to consider. If, on the other hand, it is against the policy of the Act, then of course it ought not to be selected if the case is fairly open to either. Undoubtedly, the policy of the Act was to encourage a landlord to add to the number of dwelling-houses, not to hamper him, and if in this case we are to hold that a landlord who has reconstructed the house as a whole and effected great improvements, even upon this first floor indirectly, it would very much hamper a landlord if we were to hold that, notwithstanding the benefits that the floor has derived from the other improvements of the house, he still is bound to charge only the proportion of the old rent which this floor bore. To say that a landlord who has spent a large sum on reconstruction must be left to get his remuneration from the particular floor or floors that he has structurally altered and is not allowed to get it also from a floor which has derived benefit from the alterations, merely because the alterations in that floor itself are trifling, would, I think, be a disadvantage to the landlord, and so far from furthering the policy of the Act would be really hampering it.

I am not going in detail into the facts. I have said what the landlord expended. He converted entirely the lower part of the house, as I have said, but he effected some improvements on this floor, for example, by providing other lavatories and closets on other floors, he gave the tenant of this floor a lavatory and closet, with the exclusive use of it. He put in two baths. There was alteration to the drainage which was a benefit to the first floor as well as to the whole house, and he did other

things to the house which led the learned judge to say that, if he was at liberty to look at the whole house, it had lost its identity and there would be no right to apportionment. When *Darrall* v. *Whitaker* (1) was being argued this point partly arose, and McCARDIE, J., and I heard a certain amount of argument about it. It was not necessary to decide it because we held there that the floor itself had been substantially altered and had lost its identity, but I confess that the inclination in my mind then, and in the present case, until I heard counsel's very able argument for the landlord, was in favour of the contention made on behalf of the tenant, but having heard that argument and after very carefully considering the case, I have come to the conclusion that my first view was wrong, and that the landlord's contention is right, and that the learned judge was entitled to look at the whole house and ought to have refused the application for apportionment.

Let me first of all take this case. Supposing this landlord, having altered this house as he has, had let the house as a whole. There is no doubt that he would have been perfectly unfettered with regard to the rent he could ask for the whole house, and it seems a little strange if, after he had let it in separate floors and he came to consider what rent to ask for this floor, he should have to go back to the state of things that existed in 1914, and ask only the rent that this floor would then command, having regard to the then condition of the house, and that he should not be entitled to ask the rent that this floor now commands, having regard to the new conditions of the house. I think that it is altogether wrong to say that, in order to see whether there is a right to apportionment, and in order, therefore, to ascertain whether the dwelling-house in question has been substantially altered, one must shut one's eyes to the fact that by reason of the alterations in the rest of the house this dwelling-house has itself also been substantially altered and improved. Suppose that instead of this floor having a narrow, inconvenient staircase to it, a new and convenient staircase was erected. Suppose the approach to the house was improved. It seems to me impossible to say that in those circumstances this floor would still remain the same as it was as a lettable floor in 1914. I think it would not only be unjust to the landlord to say so, but that we should be wrong in saying that, notwithstanding all these changes, it is "necessary," following the words of the section, "to have the rent apportioned." I think that one must regard the whole of the house, and that, if the structural alterations of the whole house are such that as a house it has lost its identity, the proper view to take with regard to the floors or rooms in it is that they themselves are no longer to be treated as they were in 1914, that they themselves have been substantially altered, and that the county court judge ought to have refused to make an apportionment. The appeal should be allowed with costs.

SALTER, J.—I agree. The house was let as a whole in August, 1914, and was at that time suitable for occupation by one family only. At a later date the landlord made very genuine and substantial structural alterations, expending a considerable sum of money, and thus rendered the house suitable for decent occupation by four separate tenants. The work did not amount to reconstruction by way of conversion into separate and self-contained flats within s. 12 (9). Having made these alterations, the landlord let the house thus altered to four separate tenants, and the portion let to the applicant was the upper rooms. Some work, but not much, had been done to these rooms. It seems plain enough that the letting value of a part of a house may be enormously increased by reason of substantial structural alterations made to other parts of a house although the portion in question may not be much changed. The learned judge had to decide whether the applicant's dwelling-house was to be put into the first or the third of the three categories created by s. 12 (1) (a) of the Act. He had to decide whether these rooms were first let after Aug. 3, that is after the structural alterations, and to do that he applied the test laid down in *Marchbank* v. *Campbell* (3) ([1923] 1 K.B. at p. 250), namely:

"To justify a judge in finding that the part was first let when it was first let separately there must be, in his opinion, not merely a new and separate dwelling-house in law, by virtue of a new and separate letting, but a new and separate dwelling-house in fact, by virtue of substantial structural alteration."

The learned judge had to consider whether these rooms had become a new and separate dwelling-house in fact by virtue of substantial structural alterations. He held that he was bound to look only at the work that had been done in the rooms and was not entitled to look at the work done in the rest of the house. In my view, that is too narrow a reading of what was said in *Marchbank* v. *Campbell* (3). I think he was entitled to look at all the material facts, and the structural work done in the other parts of the house was a material fact. He was entitled to ask himself whether all this work had rendered the upper part of this house a new and separate dwelling-house in fact. The learned judge has stated that, if he had thought himself free to look at this structural work, he would have held that the applicant's dwelling-house was a new and separate dwelling-house by virtue of substantial structural alterations, and he, therefore, would have held that they were first let when they were first let separately and would have refused apportionment. The appeal must be allowed, and the apportionment thereunder set aside.

Appeal allowed.

Solicitors: *Herbert A. Phillips*; *Lindo & Co.*

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

Re CARTON, LTD.

[Chancery Division (P. O. Lawrence, J.), December 7, 19, January 16, 1923]

[Reported 128 L.T. 629; 39 T.L.R. 194]

Company—Winding-up—Voluntary winding-up—Liquidator's remuneration—Basis of assessment—Scale of remuneration fixed for trustee in bankruptcy—Percentage basis.

There is no enactment or rule fixing the scale of remuneration of a liquidator in a voluntary winding-up. It is well settled that the court, when called on to fix such remuneration, is not bound by the scale applicable to an official receiver when acting as liquidator in a compulsory winding-up. Each case must be considered on its merits, but the practice of the court, in the absence of special circumstances, is to be guided by the scale fixed for the remuneration of trustees in bankruptcy.

The court is extremely reluctant to interfere with the decision of the registrar on the question of the amount of remuneration to be paid to liquidators. (Per P. O. Lawrence, J.: Unless I am persuaded that the registrar has gone wrong on some question of principle or unless I am convinced that some obvious injustice has been done, I decline to disturb the decision of the registrar on the mere ground that he might have awarded a larger sum.)

As a general rule the court only fixes remuneration on a time basis if there is no other method which would operate to give the liquidator a fair remuneration. Experience has shown that the time occupied by a liquidator and his clerks affords a most unreliable test by which to measure the remuneration. Hours may be spent over unproductive work, and it is impossible to check charges based on such a system and to gauge the value of odd hours said to have been spent on the affairs of the company. The proper method to adopt,

whenever it is practicable and in the absence of special circumstances, is to assess the remuneration on a percentage basis according to the results obtained.

Notes. As to the remuneration of a voluntary liquidator, see 6 HALSBURY'S LAWS (3rd Edn.) 742; and for cases see 10 DIGEST (Repl.) 1050, 1051. For Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Motion in Companies Winding-up.

This was an appeal from a decision of the registrar on a summons taken out by the present voluntary liquidator of Carton, Ltd., which carried on a tailoring business with seventeen shops in London, asking that the remuneration of the two former voluntary liquidators of the company, one of whom had been removed by the court though expressly exonerated from any moral blame, and the other having retired, should be fixed. A committee of inspection had fixed their remuneration at 5 per cent. on realisations, and 5 per cent. on distributions, but this they had no power to do as the remuneration could only be fixed by the company in general meeting or by the court. On this basis the amount of remuneration was £2,126 1s. which had been retained by the former liquidators. The registrar, adopting as a guide the scale of fees paid to trustees in bankruptcy, and holding that there was no work of special difficulty involved in this winding-up, fixed the remuneration of the two former voluntary liquidators at £1,050.

Wilfrid M. Hunt for the present liquidator.

E. W. Hansell for the two former liquidators.

Cur. adv. vult.

Jan. 16. **P. O. LAWRENCE, J.,** read the following judgment.—This is an appeal from an order of the registrar fixing the remuneration of the former liquidators in the voluntary winding-up of the company at the sum of £1,050 and ordering the liquidators to repay to the present liquidator the difference between that sum and the sum of £2,126 1s. retained by them on account of their remuneration.

The facts giving rise to this application are somewhat out of the ordinary. On Mar. 8, 1917, the company passed an extraordinary resolution for winding-up and appointed Mr. Mordant liquidator. On May 2, 1917, the court appointed Mr. Moody to act as joint liquidator with Mr. Mordant. On June 28, 1917, the committee of inspection purported to pass a resolution fixing the remuneration of the liquidators at 5 per cent. on realisations and 5 per cent. on distributions. This they had no power to do. The power to fix the remuneration of liquidators in a voluntary winding-up is vested in the company in general meeting: see s. 186 (ii) of the Companies Act, 1908 [now Companies Act, 1948, s. 285]. On Jan. 8, 1919, Mr. Leon, the largest shareholder of the company, took out a summons to remove Mr. Mordant on the ground that he had committed several acts of grave misconduct in the course of the winding-up. Among the more serious charges made against him were the following three, viz.: (i) that Mr. Mordant had destroyed certain books and records of the company in order to prevent the proper investigation of his accounts; (ii) that he had improperly realised the company's leasehold shops without attempting to obtain anything for the goodwill of the businesses carried on thereat; and (iii) that he and his co-liquidator had improperly retained a sum of £2,126 1s. for remuneration which was wholly excessive. This sum of £2,126 1s. was arrived at by adopting the scale of remuneration which the committee of inspection had purported to fix. On April 8, 1919, ASTBURY, J., after hearing the summons with witnesses, referred certain questions relating to these three charges to Mr. Nicholson for report. On Oct. 21, 1919, Mr. Nicholson made his report and thereby found (i) that, although the labour of forming an opinion whether the stock had been sufficiently accounted for and realised for proper sums had been considerably enhanced owing to the destruction of the stock book, he had been able to form the opinion that the stock had been sufficiently accounted for and that the realisation had under all the circumstances been satisfactory; (ii) that in his opinion the liquidators did not take all the reasonable and proper precautions to

realise the businesses which were advisable under the circumstances; and (iii) that as the creditors' committee had considered and determined the remuneration of the liquidators, he would not suggest reviewing their discretion if trading payments and payments to secured creditors were deducted from the gross realisations. On Jan. 22, 1920, ASTBURY, J., made an order removing Mr. Mordant without clearly exonerating him from the grave charges of misconduct made against him. At the same time Mr. Moody expressed his desire to retire and was discharged from acting further as liquidator. Mr. Mordant appealed from the order made by ASTBURY, J., and on May 12, 1920, the Court of Appeal, while expressly exonerating Mr. Mordant from all moral blame, affirmed the order for his removal. In giving judgment WARRINGTON, L.J., said, inter alia, that he attributed no importance to the deduction of the sum for remuneration without having that remuneration ascertained in the way laid down by Act of Parliament, because that was a matter that could be settled when his accounts were being taken. Before the hearing in the Court of Appeal Mr. Vincent had been appointed liquidator in the place of Mr. Mordant and Mr. Moody. The Court of Appeal expressed the opinion that this appointment was objectionable, because Mr. Vincent was Mr. Leon's accountant. Accordingly, on July 28, 1920, Mr. Clemons was appointed liquidator in the place of Mr. Vincent. In view of the judgment delivered by ASTBURY, J., on Jan. 22, 1920, Mr. Mordant, who was a member of the Institute of Chartered Accountants, called the attention of the disciplinary committee of that institute to the charges made against him and desired the committee to investigate such charges. The committee, after investigating the charges, came to the conclusion that no action be taken. Mr. Clemons on his appointment made a thorough investigation into the affairs of the company, and, among other things, went into the matter of the remuneration of the former liquidators. As it was quite clear that this remuneration had not been fixed either by the company or by the court, Mr. Clemons was advised to summon a general meeting of the company under s. 194 [s. 303 (1) (e) of the Act of 1948] to consider, and, if thought fit, to approve, the remuneration which Mr. Mordant and Mr. Moody had retained. This he did on May 16, 1922, and the meeting was held on May 29, 1922. Three out of the six shareholders of the company attended this meeting, viz.: Mr. Leon (who held all the ordinary and 100 of the preference shares) and his two brothers-in-law, Mr. E. M. Davis and Mr. E. H. Davis (who each held 1,000 preference shares). Mr. Mordant and Mr. Moody attended the earlier part of this meeting. Mr. Clemons explained the whole of the affairs of the company to the meeting, and eventually a resolution was passed not merely disapproving of the amount of the remuneration retained by the former liquidators, but purporting to fix such remuneration at the sum of £1,050. Mr. Leon did not vote on this resolution, and it was carried by the votes of his two brothers-in-law. Mr. Clemons then took out a summons dated June 15, 1922, asking that the remuneration of Mr. Mordant and Mr. Moody in respect of their services as joint liquidators might be fixed by the court. The registrar, on the hearing of this summons, felt himself somewhat embarrassed by the resolution passed at the general meeting of the company on May 29, 1922. Section 186 (ii) provides that the company in general meeting may fix the remuneration to be paid to the liquidators, and in the absence of fraud or of some obvious injustice it is not the practice of the court to review the decision of the company as to the amount of the remuneration to be paid to its liquidators. As, however, all the parties concerned seemed anxious to have the remuneration of the former liquidators fixed by the court, the registrar was persuaded to hear the summons on the footing that no remuneration had been fixed by the company. I think that in the circumstances of this case he was right in so doing. Strictly speaking, the meeting which was convened for May 29, 1922, was not a meeting convened for the purpose of fixing the remuneration under s. 186 (ii), but was a meeting convened under s. 194 in order to ascertain whether the company would or would not sanction the amount of the remuneration which the former liquidators had retained. Technically the company at that meeting, after having disapproved of the remuneration

retained by the former liquidators, ought not to have gone on and fixed the remuneration, as the notice convening the meeting did not specify this as part of the business to be transacted. Moreover, in my opinion, it would in the circumstances of this case have been most unsatisfactory if the decision as to the amount of the remuneration had rested with Mr. Leon and his two brothers-in-law. The two brothers-in-law, besides being presumably biased against the former liquidators, had really no interest in the question at all, as the assets are not sufficient to pay the debts in full, while Mr. Leon had only a remote interest as a creditor in respect of his guarantee to the bank after all the other creditors have been paid in full.

There is no enactment or rule fixing the scale of remuneration of voluntary liquidators, and it is well settled that the court, when called upon to fix such remuneration, is not bound by the scale applicable to the official receiver when acting as liquidator in a compulsory winding-up. Every case must be considered on its merits. The present practice of the court, in the absence of special circumstances, is to be guided by the scale fixed for the remuneration of trustees in bankruptcy. The reason for adopting this practice is, first, because the court has found that the most satisfactory method to adopt is to fix the remuneration on a percentage basis, whenever this yields a fair remuneration, and to avoid, whenever possible, a time basis; and, secondly, because the present scale of fees and percentages payable on realisations and distributions by the official receiver as liquidator in a compulsory winding-up is a pre-war scale, whereas the scale applicable to trustees in bankruptcy has been revised since the war [of 1914–18] and is more generous. In the present case the main contention placed before the registrar on behalf of the former liquidators was that the sum of £2,126 1s. had been fixed by the committee of inspection, had been approved by Mr. Nicholson, and had been confirmed by the disciplinary committee of the Institute of Chartered Accountants, and, therefore, ought to be allowed by the court. The registrar came to the conclusion that, as the court was asked to fix the remuneration, it was his duty to go into the facts and figures and form his own judgment upon the question. This he did, and as the result he arrived at the conclusion that 1,000 guineas was the proper amount of remuneration to which the liquidators were entitled. He found that, according to the scale applicable to the official receiver as liquidator, the remuneration would have amounted to about £640, and that according to the bankruptcy scale the remuneration would have amounted to about £1,066. He came to the conclusion that, as there was no evidence of any special difficulty in the winding-up in the present case, he would not be justified in awarding any higher remuneration than 1,000 guineas.

This court is always extremely reluctant to interfere with the decision of the registrar on the question of the amount of remuneration to be paid to liquidators. The registrar is constantly engaged on the task of fixing such remuneration, and has naturally a far greater experience in such a matter than this court can possibly have. In many cases the liquidator is not wholly satisfied with the amount of his remuneration as fixed by the registrar, and if the court were to show a readiness to review the decisions of the registrar in a matter of this kind the time of the court would be occupied to a far greater extent than the subject-matter would warrant. Speaking for myself, I have treated the few appeals on this question which have come before me since I have been on the Bench much the same as the court treats applications to review the decisions of a taxing master on a question of costs. That is to say, unless I am persuaded that the registrar has gone wrong on some question of principle or unless I am convinced that some obvious injustice has been done, I decline to disturb the decision of the registrar on the mere ground that he might have awarded a larger sum. In the present case I am of opinion that the registrar on the materials before him arrived at the right conclusion. I think that he was right in the view he took that the court ought to fix the remuneration and ought not to hold that the remuneration fixed by the committee

of inspection was the proper remuneration merely because it was so fixed, and because it was not dissented from by Mr. Nicholson nor considered excessive by the disciplinary committee of the Institute of Chartered Accountants. I also think that on the materials before him the registrar was right in adopting as his guide the scale applicable to trustees in bankruptcy.

I was, however, not quite satisfied that the former liquidators might not have been able to show that there were some special circumstances in the liquidation, apart from the decision of the committee of inspection and from the report of Mr. Nicholson and from the finding of the disciplinary committee of the Institute of Chartered Accountants, which would entitle them to some extra remuneration. Consequently, when the appeal first came before me, I offered to allow the former liquidators, if they so desired, to adduce further evidence for the purpose of showing that such special circumstances had existed. This offer was accepted, and I thereupon gave leave to the present liquidator to file evidence to show to what extent, if any, the irregularities, which the former liquidators admittedly had committed, had increased the expenses of the liquidation, so that when the case again came before me I could judge not only whether there were any circumstances entitling the former liquidators to extra remuneration, but also whether, if such circumstances were proved to have existed, the former liquidators had not, by reason of the irregularities they had committed, caused an increase in the expense of the liquidation which ought to be set off against any increased remuneration to which they might otherwise have been entitled. Further evidence has now been filed both by the former liquidators and by the present liquidator, and in the special circumstances of this case I considered it my duty to go carefully into this evidence and to form my own conclusion whether the amount of remuneration fixed by the registrar was adequate.

In the first place, in view of some of the arguments addressed to me, I desire to state that, in my opinion, the fact that unfounded charges were made against the former liquidators, and that Mr. Mordant had to go to the Court of Appeal to vindicate his professional honour, has no bearing on the amount which ought to be paid to the liquidators for their services in the winding-up of the affairs of the company. In the next place, I have come to the conclusion that the fact that the committee of inspection considered that 5 per cent. on realisations and 5 per cent. on distributions was the proper amount to be paid to the liquidators by way of remuneration has only this bearing on the question of the amount which the court ought to fix—that the court would look with an expectant eye for any special circumstances which would justify the fixing of such a large remuneration. As regards the finding in Mr. Nicholson's report and the finding of the disciplinary committee of the Institute of Chartered Accountants I am of opinion that these findings do not assist the court to determine the proper remuneration to be allowed. Mr. Nicholson merely states that he would not suggest reviewing the discretion of the committee of inspection, and the disciplinary committee were evidently only considering whether the amount retained by Mr. Mordant and his co-liquidator was so excessive as to amount to evidence of professional misconduct. That the question of amount of the remuneration is at large, notwithstanding the purported decision of the committee of inspection and the findings of Mr. Nicholson and of the disciplinary committee, is, I think, clear from what WARRINGTON, L.J., said when the case was before the Court of Appeal. That learned lord justice plainly intimated that the question of remuneration would come up for consideration when the former liquidators were called upon to account for the moneys they had received in the course of the liquidation.

In my judgment, therefore, the real questions to be determined on the present occasion are, first, whether any special circumstances have been proved to have existed which would render the adoption of a scale based on a percentage of realisations and distributions unfair to the former liquidators, and, secondly, if a percentage scale be the right basis of assessment, whether any special circum-

stances have been proved to have existed which would render it just for the court to assess the remuneration on a more generous scale than the scale fixed for the remuneration of trustees in bankruptcy. The former liquidators have exhibited to their latest affidavit a statement from which it appears that if the remuneration were fixed according to the time occupied by them and their clerks it would exceed the amount fixed by the registrar. That may well be. The court as a general rule only fixes remuneration on a time basis if there is no other method which would operate to give the liquidator a fair remuneration. Experience has shown that the time occupied by a liquidator and his clerks affords a most unreliable test by which to measure the remuneration. Even the best accountant may spend hours over unproductive work, let alone his more or less efficient staff of clerks. Moreover, it is quite impossible to check charges based on such a system and to gauge the value of odd hours said to have been spent on the affairs of the company. The court has long since come to the conclusion that the proper method to adopt, whenever it is practicable, is to assess the remuneration according to the results attained.

In the present case I find as a fact that there are no special circumstances which would render it unjust to the former liquidators to adopt a percentage basis in assessing their remuneration. This is not a case where the proceeds of realisation were so small as to be out of proportion to the work done in producing them. The proceeds of realisation and the amounts distributed were very substantial, and, in my judgment, the remuneration should be fixed in the present case on a percentage basis. It remains to be considered whether it has been proved that the scale which the registrar has adopted is too low. I have read and considered what the liquidators have to say about the work which they had to do. I find that there is nothing out of the ordinary in the duties which they had to perform in the winding-up of the affairs of this company. The liquidation was quite an ordinary one, and involved no more arduous or complicated duties than in numerous cases which come under the cognisance of the court as matter of regular routine. If there had been a compulsory winding-up the official receiver would certainly not have been allowed remuneration on a more generous scale nor would the trustee in bankruptcy if the business had belonged to a trader or firm of traders. The company's business consisted of a tailoring business with headquarters in London and nineteen branches—seventeen in the London district, one at Brighton and one at Southend. The machinery and fixtures at the headquarters and the stock at all the premises were realised and the premises themselves disposed of. The liquidators were accountants and naturally had to obtain the services of valuers, auctioneers, and solicitors to assist them in the realisation. The expense of obtaining such assistance was properly charged in their accounts. No doubt a considerable amount of detail work had to be done by the liquidators and their staff, but for such work I am of opinion that they will be adequately remunerated by the sum which the registrar has allowed.

In the result I find that there are no special circumstances which would justify an increase in the scale which the registrar has adopted. In arriving at these conclusions I have left altogether out of consideration the loss and expenses which must inevitably have been occasioned by the irregularities committed by the liquidators in the course of winding-up. If, however, I am wrong in holding that the former liquidators are not entitled to anything beyond the usual remuneration I think that any extra remuneration to which they might be entitled would be more than counterbalanced by the expenses occasioned by the irregularities which they have committed, and by the fact that the liquidators have not been very helpful to Mr. Clemons in his endeavours to unravel the tangle brought about by their stupidity in destroying books and records before the winding-up was complete, to say nothing about the opinion formed both by Mr. Nicholson and by Mr. Clemons after full investigation that the liquidators did not take all the reasonable and proper precautions to realise the branch businesses of the company which were

advisable under the circumstances. All these matters would, in my opinion, form the proper subject-matter of a set-off against any extra remuneration. In conclusion, I hold that the remuneration fixed by the registrar was adequate, and I dismiss this appeal with costs.

Solicitors: *Peter Thomas & Clark*; *Taylor, Wilcocks & Co.*

[*Reported by* G. P. Langworthy, Esq., *Barrister-at-Law.*]

CROSS *v.* IMPERIAL CONTINENTAL GAS ASSOCIATION

[Chancery Division (Romer, J.), April 23, 24, May 8, 1923]

[Reported [1923] 2 Ch. 553; 93 L.J.Ch. 49; 129 L.T. 558; 39 T.L.R. 470]

Company—Dividend—Payment out of realised profit on total capital assets of company—Companies Clauses Consolidation Act, 1845 (8 *& 9 Vict., c.* 16), *s.* 121.

The only restriction, express or to be implied, imposed by s. 121 of the Companies Clauses Consolidation Act, 1845, on the payment of a dividend by a company registered under the Companies Clauses Acts is that the capital stock, by which is meant the paid-up capital of the company, shall not be in any degree reduced, and, therefore, such a company has power to distribute by way of dividend a profit on the realisation of its capital assets when those assets have appreciated as a whole.

Notes. As to payment of dividends, see 6 Halsbury's Laws (3rd Edn.) 72, 73, 396–406; and for cases see 9 Digest (Repl.) 629–632. For Companies Clauses Consolidation Act, 1845, Companies Clauses Act, 1863, and Companies Act, 1948, see 3 Halsbury's Statutes (2nd Edn.) 277, 335, 452.

Cases referred to:

(1) *Attree* v. *Hawe* (1878), 9 Ch.D. 337; 47 L.J.Ch. 863; 38 L.T. 733; 43 J.P. 124; 26 W.R. 871, C.A.; 8 Digest (Repl.) 367, *494*.

(2) *Lawrence* v. *West Somerset Mineral Railway*, [1918] 2 Ch. 250; 87 L.J.Ch. 513; 119 L.T. 509; 62 Sol. Jo. 652; [1918–19] B. & C.R. 91; 9 Digest (Repl.) 637, *4238*.

(3) *Lubbock* v. *British Bank of South America*, [1892] 2 Ch. 198; 61 L.J.Ch. 498; 67 L.T. 74; 41 W.R. 103; 8 T.L.R. 472; 9 Digest (Repl.) 625, *4180*.

(4) *Foster* v. *New Trinidad Lake Asphalt Co., Ltd.*, [1901] 1 Ch. 208; 70 L.J.Ch. 123; 49 W.R. 119; 17 T.L.R. 89; 45 Sol. Jo. 100; 8 Mans. 47; 9 Digest (Repl.) 629, *4201*.

(5) *Verner* v. *General and Commercial Investment Trust*, [1894] 2 Ch. 239; 63 L.J.Ch. 456; 70 L.T. 516; 10 T.L.R. 393; 38 Sol. Jo. 384; 1 Mans. 136; 7 R. 170, C.A.; 9 Digest (Repl.) 181, *1170*.

Motion by a member and debenture stockholder of the defendants, the Imperial Continental Gas Association, suing on behalf of himself and all other the members and debenture stockholders, for an injunction to restrain the association from applying a sum of £238,698 odd, received by the association, or any part of that sum, in the payment of any dividend to its members without at the same time redeeming the whole of its outstanding debenture stock, or, alternatively, the said debenture stock to a nominal amount equal to one-fourth of the nominal amount distributed among its members.

The Imperial Continental Gas Association was established for the purpose of supplying cities, towns, and places in foreign countries with gas. It was at first an unincorporated company regulated by a deed of co-partnership of Mar. 9, 1826. In 1853 it was incorporated by Act of Parliament. That Act, however, was repealed by the Imperial Continental Gas Association Act, 1870, which also avoided the deed of co-partnership, and provided, by s. 4, as follows:

"Notwithstanding the repeal of the recited Act and the avoidance of the said deed of co-partnership, the association shall remain as from the passing of the said recited Act, and continue incorporated by the name of 'The Imperial Continental Gas Association,' for the purpose of supplying, either exclusively by means of their own capital and property, or in conjunction with any other company or party, any cities, towns, and places in foreign countries with gas, and by that name shall continue and be a body corporate, with perpetual succession and a common seal with power to purchase, hire, and use, and also to sell any lands, buildings, stations. . . ."

By s. 11 of that Act the Companies Clauses Consolidation Act, 1845 (excepting the clauses with respect to the conversion of borrowed money into capital), and Parts I, II, and III of the Companies Clauses Act, 1863, as amended by the Companies Clauses Act, 1869, were incorporated. By s. 116 of the Companies Clauses Consolidation Act, 1845:

"The books of the company shall be balanced at the prescribed periods, and, if no periods be prescribed, fourteen days at least before each ordinary meeting; and forthwith on the books being so balanced an exact balance sheet shall be made up, which shall exhibit a true statement of the capital, stock, credits, and property of every description belonging to the company, and the debts due by the company, at the date of making such balance-sheet, and a distinct view of the profit and loss which shall have arisen on the transactions of the company in the course of the preceding half year . . ."

Sections 120 and 121, which are introduced by these words: "And with respect to the making of dividends be it enacted as follows," provide:

"120. Previously to any ordinary meeting at which a dividend is intended to be declared the directors shall cause a scheme to be prepared, showing the profits, if any, of the company for the period current since the preceding ordinary meeting at which a dividend was declared, and apportioning the same, or so much thereof as they may consider applicable to the purposes of dividend, among the shareholders, according to the shares held by them respectively, the amount paid thereon, and the periods during which the same may have been paid, and shall exhibit such scheme at such ordinary meeting, and at such meeting a dividend may be declared according to such scheme. 121. The company shall not make any dividend whereby their capital stock will be in any degree reduced: provided always, that the word 'dividend' shall not be construed to apply to a return of any portion of the capital stock, with the consent of all the mortgagees and bond creditors of the company, due notice being given for that purpose at an extraordinary meeting to be convened for that object."

That Act contained various provisions relating to the borrowing of money by a company on mortgage or bond, and the Companies Clauses Act, 1863, contained provisions as to the creation and issue by a company of debenture stock and the remedies available to debenture stockholders whose interest might be in arrear. By the Association's Act of 1878, after reciting that the whole of the association's debenture or bond debt had been paid off, the whole of its share capital was converted into stock (s. 2), the association's then existing powers of borrowing were repealed (s. 5), and by s. 8 it was provided:

"Inasmuch as the association have no power to carry on their operations within any part of the United Kingdom, they may from time to time (with the

consent of three-fourths of the votes of the members in person or by proxy at any general meeting or meetings specially convened for the purpose) reduce the nominal capital of the association by returning to each member such sum in proportion to the amount of his holding of stock in the association as may be determined by the meeting or meetings at which the reduction is decided on, and as from the date of the resolution deciding on such reduction the nominal amount of the aggregate capital of the association shall be deemed to be altered accordingly in all Acts of Parliament and documents affecting the association."

By the Association's Act of 1884 the association was given power to borrow on mortgage or debenture and to charge their undertaking with repayment of any sums so borrowed with interest, and by its Act of 1893 it was provided that the total amount of principal debt outstanding should not at the time of issue exceed one-fourth of the capital of the association then issued and fully paid.

A further Act dealing with the Association, which was passed in 1916, recited that:

"By virtue of the Act of 1884 as amended by the Act of 1893 the association are empowered to borrow and re-borrow on mortgage or debenture any sums not exceeding one-fourth part of the capital of the association for the time being issued and fully paid-up and in exercise of such powers and of the powers conferred by the Companies Clauses Acts, 1863 and 1869, the association have from time to time created and issued debenture stock to the aggregate nominal amount of £1,235,000 bearing interest at the rate of three and one-half per centum per annum but no mortgages or debentures of the association are at present outstanding."

Section 3 provided:

"The powers of the association shall be deemed to include and as from the passing of the Act of 1870 to have included the following powers (that is to say): Power to purchase, acquire, accept, hold, and enjoy all shares, stock, mortgages, debentures, or debenture stock, or other security, or interest of or in any corporation, company, association, or body carrying on any undertaking in the United Kingdom or in any part of His Majesty's overseas Dominions or in any foreign country of which the objects are similar to or connected with or incidental to the objects of the undertaking of the association; power to sell, vary, exchange, let, lease, transfer, surrender, or otherwise deal with or dispose of any such undertaking as aforesaid or any similar undertaking established by the association under their statutory powers or any business, rights, contracts, concessions, privileges, shares, stock, mortgages, debentures, or debenture stock, or other security, or interest possessed, granted to, carried on, or held by the association, whether singly or in conjunction with any other corporation, company, association, body, or person upon and subject to such terms and conditions and for such consideration whether in cash or in shares, stock, mortgages, debentures, debenture stock, or other securities of or interest in any corporation, company, association, or body, or partly in one form and partly in another or others or for any other consideration as the directors of the association may think fit."

By s. 9:

"Notwithstanding anything in s. 8 of the Act of 1878 the association shall not reduce their nominal capital as provided by that section unless simultaneously with such reduction they redeem any then outstanding debenture stock to a nominal amount equal to one-fourth part of the nominal amount by which the capital of the association is reduced."

In August, 1914, the Association was possessed of valuable gas undertakings on the continent, including gas undertakings in Berlin and other towns and places in Germany. On the outbreak of war all these German undertakings were placed

under compulsory administration by the German government, and in August, 1916, a decree was issued in Germany ordering their liquidation. By virtue of this decree the whole of the German undertakings were, with an immaterial exception, sold to various German companies or municipalities in the years 1917 and 1918. When, therefore, the Treaty of Peace with Germany came into force, the Association duly filed with the proper authority a claim for compensation, and in response to that claim the proceeds of the sale of the German undertakings of the Association, amounting at the Peace Treaty rate of exchange to £5,625,896, were in due course paid over to the Association. The Association, however, claimed to be paid, in addition to this sum, compensation under art. 297 (e) of the Treaty of Peace in respect of damage or injury inflicted upon their property, rights, and interests in German territory, and this claim has been finally agreed with the German government at £1,600,000. Only part of this latter sum had been paid up to the time of the hearing of the motion, but the Association has so far received in all from the German government a sum of £5,864,594. The German undertakings in respect of which this sum has been paid stood in the books of the association at £4,397,400, after writing off depreciation, so that the association has realised so far a profit upon the book value of the undertakings of £1,467,194. Out of the money so received from the German government the directors, in pursuance of the powers conferred upon the Association by the Act of 1878, utilised part of the £4,397,400 representing the book value of the German undertakings for the purpose of reducing the nominal capital of the Association from £4,940,000 to £1,976,000 by returning to the members the sum of £2,964,000. Having regard to s. 9 of the Act of 1916, this involved the simultaneous redemption of at least one-fourth of the nominal amount of debenture stock that was then outstanding. Such redemption was duly made, the total sum so paid to the members and debenture stockholders amounting to £3,708,840. The balance of the £4,397,400 was retained as part of the assets of the Association. To all this no objection was raised, but the directors had next to consider how the book profit of £1,467,194 should be dealt with, and they proposed to appropriate £1,228,495 towards writing down various assets of the Association, and to treat the balance of £238,698 as profit available for paying a dividend to the members. The legality of the application of this last mentioned sum in payment of a dividend was challenged by the plaintiff in the present action, both in his capacity as a debenture stockholder and in his capacity as a member.

T. R. Hughes, K.C., and *R. H. Hodge* for the plaintiff.

A. C. Clauson, K.C., and *Howard Wright* for the Association.

Cur. adv. vult.

May 8. **ROMER, J.**, read the following judgment.—I will consider first of all the plaintiff's position as a debenture stockholder. As such he contends that the debenture stock constituted a specific charge upon the German undertakings and that, those undertakings having been compulsorily sold free from that charge, the debenture stockholders are entitled, upon the ordinary principles applicable as between a mortgagee and a mortgagor, to have the proceeds of such sale applied in the first place in reduction of their "debt." Alternatively, he claims that no part of this £238,698 can be paid to the members unless, simultaneously with such payment, the outstanding debenture stock is redeemed to the extent of one-fourth of the amount paid to the members. This alternative claim is based upon s. 9 of the Act of 1916, and it is, I think, sufficient to say in answer to it that the Association are not proposing to reduce their nominal capital or to "return" anything to the members within the meaning of s. 8 of the Act of 1878.

In order, however, to deal with the plaintiff's first contention, it is necessary to see what is the position of a holder of debenture stock issued under the provisions of the Companies Clauses Act, 1863. There are several authorities to be found in the books dealing with this matter, but it is sufficient to refer to one of them only. In *Attree* v. *Hawe* (1) the Court of Appeal had to consider the question whether

such debenture stock gives the holder thereof an interest in land within the meaning of the Charitable Uses Act, 1735. The judgment of the court consisting of Sir George Jessel, M.R., James, L.J., Baggallay, L.J., and Bramwell, L.J., answering this question in the negative, was delivered by James, L.J. In the course of his judgment he said:

"But the case before us is really not that of a debenture, but of a debenture stock. It seems to be called debenture stock, lucus a non lucendo, because it is anything but a debenture. There is no doubt, except, indeed, as to the annual interest; the capital cannot be called in, and cannot be paid off. It is a right to a perpetual annuity, payable out of the concern. There is no conveyance or assignment of anything to the stockholder, or to any trustee for him. There is an entry in the books of the concern that there is so much debenture stock, on which there is so much to be paid half-yearly to the holders, just like the entry of the National Debt in the great books at the Bank of England. And the whole of the rights of a stockholder depend on the Act of Parliament authorising railways and other bodies to create such a stock."

He read s. 22 of the Companies Clauses Act, 1863, and s. 23, and referred to s. 24. Then he said:

"So far it is quite clear that the stock is of the same nature as other stock of the company, only with the important difference that it ranks in payment over all other stock, and that all arrears must be paid before a farthing is to reach the proprietors of the other stock. It is nothing but preference stock with a special preference. There is nothing to give to the stockholders any right, either at law or in equity, under any circumstances to take possession of a single item of the property of the company in specie, whether real or chattel. . . . The only thing really chargeable is the net earnings of the company, the same fund out of which, if sufficient, the dividends and interest of the other stockholders are to be paid. . . . By s. 31 it is, no doubt, provided that, in all respects not otherwise by or under the Act or the special Act provided for, debenture stock shall be considered as entitling the holders to the rights and powers of mortgagees of the undertaking, other than the right to require the repayment of the principal money. But what are the rights and powers of mortgagees of the undertaking consistent with the powers conferred by the special Act on the railway directors? They are not powers to take the land or enter on the land, or in any way to interfere with the ownership, possession, or dominion of the statutory owners and managers. The result is that the debenture stock is a charge on the net profits and earnings of a trading corporation, and is no more land, tenement, or hereditament, or any interest in land, tenement, or hereditament, or charge or incumbrance affecting land, tenement, or hereditament, than the share stock in such corporation is, or a bond or other debt due from a man who has got real property is."

Every word in these passages applies to the debenture stock of the association except that it can be paid off by this Association. It follows that the debenture stock did not constitute a specific charge upon the German property, and that, inasmuch as no interest upon it is in arrear, there is no debt due to the debenture stockholders. They have no right to interfere with the ownership, possession or dominion of the Association as the statutory owners and managers. If, therefore, the Association is, having regard to its constitution, entitled as between itself and its members to distribute the sum in question by way of dividend, the debenture stockholders have not, in my opinion, any right to object. Even if the Association are not so entitled, it is contended on the authority of *Lawrence* v. *West Somerset Mineral Railway* (2) that an action by a debenture stockholder to restrain the distribution cannot be entertained. I need not, however, further consider this latter contention. If the plaintiff be entitled to succeed on the motion as a member, he is in no worse position, and if he be not so entitled he is in no better position by reason of his suing also as a debenture stockholder.

I proceed, therefore, to inquire whether the plaintiff in his capacity of member can successfully impeach the legality of the proposed distribution. If the Association were a company registered under the Joint Stock Companies Acts, the legality of the proposed distribution could not, I think, be challenged successfully, unless, of course, it were in contravention of some special regulation of the company. The power of such a company to distribute a realised profit on its capital assets was affirmed by CHITTY, J., in *Lubbock* v. *British Bank of South America* (3), and was recognised by BYRNE, J., in *Foster* v. *New Trinidad Lake Asphalt Co., Ltd.* (4). In the latter case, a proposed distribution by way of dividend of a realised profit on an individual capital asset, without taking into account the value of the other capital assets, was held to be illegal. BYRNE, J., however, in his judgment laid down the law upon the point as follows:

> "It is clear, I think, that an appreciation in total value of capital assets, if duly realised by sale or getting in of some portion of such assets, may in proper case be treated as available for purposes of dividend. This, I think, is involved in the decision in the case of *Lubbock* v. *British Bank of South America* (3) cited with approval by LORD LINDLEY in *Verner* v. *General and Commercial Investment Trust* (5) ([1894] 2 Ch. at p. 265), where he says:
>
> > 'Moreover, when it is said, and said truly, that dividends are not to be paid out of capital, the word "capital" means the money subscribed pursuant to the memorandum of association, or what is represented by that money. Accretions to that capital may be realised and turned into money, which may be divided amongst the shareholders, as was decided in *Lubbock* v. *British Bank of South America* (3).'
>
> If I rightly appreciate the true effect of the decisions, the question of what is profit available for dividend depends upon the result of the whole accounts fairly taken for the year, capital as well as profit and loss, and although dividends may be paid out of earned profits in proper cases, although there has been a depreciation of capital, I do not think that a realised accretion to the estimated value of one item of the capital assets can be deemed to be profit divisible among the shareholders without reference to the result of the whole accounts fairly taken."

In the present case it cannot be disputed that there has been a total appreciation of capital assets by at least the sum in question. It is not denied by the plaintiff that if the proposed distribution be made every penny of the paid-up capital of the Association will still remain intact. He says, however, that, whatever might have been the position had the Association been registered under the Joint Stock Companies Acts, the authorities to which I have referred in no way conclude the question in the case of a company to which the Companies Clauses Consolidation Acts apply. But it was held by EVE, J., in *Lawrence* v. *West Somerset Mineral Railway* (2), to which I have already referred, that for the present purpose there is no substantial distinction to be drawn between companies registered under the one set of Acts and companies that are governed by the other. With that decision I respectfully agree. In both cases the application of the paid-up capital of the company in payment of dividends is illegal. The only difference is that in the case of a company registered under the Joint Stock Companies Acts the application is not expressly prohibited by the Acts and in the Companies Clauses Consolidation Act, 1845, s. 121, it is. I will read the opening words of that section again: "The company shall not make any dividend whereby their capital stock will be in any degree reduced." This section is the only express restriction on the company's power of paying a dividend to which my attention has been called, and the restriction is that the "capital stock" shall not be reduced. It is contended by the plaintiff that capital stock in this section means capital assets generally. I do not think so. The proviso to the section, which speaks of a "return" of a portion of the capital stock, seems to me to indicate that capital stock means the paid-up capital of the company. I cannot, therefore, find any positive prohibition prevent-

ing a company to which the Act applies from paying a dividend out of a realised profit on its total capital assets. Is then such a prohibition to be implied? The plaintiff says that it is, by reason of ss. 116 and 120. His contention, as I understand it, is that s. 116 requires a company to keep its revenue account distinct and separate from its balance-sheet, that the profits out of which dividends may be paid in accordance with s. 120 are the profits disclosed by the revenue account into which he says no capital appreciation can be brought, and that the payment of any other dividend is impliedly forbidden. But what s. 116 says is that the balance-sheet shall exhibit a distinct view of the profit or loss which shall have arisen on the transactions of the company in the course of the preceding half-year. If, therefore, one of the transactions of the company has resulted in a realised profit from a capital asset it should, one would think, be brought within the scope of the "distinct view." In the present case the Association has power to sell any part of its undertaking, and by receiving from the German government the proceeds of the sale of its German undertaking may be treated as having affirmed and adopted such sale. The sale may, therefore, justly be considered for the present purpose as one of the company's transactions. Without, therefore, being in any way understood to accede to the plaintiff's contention that the payment of any dividend other than that mentioned in s. 120 of this Act is forbidden by implication, I come to the conclusion that in the present case the Association has, under the section itself, power to distribute the realised profit by way of dividend among its members. The motion must be refused.

Solicitors: *Clapham, Fraser, Cook & Co.*; *Wigan, Champernowne & Prescott.*

[*Reported by* G. P. Langworthy, Esq., *Barrister-at-Law.*]

Re COUNTESS OF ROSSE. PARSONS *v.* EARL OF ROSSE

[Court of Appeal (Lord Sterndale, M.R., Warrington and Younger, L.JJ.), May 1, 1923]

[Reported 93 L.J.Ch. 8; 129 L.T. 592; 67 Sol. Jo. 638]

Will—Legacy—"Indoor and outdoor servants"—Resident land agent.

The testatrix, by her will, bequeathed the following legacies: "To each of my indoor and outdoor servants not in receipt of daily, weekly or monthly wages who shall be in my service at my death, and shall have been in my service for at least three years immediately preceding, and who shall not be under notice to leave, given or served, one year's wages in addition to wages then due." The defendants, who were land agents in the employ of the testatrix and resident in a house supplied by her on her estates, claimed to be entitled to a legacy under this clause as being her outdoor servants. Both were in receipt of a salary payable half-yearly and had acted as her land agents for more than three years preceding her death.

Held: in ordinary language the defendants could not be described as the "servants" of the testatrix, and since there was nothing in the context of the will to displace the ordinary meaning of the words, the claim failed.

Notes. Referred to: *Performing Right Society* v. *Mitchell and Booker* (*Palais de Danse*), [1924] 1 K.B. 762.

As to description of donees, see 34 Halsbury's Laws (2nd Edn.) 323 et seq.; and for cases see 44 Digest 899 et seq.

Appeal from an order of Romer, J., made on an originating summons issued by the executors and trustees of the will of the late Countess of Rosse to determine

whether the defendants, Lawrence James, and his son Lawrence James, jun., the former of whom was the resident land agent of the testatrix's estates, living in a house supplied by her on the estates, and received £600 a year payable half-yearly, while the son worked under his father, receiving a smaller sum annually, also payable half-yearly, were entitled to participate in the following legacy bequeathed by the will:

> "I bequeath, free of duty, to each of my indoor and outdoor servants not in receipt of daily, weekly or monthly wages who shall be in my service at my death and shall have been in such service for at least three years immediately preceding and who shall not be under notice to leave, given or served, one year's wages in addition to wages then due."

Lawrence James had been in the service of the testatrix for thirty-one years at her death, and his son for more than three years prior to her death.

Romer, J., held that neither Lawrence James nor his son was a servant in receipt of wages, and the defendants appealed.

Gavin T. Simonds for the defendants.
Howard Wright for the trustees.
Bryan Farrer for the residuary legatees.

LORD STERNDALE, M.R.—Speaking for myself I should have thought, if the case had not been argued, that it was unarguable. I will go further than Romer, J., who thought that not one person in ten thousand would have described the defendants as outdoor servants, and will say that I do not believe that there is anyone outside the law courts and their immediate vicinity who would suggest that these men were servants in receipt of wages. I do not intend to discuss the cases which have been referred to by counsel, as they are all decided on different wills and different facts from those of the present case. [His Lordship read the material clauses of the will and continued:] Why the testatrix inserted the qualification, "not in receipt of daily, weekly or monthly wages," I cannot imagine, but I suspect that there was an error in drafting, as its probable effect would be to cut out of the will various outdoor servants. That, however, does not affect the point now raised. I take the description of the defendants from that given by Romer, J., which was admitted to be correct as far as it went, though some further evidence was allowed to be filed to supplement it. The defendant, Lawrence James, the father, was the resident agent for the testatrix's estates which were between 4,000 and 5,000 acres in extent, and he was paid a salary of £600 a year by two equal half-yearly payments, in February and August; he also received commission on the net profits of the home farm. He described his principal duties in an affidavit as consisting in letting farms, collecting rents, managing farms in hand, paying rates, tithes, and so on. The son was in the same position, except that he worked under his father. I entirely agree with the learned judge that no one, in ordinary language, would describe the defendants as outdoor servants. But it is possible that there might be some context in the will to compel the court to say that the ordinary meaning of the words is displaced, and that the defendants must be included. Is there any such context? The context, in my opinion, points the other way. The general bequest to indoor and outdoor servants follows immediately on annuities and legacies given to the testatrix's butler and other persons named as to whom it cannot possibly be doubted that they were servants of the testatrix. I wish to guard myself, however, from any suggestion that I am applying the terrible doctrine of ejusdem generis to this will. I think that the learned judge was right, that the defendants cannot claim any share in the bequest as servants, and therefore the appeal must be dismissed.

WARRINGTON, L.J.—I am of the same opinion. In the absence of a context it is impossible to come to the conclusion that the testatrix meant to include the defendants among her outdoor servants in receipt of wages. All the expressions used in the will as to this legacy are with regard to persons in a very different

social position. So far as there is any context at all it points the other way. There are annuities and legacies to persons who would certainly be described as indoor or outdoor servants. One other point may be observed. If the defendants were to succeed each of them would be placed on the same footing as every kitchen-maid and under-housemaid employed by the testatrix. Such servants are almost always employed at yearly wages paid at intervals, and one can hardly suppose that the defendants should be regarded as being in that class.

YOUNGER, L.J.—I agree. I am very clearly of opinion that neither of the defendants was an outdoor servant within the meaning of the clause of the will.

Appeal dismissed.

Solicitors: *Nicholl, Manisty & Co.*; *Bischoff, Cox, Bischoff & Thompson*; *Emmet & Co.*, for *Claude Leatham & Co.*, Wakefield.

[*Reported by* J. L. Denison, Esq., *Barrister-at-Law.*]

ORAM *v.* ORAM

[Probate, Divorce and Admiralty Division (Hill, J.), March 26, 1923]

[Reported 129 L.T. 159; 39 T.L.R. 332]

Judicial Separation—Discharge of decree—Power of court—Resumption of cohabitation by parties—Matrimonial Causes Act, 1858 (21 & 22 *Vict., c.* 108), *s.* 8.

The court has power to discharge a decree of judicial separation where the parties have resumed cohabitation.

Notes. Section 8 of the Matrimonial Causes Act, 1858, was repealed by the Supreme Court of Judicature (Consolidation) Act, 1925. As to reversal of a decree of judicial separation, see now s. 14 (3) of the Matrimonial Causes Act, 1950.

As to reversal of decrees of judicial separation, see 12 Halsbury's Laws (3rd Edn.) 286, 287; and for cases see 27 Digest (Repl.) 602. For the Matrimonial Causes Act, 1950, s. 14 (3), see 29 Halsbury's Statutes (2nd Edn.) 401, 402.

Motion on behalf of the petitioner for discharge of a decree of judicial separation made on Feb. 17, 1917, at the suit of a wife on the ground of the husband's adultery.

After the grant of the decree the wife petitioned for increased alimony, but while that proceeding was pending the husband was taken ill, and the wife, hearing of it, went to see him, and nursed him. A reconciliation followed, and the parties lived together for a time. The husband then left the wife, and she after waiting two years presented a petition for judicial separation on the ground of desertion, but found that it was barred by the existence of the decree of judicial separation, while she was also unable to obtain alimony in her former suit because she had condoned the husband's adultery.

W. Frampton for the petitioner.

C. Beddington, for the respondent, consented to the application.

HILL, J.—My difficulty is that, although in the Matrimonial Causes Act, 1858, the discharge of a decree of judicial separation appears to be contemplated, no machinery is provided. Is there any authority on the point? [*Frampton.*—I am not able to show any authority, but submit that the court has an inherent power to discharge an order which has become ineffective.] I think I can make the order. Section 8 of the Matrimonial Causes Act, 1858, which deals with protection orders, says that

"A decree for judicial separation . . . shall, until reversed or discharged . . . be deemed valid and effectual."

Although there is not any express provision for the discharge of a decree of judicial separation, when the parties by resuming cohabitation have put an end to it I think this must follow, and I, therefore, discharge the decree.

Solicitors: *Murr & Co.*; *Burn & Berridge.*

[*Reported by* J. A. C. SKINNER, ESQ., *Barrister-at-Law.*]

RUDD *v.* RUDD

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Horridge, J.), October 16, December 19, 1923]

[Reported [1924] P. 72; 93 L.J.P. 45; 130 L.T. 575; 40 T.L.R. 197]

Domicil—Change of domicil—Domicil of origin—Onus of proof.
Conflict of Laws—Foreign decree—Enforcement—Decree of divorce—No notice to respondent in this country.

The onus of proving a change of domicil of origin is strongly on the party asserting it. Even if such a change is proved to the satisfaction of the court, a decree of divorce granted to a husband by the court of the alleged new domicil is not binding on the wife if she had no notice of the proceedings.

Semble: even if the respondent husband did prove a change of domicil the wife could still obtain relief from the court as a deserted wife.

Notes. Relief can now be given by the court to a deserted wife under s. 18 of the Matrimonial Causes Act, 1950 (29 HALSBURY'S STATUTES (2nd Edn.) 405).

Explained: *Maher* v. *Maher*, [1951] 2 All E.R. 37. Considered: *Macalpine* v. *Macalpine*, [1957] 3 All E.R. 134. Referred to: *Hughes* v. *Hughes* (1932), 48 T.L.R. 328; *Igra* v. *Igra*, [1951] P. 404.

As to abandonment of domicil of origin, see 7 HALSBURY'S LAWS (3rd Edn.) 16 et seq.; and for foreign decree of divorce, see ibid. p. 112 et seq.; and for notice of foreign proceedings, see ibid., p. 146–7; and for cases see 11 DIGEST (Repl.) 331 et seq., 471–473, 481 et seq., 517–519.

Cases referred to:

(1) *Casdagli* v. *Casdagli*, [1919] A.C. 145; 88 L.J.P. 49; 120 L.T. 52; 35 T.L.R. 30; 63 Sol. Jo. 39, H.L.; 11 Digest (Repl.) 344, *139*.

(2) *Keyes* v. *Keyes and Gray*, [1921] P. 204; 90 L.J.P. 242; 124 L.T. 797; 37 T.L.R. 499; 65 Sol. Jo. 435; 11 Digest (Repl.) 467, *1003*.

(3) *Hodgson* v. *De Beauchesne* (1858), 12 Moo.P.C.C. 285; 33 L.T.O.S. 36; 7 W.R. 397; 14 E.R. 920, P.C.; 11 Digest (Repl.) 332, *55*.

(4) *Winans* v. *A.-G.*, [1904] A.C. 287; 73 L.J.K.B. 613; 90 L.T. 721; 20 T.L.R. 510, H.L.; 11 Digest (Repl.) 329, *41*.

(5) *Buchanan* v. *Rucker* (1808), 9 East, 192; 103 E.R. 546; 11 Digest (Repl.) 506, *1226*.

(6) *Shaw* v. *A.-G.* (1870), L.R. 2 P. & D. 156; 39 L.J.P. & M. 81; 23 L.T. 322; 18 W.R. 1145; 11 Digest (Repl.) 481, *1082*.

(7) *Pemberton* v. *Hughes*, [1899] 1 Ch. 781; 68 L.J.Ch. 281; 80 L.T. 369; 47 W.R. 354; 15 T.L.R. 211; 43 Sol. Jo. 365, C.A.; 11 Digest (Repl.) 487, *1115*.

Also referred to in argument:

Briggs v. *Briggs* (1880), 5 P.D. 163; 49 L.J.P. 38; 42 L.T. 662; 28 W.R. 702; 11 Digest (Repl.) 472, *1038*.

Mitford v. *Mitford and Von Kuhlmann*, [1923] P. 130; 92 L.J.P. 90; 129 L.T. 153; 39 T.L.R. 350; 11 Digest (Repl.) 485, *1099*.

Bater v. *Bater*, [1906] P. 209; 75 L.J.P. 60; 94 L.T. 835; 22 T.L.R. 408; 50 Sol. Jo. 389, C.A.; 11 Digest (Repl.) 482, *1087*.

Le Mesurier v. *Le Mesurier*, [1895] A.C. 517; 64 L.J.P.C. 97; 72 L.T. 873; 11 T.L.R. 481; 11 R. 527, P.C.; 11 Digest (Repl.) 468, *1011*.

Colliss v. *Hector* (1875), L.R. 19 Eq. 334; 44 L.J.Ch. 267; 39 J.P. 295; 23 W.R. 485; 11 Digest (Repl.) 491, *1134*.

Ogden v. *Ogden*, [1908] P. 46; 77 L.J.P. 34; 97 L.T. 827; 24 T.L.R. 94, C.A.; 11 Digest (Repl.) 357, *260*.

Stathatos v. *Stathatos*, [1913] P. 46; 82 L.J.P. 34; 107 L.T. 592; 29 T.L.R. 54; 57 Sol. Jo. 114; 11 Digest (Repl.) 472, *1039*.

De Montaigu v. *De Montaigu*, [1913] P. 154; 82 L.J.P. 125; 109 L.T. 79; 29 T.L.R. 654; 57 Sol. Jo. 703; 11 Digest (Repl.) 473, *1040*.

Armytage v. *Armytage*, [1898] P. 178; 67 L.J.P. 90; 78 L.T. 689; 14 T.L.R. 480; 11 Digest (Repl.) 475, *1052*.

Deck v. *Deck* (1860), 2 Sw. & Tr. 90; 29 L.J.P.M. & A. 129; 2 L.T. 542; 8 W.R. 666; 164 E.R. 926; 11 Digest (Repl.) 468, *1015*.

Green v. *Green*, [1893] P. 89; 62 L.J.P. 112; 68 L.T. 261; 41 W.R. 591; 1 R. 507; 11 Digest (Repl.) 482, *1086*.

Harvey v. *Farnie* (1882), 8 App. Cas. 43; 52 L.J.P. 33; 48 L.T. 273; 47 J.P. 308; 31 W.R. 433, H.L.; 11 Digest (Repl.) 481, *1084*.

Undefended Petition by a wife for restitution of conjugal rights.

The domicils of origin of the parties were English, and they were married in England in October, 1912. In 1914 the husband left England and went first to Canada and afterwards to the United States. In 1917 he ceased writing to his wife, and, though he sent her occasional remittances down to 1919, these ceased in that year. On Nov. 23, 1920, he obtained a decree of divorce in the State of Washington, on the ground of the wife's desertion, after publication under the orders of a court in that State of a notice of the proceedings in a local newspaper for seven consecutive weeks, which did not reach the wife, a registered letter addressed to her at an address at which she had never lived furnished by the husband having been returned undelivered. On June 30, 1922, he went through a form of marriage in that State with a woman with whom he had since cohabited. The wife first heard of the American divorce by a letter, which reached her solicitors on Sept. 1, 1921. On May 3, 1922, she wrote the respondent a letter asking him to return to her, which was delivered to him personally in September, 1922, but to which he had not replied, nor had he ever returned to her. The wife had never been to America, but a witness who was present when her letter was delivered in September, 1922, said that the respondent then stated that his intention was never to return to England.

L. R. Lipsett for the petitioner.

HORRIDGE, J., referred to *Casdagli* v. *Casdagli* (1), and said that he was not satisfied that the petitioner had had sufficient notice of American proceedings, and following the example of the President in *Keyes* v. *Keyes and Gray* (2) should take steps to have the case argued. The suit accordingly stood adjourned.

Dec. 19.—The hearing was resumed. *Sir Harold Smith, K.C.*, and *Noel Middleton* appeared for the Attorney-General as amici curiae.

L. R. Lipsett for the petitioner in support of the American decree.

HORRIDGE, J.—This suit is really brought to obtain a declaration that the American decree of divorce holds good here. The petitioner asks for restitution, but would like her application to be refused on the ground that there is no subsisting marriage. Two questions arise for determination: (i) Had the husband

A acquired a domicil in the State of Washington when he instituted divorce proceedings there? (ii) The wife not having had any notice or knowledge of those proceedings, is the decree of the Washington court binding on her? Clear evidence of intention is required to establish a change of the domicil of origin: *Hodgson* v. *De Beauchesne* (3); *Winans* v. *A.-G.* (4). Those authorities show that the onus of proving a change is strongly on the party asserting it. I am not satisfied by the B evidence before me that the husband had at the material time obtained a domicil in the State of Washington, so the court which granted him a decree there had no jurisdiction. No doubt, in September, 1922, the respondent announced his intention of living permanently in Washington, but I am not impressed by these declarations made after the question had been raised.

The second question is can such a decree without any notice be binding on a wife C resident here? The idea that a woman can find herself divorced without any notice of the proceedings shocks me. If I am right in holding that the American court had no jurisdiction, the question of notice is immaterial, but I think that a person resident in this country must at least have notice—not necessarily formal notice, but knowledge—of the proceedings, before he can be bound here by the decree of a foreign court. This seems to have been the view of LORD ELLENBOROUGH D in *Buchanan* v. *Rucker* (5), and in *Shaw* v. *A.-G.* (6), though the American decree was held invalid for want of jurisdiction based on domicil, LORD PENZANCE said, referring to facts very similar to those of this case:

> "A judgment so obtained has, therefore, in addition to the want of jurisdiction the incurable vice of being contrary to natural justice, because the proceedings are ex parte, and take place in the absence of the party affected by E them. I must hold therefore that the first marriage was not dissolved."

Again in *Pemberton* v. *Hughes* (7) LORD LINDLEY, M.R., said: "There are no grounds whatever for saying that the plaintiff did not know of the proceedings," implying that such want of knowledge would have been a good ground of objection to the American decree there in question, and VAUGHAN WILLIAMS, L.J., a great F authority on all questions of procedure, said:

> "Here it is alleged there was no proper service. The true principle seems to me to be that a judgment whether in personam or in rem of a superior court having jurisdiction over the person, must be treated as valid till set aside either by the court itself or by some proceeding in the nature of a writ of error, unless there has been some defect in the initiation of proceedings, or in the course of G proceedings, which would make it contrary to natural justice to treat the foreign judgment as valid, as for instance a case where there had been not only no service of process, but no knowledge of it."

The petitioner in this case had no knowledge of the American proceedings, so on this ground also the American decree cannot stand. Even if the husband has now acquired an American domicil, I am glad to think that on the authorities that have H been cited to me, the petitioner can still come to this court for matrimonial relief as a deserted wife. There must be a decree of restitution of conjugal rights to be obeyed within forty-five days of service, with costs.

Solicitors: *H. J. Woodhouse & Co.*, for *G. T. Mainprize*, Hull; *The Treasury Solicitor.*

[*Reported by* J. A. C. SKINNER, ESQ., *Barrister-at-Law.*]

Re SPEIR. HOLT *v.* SPEIR

[Court of Appeal (Sir Ernest Pollock, M.R., Warrington and Sargant, L.JJ.), December 18, 1923]

[Reported [1924] 1 Ch. 359; 93 L.J.Ch. 225; 130 L.T. 564; 68 Sol. Jo. 251]

Settlement—Capital or income—Capital—Bonus shares—Tenant for life entitled to "dividends, bonuses, and income" of original shares—Issue of bonus shares—Right of tenant for life to capital bonus.

By her will, dated Sept. 17, 1917, the testatrix, who died on Feb. 11, 1918, bequeathed to the trustees thereof 300 ordinary shares in a company upon trust to pay the "dividends, bonuses, and income" thereof to R.S. and J.S., his wife, and the survivor of them, and after their deaths upon trust to hold such shares for the H. Infirmary absolutely. In 1919 the company, having accumulated a large sum out of profits represented by a general reserve fund over and above the dividends distributed to the shareholders, and having also certain undistributed profits not carried to any reserve fund, proposed to distribute those sums by way of bonus to the shareholders. By resolutions passed on Mar. 26, 1919, and confirmed on April 11, 1919, the company decided to increase its capital by the creation of new £1 shares, and in June, 1919, it was agreed between the company and the shareholders that the company should pay to the shareholders the bonus in question by the issue and allotment to them of the new £1 shares which would be distributed among them in proportion to the number of ordinary shares held by them. R.S. died in 1922.

Held: as a general rule it rested with a company to determine whether funds in its hands should be distributed as income or retained by it as capital; in the present case on construction of the will, by the application of the ejusdem generis rule or by regarding the words in the order or collocation in which they were used, "dividends, bonuses, and income" all related to income; and, therefore, there was nothing in the will to displace the application of the general rule, and only the right to the income of the new shares, and not the new shares themselves, passed to J.S. as surviving tenant for life.

Notes. Followed: *Re Wright's Settlement Trusts, Wright* v. *Wright*, [1945] 1 All E.R. 587.

As to the rights of a tenant for life on a distribution by a company of profits as capital, see 29 Halsbury's Laws (2nd Edn.) 648–650. For cases see 40 Digest (Repl.) 715 et seq.

Cases referred to:

(1) *Bouch* v. *Sproule* (1887), 12 App. Cas. 385; 56 L.J.Ch. 1037; 57 L.T. 345; 36 W.R. 193, H.L.; 40 Digest (Repl.) 725, *2152*.

(2) *I.R.Comrs.* v. *Blott*, *I.R.Comrs.* v. *Greenwood*, [1921] 2 A.C. 171; 90 L.J.K.B. 1028; 125 L.T. 497; 37 T.L.R. 762; 65 Sol. Jo. 642; 8 Tax. Cas. 101, H.L.; 28 Digest (Repl.) 345, *1525*.

Also referred to in argument:

Re Malam, Malam v. *Hitchens*, [1894] 3 Ch. 578; 63 L.J.Ch. 797; 71 L.T. 655; 38 Sol. Jo. 708; 13 R. 38; 40 Digest (Repl.) 727, *2167*.

Re Evans, Jones v. *Evans*, [1913] 1 Ch. 23; 82 L.J.Ch. 12; 107 L.T. 604; 57 Sol. Jo. 60; 19 Mans. 397; 40 Digest (Repl.) 725, *2154*.

Re Hatton, Hockin v. *Hatton*, [1917] 1 Ch. 357; 86 L.J.Ch. 375; 116 L.T. 281; 61 Sol. Jo. 253; 40 Digest (Repl.) 725, *2158*.

Re Ogilvie, Ogilvie v. *Ogilvie* (1919), 88 L.J.Ch. 159; 120 L.T. 436; 35 T.L.R. 218; 63 Sol. Jo. 246; 40 Digest (Repl.) 725, *2155*.

Re Thomas, Andrew v. *Thomas*, [1916] 2 Ch. 331; 85 L.J.Ch. 519; 114 L.T. 885; 32 T.L.R. 530; 60 Sol. Jo. 537, C.A.; 40 Digest (Repl.) 722, *2131*.

Re Mittam's Settlement Trusts (1858), 4 Jur.N.S. 1077; 40 Digest (Repl.) 715, *2086.*

Appeal from a decision of P. O. Lawrence, J.

By her will, dated Sept. 17, 1917, Charlotte Jane Speir appointed Arthur Holt, John Holt, and John Edward Addison Titley executors and trustees, and after various bequests bequeathed to the trustees three hundred ordinary shares in the Lancaster Steam Coal Collieries, Ltd., upon trust to pay the dividends, bonuses, and income thereof to Robert Speir and Jane Speir his wife during their lives and during the life of the survivor to pay such dividends, bonuses, and income to such survivor, and from and after the death of the survivor she directed that her trustees should hold the three hundred ordinary shares upon trust for the Harrogate Infirmary absolutely. Robert Speir died on Feb. 20, 1922. Jane Speir claimed that at the date when the bonus shares were issued the trustees ought to have transferred such of those shares as were due in respect of the bequest in their favour to her husband Robert Speir and herself to which they became absolutely entitled by virtue of the bequest to them of the dividends, bonuses, and income arising from the 300 shares bequeathed by the will and that the trustees had no power to hold the bonus shares and only pay the dividends thereon to Robert Speir and herself, and in the events which had happened that she was entitled now to the investments representing the bonus shares. The trustees of the will then issued a summons against Jane Speir and the trustees of the Harrogate Infirmary to determine whether they ought to have transferred to the defendant Jane Speir jointly with her husband the late Robert Speir all or any of the shares in question. P. O. Lawrence, J., held that the shares were allotted to the trustees in satisfaction of their proportion of the cash bonus which the company had determined to distribute, and, therefore, that the shares were allotted to the trustees as a bonus in respect of the 300 shares the subject-matter of the gift. The fact that the company had capitalised the bonus and had satisfied it by the issue and allotment of shares did not prevent the bonus from passing to the tenant for life. There was nothing in the will to confine such gift to "income" bonuses or "cash" bonuses as distinguished from bonuses which the company had capitalised or which the company satisfied by the allotment of shares. Therefore, the shares in question passed to the tenants for life as joint tenants and in the events which had happened belonged to Jane Speir as the survivor. The defendants, the trustees of the Harrogate Infirmary, appealed.

F. K. Archer, K.C., and *Horace Freeman* for the trustees of Harrogate Infirmary.
Dighton Pollock for the trustees of the will.
C. E. E. Jenkins, K.C., and *J. MacMullan* for the tenant for life.

SIR ERNEST POLLOCK, M.R.—This is an appeal from a judgment of P. O. Lawrence, J., who had to decide what is the proper construction of the will of Mrs. Speir and what was the effect of a bequest made by her of 300 ordinary shares in the Lancaster Steam Coal Collieries, Ltd. That was a colliery in which Mrs. Speir had shares for a very considerable time before her death. The company had been capitalised at a very small sum, so that it was enabled to pay very large dividends. In some cases the company had paid, not merely what was known as dividend, but a bonus, so that the distribution took the form of both dividend and bonus. Later, the company accumulated large profits, and ultimately it was determined that it should increase its capital, first, by turning 40,000 shares of £5 each into 200,000 shares of £1 each. Then, by an agreement made between the company and the shareholders, dated June 13, 1919, it was recited:

> "Whereas the company has out of the profits of its undertaking for some years past accumulated large sums now represented by a general reserve fund over and above the dividends distributed to the shareholders and has also in hand certain undistributed profits not carried to any reserve fund and proposes to distribute as bonus among the shareholders the sum of £634,980, being such

general reserve fund, and part of such undivided profits rateably in proportion to the ordinary shares held by the shareholders."

Then it was agreed that the company should pay to the shareholders their aliquot part of that sum by the issue to them of fully paid £1 shares, according to the amount of their holding in the company. The learned judge, after a careful examination of those facts, came to the conclusion that those shares were purely a bonus issued to the shareholders. It is important that we should note what the judge has found because when he comes to determine what is the true interpretation of the clause which I will read in a moment I doubt whether his interpretation differs from that which I think ought to be put upon it.

Those shares, therefore, were issued as bonus shares, and no doubt they replaced the undistributed profits from which the company was able to distribute them. The testator says:

"I bequeath to my trustees 300 ordinary shares in the Lancaster Steam Coal Collieries, Ltd., upon trust to pay the dividends, bonuses, and income thereof to the said Robert Speir of Roebank Largs aforesaid, and Jane Speir his wife during their lives and during the life of the survivor."

What do those words mean, "dividends, bonuses, and income"? Do they relate to matters solely of income or is the use of the word "bonuses" introduced as meaning to include a distribution of the capital as bonus? Counsel for the tenant for life says that unless we interpret the word "bonuses" as including a distribution of the capital by way of bonus, the words are otiose and no effect is given to them. On the other hand, it is contended that ample meaning can be given if we have regard to the fact which was known to the testatrix, namely, that not only dividends but bonuses had in the past been distributed, and that she may have had the intention expressly to clear up any possible doubt and definitely use words which would show that, if there came a distribution of bonuses as well as dividends, that was to be paid to Robert Speir or his wife, as the case might be. Looking at those words, and applying the rule ejusdem generis, I think the three words intended to relate to what I will call the income or produce of the shares. It may be that the words are not all of them necessary, that the word "income" might be sufficient, but you have got the word "bonuses," which had been and might be again distributed, in addition to "dividends" and "income," all of which point to something which is in the nature of income and not in the nature of capital. It is the income of those shares, the produce of those shares, which is given to Robert Speir of Roebank Largs, as the tenant for life. Therefore, he is to take that produce, and if there be a distribution of shares as capital, then it is not within those words.

Then comes the question: Do we agree with the learned judge in the finding he has come to, namely, that these shares are to be looked upon as replacing or representative of a cash bonus, and not to be treated as in the nature of a distribution of capital? Upon that I have come to a different conclusion from that of the learned judge. It seems clear if one goes back to the statement made by Lord Watson in his speech in *Bouch* v. *Sproule* (1), that the right position from which this question ought to be considered is that it is equally within the power of the company to capitalise the undivided profits of the company by issuing new shares or to divide the undivided profits which have been accumulating. When we turn to *I.R.Comrs.* v. *Blott*, *I.R.Comrs.* v. *Greenwood* (2), in the judgments of all the three Lords who were in the majority in that case, it is pointed out that it is the conduct of the company which determines what is the nature of the distribution. Lord Haldane says this:

"The transaction in the present case was one in which the company was in law dominant on the question whether the money in question was to be capital or income for all purposes."

Equally Lord Finlay relied upon and cited the passage I have already quoted from Lord Watson's speech in *Bouch* v. *Sproule* (1). Lord Cave, L.C. ([1921] 2 A.C.

A at p. 200), says that where there has been a distribution of shares credited as fully paid up it is quite true to say that it is a distribution of profits, but in the reasons which he gives he says:

> "The transaction took nothing out of the company's coffers, and put nothing into the shareholders' pockets; and the only result was that the company, which before the resolution could have distributed the profit by way of dividend B or carried it temporarily to reserve, came thenceforth under an obligation to retain it permanently as capital."

Applying these tests it seems to me that what was done by the Lancaster Steam Coal Collieries Co. was to make a distribution of what is to be regarded, not as undivided profits, but as capital, which it was enabled to do by reason of its C possession of undivided profits. On the question of fact these shares must be regarded as capital, and their distribution as a distribution of capital not of income. Therefore, if I am right as to the meaning of these words "dividends, bonuses, and income" they do not cover a distribution of shares which are to be treated as capital. Counsel for the tenant for life pressed upon us the use of the word "bonuses" as including, I may say necessarily including, something not merely in the nature of cash bonus, but also a capital bonus because of the fact that the D words "dividends" and "income" would be sufficient to cover a cash bonus, but, giving that argument its full weight, it is to my mind impossible, having regard to the collocation of words, to assume that the testator intended to include the capital distribution. For these reasons, which I have founded on the cases that I have referred to, it seems to me plain that the right view of this distribution is that it E was in the nature of capital. Therefore, the words in the will do not cover it, and these shares do not pass to the tenant for life. I am of opinion, therefore, that the appeal must be allowed.

WARRINGTON, L.J.—The question in this case arises between the tenant for life and the remaindermen, and relates to the shares in a company bequeathed by the testatrix's will to her trustees. After the testatrix's death additional shares F were issued to the trustees, and the question is whether these additional shares are to be treated as an accretion of capital or are to be held in trust for or transferred to the tenant for life. These additional shares represent what, prior to their creation, had been, first a general reserve fund, and secondly a fund of accumulated, undistributed profits. It is now well settled that it rests with the company to settle and determine whether such resources, if they possess them, should be G distributed as income or shall be retained by them as capital. Each shareholder in the latter case becomes entitled to an addition to his existing shares corresponding in due proportion to the amount so capitalised. It is also settled that in an ordinary case one is entitled to capital if the company does what has been done in this case, that is to say, capitalises its fund of undistributed profits in new shares representing the due proportion of the amount so capitalised as an accretion to the H original capital.

The question is whether in this will the testatrix, in her trust for the tenant for life, has used expressions which would take the case out of the general rule and give to the tenant for life something which, but for these expressions, would be an accretion of capital. The learned judge has held that the expressions are sufficient for that purpose. With all respect to him, I take the opposite view. After I bequeathing the shares to the trustees upon trust, she says, "to pay the dividends, bonuses, and income thereof" to the tenant for life, and then—I read it shortly but perfectly accurately—"to hold such three hundred ordinary shares upon trust for the Harrogate Infirmary absolutely." She then gives power to her trustees to sell the shares and invest the proceeds of sale, and, if they decide to do so, the income of these investments shall be applied in the same manner as the income of the shares. The investment clause is wide enough to authorise the investment of the proceeds of sale of these shares in shares which might quite possibly pay, not a bonus in the ordinary sense, but an extra dividend. In fact, this company

has periodically—and some of those periods have fallen during the time that the testatrix was a shareholder—paid additional dividends of that nature, calling them bonuses, as many companies do. The testatrix, therefore, knew that some additional income might very well be paid under the name of bonus, and she used, therefore, these words "dividends, bonuses, and income." Could it possibly be said that these words, used in that collocation, include something which is not income, something under which the shareholder never receives any money at all, although he receives his right to participate in the capital assets of the company? I do not think they do. I think the construction I should place upon those words is that they are three words which all mean the same thing, namely, income, but, as is frequently the case with legal documents, several words, whether with the notion of abundant caution or not, I do not know, have been used where one would do. There could have been no question if she had said "income"; there could have been no question if she had said "dividends"; but she chose to use these three words, and it seems to me that she has only used those three words as expressing the same thing, namely, the income of the shares. I think that it is quite clear, and that it is made more clear by the reference to the income of any new investments being applied in the same manner as the income of the shares to the tenant for life. Accordingly, I think the ordinary rule applies and the additional shares must be capitalised and added to the 300 original shares.

SARGANT, L.J.—This is a pure question of the construction of the particular phrase in the will, "upon trust to pay the dividends, bonuses, and income" of certain shares to the tenant for life. Had the direction merely been to pay the income to the tenants for life, it is admitted that the result of what the company did would have been to capitalise the company's shares and to prevent the tenant for life getting them. What is said for them is that the specific mention of "bonuses" enlarges the gift to them so as to entitle them to retain these bonus shares for themselves as under a special gift to them. I cannot accept this argument. It seems to me that the order or collocation of the words in the phrase "dividends, bonuses, and income" indicates that the word "bonuses" connotes rather something inside and within the general word "income" than outside and in addition to it, and this view is to some slight extent supported by the use of the single word "income" in subsequent parts of the will. Further, not only is the word "bonuses" amply satisfied by being applied to bonuses in the nature of income, but the use of the word "bonuses" was specially appropriate in this particular case having regard to the practice of the company in question. I think, therefore, the appeal should be allowed.

Appeal allowed.

Solicitors: *Collyer-Bristow & Co.*, for *Titley & Paver-Crow*, Harrogate; *Dinn & Son*, for *W. R. & R. Gibson*, Newcastle-upon-Tyne.

[*Reported by* G. P. Langworthy, Esq., *Barrister-at-Law.*]

ABRAM STEAMSHIP CO., LTD. *v.* WESTVILLE STEAMSHIP CO., LTD.

[House of Lords (Earl of Birkenhead, Viscount Finlay, Lord Dunedin, Lord Atkinson and Lord Shaw), April 30, May 1, July 6, 1923]

[Reported [1923] A.C. 773; 93 L.J.P.C. 38; 130 L.T. 67]

Contract—Rescission—Misrepresentation—Essential error—Date of rescission—Notice of repudiation or intention to rescind—Defence to action—Affirmation of contract—Need to prove unequivocal act with full knowledge of misrepresentation.

Where one party to a contract expresses by word or act in an unequivocal manner that by reason of fraud or essential error of a material kind inducing him to enter into the contract he has resolved to rescind it, and refuses to be bound by it, the expression of his election, if justified by the facts, terminates the contract, puts the parties in statu quo ante, and restores things, as between them, to the position in which they stood before the contract was entered into. It may be that the facts impose on the party desiring to rescind the duty of making restitutio in integrum. If so, he must discharge that duty before the rescission is, in effect, accomplished, but if the other party to the contract questions the right of the first to rescind, thus obliging the first party to bring an action at law to enforce the right he has secured for himself by his election, and the first party gets a verdict, it is an entire mistake to suppose that it is this verdict which by itself terminates the contract and restores the antecedent status. The verdict is merely the judicial determination of the fact that the expression by the plaintiff of his election to rescind was justified, was effective, and put an end to the contract.

On Sept. 24, 1919, the appellants contracted with a firm of shipbuilders for the building of a steamer. In February, 1920, the appellants assigned their rights under the contract to the respondents on certain representations as to the state of construction reached by the vessel which, though not fraudulent, were untrue. In March, 1920, the respondents assigned their contract on the same representations with certain additional statements to the B. company. In June, 1920, the B. company, having discovered that the representations were untrue, wrote to the respondents repudiating the contract. On July 2 the B. company intimated to the shipbuilders approval of a suggestion they had made for an alteration in the construction of the steamer. The respondents refused to accept the B. company's repudiation of the contract and on Aug. 18 the B. company issued a writ in England claiming rescission of the contract. On Nov. 30 it was ordered that judgment by consent be entered for the B. company. Meanwhile, namely, on Nov. 5, the respondents had brought a similar action in Scotland against the present appellants.

Held: (i) before it could be said that the B. company, with full knowledge of the essential error into which they had been led, had elected to affirm the contract, with the result that their claim against the respondents for rescission must fail, it must be proved that they had affirmed the contract by some unequivocal act; the consent to the alteration in the construction of the vessel contained in the letter of July 2 did not constitute such an act; and, therefore, the B. company were entitled to rescind their contract with the respondents; that rescission dated from June, 1920, when they gave notice to the respondents that they repudiated the contract; and, accordingly, that contract was not in existence when the respondents issued their writ against the appellants, so that they were not at that time in the position of maintaining the contract of assignment with the B. company while at the same time seeking to rescind the contract between them and the appellants, but were entitled to succeed in their action against the appellants.

Notes. As to actions for rescission on the ground of misrepresentation, see 26 HALSBURY'S LAWS (3rd Edn.) 874 et seq.; and for cases see 35 DIGEST 65 et seq.

Cases referred to:

(1) *Edinburgh United Breweries* v. *Molleson*, [1894] A.C. 96; 58 J.P. 364; 21 R. (H.L.) 10, H.L.; 35 Digest 16, *89*.

(2) *Symington* v. *Campbell* (1894), 21 R. (Ct. of Sess.) 434; 31 Sc.L.R. 372; 1 S.L.T. 478.

(3) *Hunt* v. *Silk* (1804), 5 East, 449; 2 Smith, K.B. 15; 102 E.R. 1142; 12 Digest (Repl.) 622, *4804*.

(4) *Blackburn* v. *Smith* (1849), 2 Exch. 783; 18 L.J.Ex. 187; 154 E.R. 707; 12 Digest (Repl.) 622, *4805*.

(5) *Lamare* v. *Dixon* (1873), L.R. 6 H.L. 414; 43 L.J.Ch. 203; 22 W.R. 49, H.L.; 35 Digest 78, *762*.

(6) *Reese River Silver Mining Co., Ltd.* v. *Smith* (1869), L.R. 4 H.L. 64; 39 L.J.Ch. 849; 17 W.R. 1042, H.L.; 35 Digest 35, *274*.

(7) *Oakes* v. *Turquand and Harding*, *Peek* v. *Turquand and Harding*, *Re Overend, Gurney & Co.* (1867), L.R. 2 H.L. 325; 36 L.J.Ch. 949; 16 L.T. 808; 15 W.R. 1201, H.L.; 35 Digest 22, *130*.

(8) *Clough* v. *London and North Western Rail. Co.* (1871), L.R. 7 Exch. 26; 41 L.J.Ex. 17; 25 L.T. 708; 20 W.R. 189, Ex. Ch.; 35 Digest 69, *669*.

(9) *Jones* v. *Carter* (1846), 15 M. & W. 718; 153 E.R. 1040; 31 Digest (Repl.) 290, *4252*.

(10) *Croft* v. *Lumley* (1858), 6 H.L.Cas. 672; 27 L.J.Q.B. 321; 31 L.T.O.S. 382; 22 J.P. 639; 4 Jur.N.S. 903; 6 W.R. 523; 10 E.R. 1459, H.L.; 12 Digest (Repl.) 536, *4066*.

(11) *Dumpor's Case* (1603), 4 Co. Rep. 119b; 76 E.R. 1110; sub nom. *Dumper* v. *Syms*, Cro. Eliz. 815; 31 Digest (Repl.) 436, *5639*.

(12) *Doe d. Cheny* v. *Batten* (1775), 1 Cowp. 243; 98 E.R. 1066; 31 Digest (Repl.) 507, *6324*.

Additional cases referred to in the First Division of the Court of Session:

(13) *Manners* v. *Whitehead* (1898), 1 F. (Ct. of Sess.) 171; 36 Sc.L.R. 94; 6 S.L.T. 199; 35 Digest 25, *163 iv*.

(14) *Menzies* v. *Menzies* (1893), 9 T.L.R. 347; 20 R. (H.L.) 108, H.L.; 35 Digest 66, *629*.

(15) *Edgar* v. *Hector*, 1912 S.C. 348; 39 Digest 687, *l*.

(16) *Panmure* v. *Crockart* (1854), 17 Dunl. (Ct. of Sess.) 85.

(17) *Re Hop and Malt Exchange and Warehouse Co., Ex parte Briggs* (1866), L.R. 1 Eq. 483; 35 Beav. 273; 35 L.J.Ch. 320; 14 L.T. 39; 12 Jur.N.S. 322; 55 E.R. 900; 9 Digest (Repl.) 265, *1672*.

(18) *Western Bank of Scotland* v. *Addie*, *Addie* v. *Western Bank of Scotland* (1867), L.R. 1 Sc. & Div. 145; 5 Macph. (H.L.) 80, H.L.; 35 Digest 30, *214*.

(19) *Glasgow and South Western Rail. Co.* v. *Boyd and Forrest*, [1915] A.C. 526; 84 L.J.P.C. 157; 1915 S.C. (H.L.) 20; 35 Digest 77, *751*.

(20) *Adam* v. *Newbigging* (1888), 13 App. Cas. 308; 57 L.J.Ch. 1066; 59 L.T. 267; 37 W.R. 97, H.L.; 35 Digest 77, *754*.

(21) *Erlanger* v. *New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218; 48 L.J.Ch. 73; 39 L.T. 269; 27 W.R. 65, H.L.; 35 Digest 77, *748*.

Appeal by the defendants in the action from a decision of the First Division of the Court of Session—the Lord President (LORD CLYDE), Lords MACKENZIE, SKERRINGTON and CULLEN—(reported 1922 S.C. 571 sub nom. *Westville Shipping Co., Ltd.* v. *Abram Steamship Co., Ltd.*: for judgment of the Lord President, LORD CLYDE, see post, p. 653) which affirmed a decision of the Lord Ordinary (LORD HUNTER) in favour of the plaintiffs, the present respondents.

The facts appear from their Lordships' opinions.

Charles H. Brown, *K.C.*, and *A. H. D. Gillies* (both of the Scottish Bar) for the appellants.

A. T. Miller, *K.C.*, and *W. G. Normand* (of the Scottish Bar), for the respondents, were not called on to argue.

The House took time for consideration.

July 6. The following opinions were read.

EARL OF BIRKENHEAD.—I have had the advantage of reading the opinions herein of my noble and learned friends LORD DUNEDIN and LORD ATKINSON. I agree with them, have nothing to add, and move that the appeal be dismissed with costs.

VISCOUNT FINLAY.—I have had the advantage of reading the opinion prepared by LORD DUNEDIN and find that it exactly expresses my views on this case. I concur with it and have nothing to add.

LORD DUNEDIN.—The facts on which the question is raised in this case are as follows. The appellants, by a contract dated Sept. 24, 1919, contracted with a firm of shipbuilders for the building and finishing of a steel screw steamer of certain dimensions. The appellants in February, 1920, assigned that contract to the respondents. In the negotiations for assignment there were representations as to the stage of construction which the steamer had by that time reached, which representations were admittedly untrue. By the terms of the agreement of assignment the sum of £26,000 was payable within twenty days of the execution of the agreement and that sum was duly paid. On Mar. 13, 1920, the respondents assigned to the British Hispano Line, Ltd., for a certain consideration all the rights under the agreement. In doing so they passed on the information which they had received from the appellants as to the state of progress of the vessel. In June, 1920, the British Hispano company discovered that the representations made as to the state of progress were untrue. They at once repudiated the contract. The respondents gave intimation of this to the appellants, and in turn repudiated their contract. The British Hispano company raised action in the English courts to set aside their contract and recover the money paid under it. While that action was in dependence the respondents raised the present action against the appellants to set aside the contract and recover the money paid under it. The summons was signed on Nov. 5, 1920. On Dec. 11 judgment was given in favour of the plaintiffs in the English action, the respondents in this case, defendants in that, being advised that they had no defence. The only other matter that need be mentioned is that before action raised a suggestion was made by the builders for a small alteration in the deckhouse. This was passed on by the respondents to the sub-purchasers and approved by them.

On these facts it is admitted that there was misrepresentation for which the appellants are responsible which induced the respondents to enter into the contract for the purchase of the ship with them. The materiality of such misrepresentation was not actually admitted, but it was found by both courts below on what I consider very clear grounds. There is, therefore, so far good ground for setting aside the contract. The defence depends on two points. First, it is said that the respondents elected to affirm the contract, after they were aware of the grounds for rescission, by consenting to certain alterations as shown by the letters. My Lords, election to affirm must, if to be gathered from action, be gathered from unequivocal acts. It is not conclusive that the act in itself was trivial, but the triviality of the act may easily affect the inferences to be drawn from it. Now, here the alteration of a certain part of the deckhouse was an alteration suggested by the builders and passed on by the respondents to the sub-purchaser. It was assented to, but I cannot for myself think that the assent to such an alteration in the circumstances can possibly be taken as a considered affirmation of the contract. The plea thus becomes equally useless to the appellants in the present action, as it would have been if it had been taken in the action brought by the sub-purchaser

against the respondents. This takes away the whole sting of pointing out that the decree in that action was a consent decree. Persons cannot be held liable for not having put forward pleas which are unsound in themselves. The second point is that the action is barred by the fact of the sub-sale. So long as the sub-sale stood, this would of course be so. As has well been pointed out by the Lord President,* no one can be allowed to maintain a contract between him and another and at the same time to reduce another contract on which alone his title to make that contract depended. That was the position of Dunn in *Edinburgh United Breweries* v. *Molleson* (1). Dunn proposed to stick to his contract with the United Breweries Co. and at the same time to reduce the original contract. But here the sub-contract no longer exists. It has been put out of the way by the decision in the English courts. I am of opinion that the dicta in *Molleson's Case* (1) provide the answer to the contention. It is true that LORD WATSON puts the matter hypothetically, but LORD HERSCHELL was more explicit. He says:

> "No doubt, if there had been any fraud, if there had been misrepresentation, it would have been open to Dunn, notwithstanding the execution of the conveyance, to set aside the conveyance and to put an end to the transaction altogether."

On principle I can see no answer to this point. The sub-contract, which was ex hypothesi the only obstacle, has been completely swept away. The respondents have been put back into their original position, i.e., as purchasers under the contract with the appellants. Why, then, should they not reduce that contract if they have relevant grounds to do so?

The only point remaining is founded on date. It is said on the authority of *Symington* v. *Campbell* (2) that at the date of the raising of the present action the pursuers had no title to sue, and that the action is not saved by a title subsequently emerging. It is as well to set out what *Campbell's Case* (2) actually decided. A. purchased a vessel from B. Prior to his purchase injury had been done to the ship by the alleged fault of C.; A. raised an action against C. for damages for such injuries. Subsequently to the service of the summons A. obtained from B. an assignation of all claims competent to him against C. It was held that at the date of the summons A. had no title to sue and that a subsequent assignation did not cure that defect. But it is to be observed that there the title conferred by the assignation was a perfectly independent title. The sale of the ship by B. to A. did not convey any right to damages which were a personal right in B.; consequently the subsequent assignation could never cure the original defect in title. Here the matter is quite different. The original title to set aside a contract induced by misrepresentation was quite good. It is true that for the moment there seemed a good answer, namely: "You have parted with the subject of the contract, and, therefore, you have lost your interest," but the moment that the instrument by which they had so parted was swept away the original title was then in all its force. I, therefore, concur in the judgment proposed.

LORD ATKINSON.—Beyond concurring with the judgment which has been delivered by my noble friend who has preceded me, and expressing my high appreciation and approval of the admirable and convincing judgment which has been delivered by the Lord President in the First Division of the Court of Session,* I should not have attempted to add anything to what has been already said, were it not that some of the contentions urged in support of the appeal, especially on the point of the rescission of the contract of Mar. 13, 1920, entered into between the British Hispano Line, Ltd., and the respondent company, need, I think, special consideration.

Where one party to a contract expresses by word or act in an unequivocal manner that by reason of fraud or essential error of a material kind inducing him to enter into the contract he has resolved to rescind it, and refuses to be bound by it, the

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* See post p. 653.

A expression of his election, if justified by the facts, terminates the contract, puts the parties in statu quo ante, and restores things, as between them, to the position in which they stood before the contract was entered into. It may be that the facts impose upon the party desiring to rescind the duty of making restitutio in integrum. If so, he must discharge that duty before the rescission is, in effect, accomplished, but if the other party to the contract questions the right of the first to rescind, thus B obliging the first party to bring an action at law to enforce the right he has secured for himself by his election, and the first party gets a verdict, it is an entire mistake to suppose that it is this verdict which by itself terminates the contract and restores the antecedent status. The verdict is merely the judicial determination of the fact that the expression by the plaintiff of his election to rescind was justified, was effective, and put an end to the contract. Questions whether the judgment C relates back to a date earlier than its own are really irrelevant. So long ago as the year 1804 this was in effect decided by Lord Ellenborough, C.J., Grose, Laurence and Le Blanc, JJ., in *Hunt* v. *Silk* (3). It was there laid down "that a contract cannot be rescinded by one party for the default of the other, unless both can be put in statu quo as before the contract."

This decision was approved of and followed in *Blackburn* v. *Smith* (4). There D the defendant agreed to sell and the plaintiff to purchase a piece of land. The latter paid a deposit and went into possession. Owing to the events which occurred the plaintiff gave notice to rescind the contract and brought an action to recover the deposit. Parke, B., when delivering the judgment of the court, said:

> "We think, on the principle of the case of *Hunt* v. *Silk* (3), inasmuch as the E plaintiffs had the possession of the property, and the parties could not be placed in statu quo, the count for money had and received [i.e., the deposit] cannot be maintained."

That means that, owing to the fact of this possession, rescission could not have its natural effect.

It may be doubted whether since the decision of *Lamare* v. *Dixon* (5), to be F presently referred to on another point, the same importance will henceforth be attributed to the entry into possession of land as was given to it in these two cases. In *Reese River Silver Mining Co., Ltd.* v. *Smith* (6) the respondent alleged that he had been induced to take shares in the company by fraud and misrepresentation contained in the prospectus. He filed a bill against the directors, alleging that he took shares in the company on the faith that the statements made in the prospectus G and articles were true and accurate, within the knowledge of the directors. But these statements, he alleged, were false, &c., &c., and prayed that his name might be removed from the register of the company. A winding-up order had been subsequently made. Smith's name was placed on the list of contributors. On July 10, 1886, he took out a summons to have the register rectified by the removal of his name. The application was refused by the then Master of the Rolls. On appeal H this decision was reversed by the lords justices, and from their decision an appeal was brought to this House. Lord Hatherley, L.C., in giving judgment, said, referring to *Oakes* v. *Turquand and Harding* (7):

> "It appeared to your Lordships, and with all humility I would say it appears to me, perfectly correct to say that the agreement subsists until rescinded; that is to say, in this sense, until rescinded by the declaration of him whom I you have sought to bind by it, that he no longer accepts the agreement but entirely rejects and repudiates it. It is not meant, I apprehend, by that expression 'until rescinded' used by any of your Lordships at the time when that case was argued before the House, to say that the rescission must be an act of some court of competent authority, and that, until the rescission by that court of competent authority takes place, the agreement is subsisting in its full rigour. . . . If in a case of this description the directors had committed the fraudulent act of putting a man's name upon the list which ought not to have been put there, and had allotted him shares, so that if it turned out to be

beneficial it would be competent to the person to say: 'Now I elect to hold them, because, though coming to me by your fraud upon me, I find it beneficial to me to hold them, and you cannot aver your own fraud to prevent my so doing,' in that case the directors could not have taken his name off the list without communication with him. But if, immediately that he knows what the directors have done, he says: 'I have made up my mind to reject the contract, and I assert that intention of mine in the plainest and most open manner competent to me, by my communication to you insisting on having my name removed, and on your neglecting your duty to remove my name I proceed to file my bill to compel you to do so,' I take it that thereupon the contract is at an end, and the gentleman is entitled to have his name removed from the list."

LORD WESTBURY and LORD CAIRNS would appear to have approved of this statement of the law.

It is not now disputed that false statements were made to the British Hispano company as to the forward condition of the ship at the time they bought her. It is not now disputed that these statements were material, neither is it disputed that, relying upon them as truthful and accurate, the company entered into the contract to purchase the ship. On June 20, 1920, they sent their representative to Dublin to discover by inspection what was the actual condition of the ship. It was then found that all the statements as to her forward condition were untrue, that little more had been done beyond laying the vessel's keel. They then consulted their solicitors, and took a course very much like that suggested by LORD HATHERLEY. They wrote to their vendors, the respondents, a letter detailing the misrepresentations made to them on which they alleged they acted, and wound up the letter with this paragraph:

"We must now, however, inform you that had we known the position and that your statement was incorrect we should never have agreed to purchase your contract, and that in consequence of this misrepresentation we must repudiate the contract and ask you for an immediate return of the sum of £33,000 paid by us."

On July 9 the solicitors again wrote:

"We are instructed to again state that our clients feel that misrepresentations were made and they insist on repudiating the contract. Unless we hear from you with regard to the matter within the next few days, we are instructed to commence proceedings."

The respondents did not pay to the British Hispano company the £33,000 or any part of it. They did not accept the Hispano company's repudiation of the contract to purchase this ship on the ground that it was void for essential error. On the contrary, on July 8, 1920, they wrote to the Hispano company stating that they would hold them to their contract. The Hispano company was, therefore, obliged to institute proceedings to enforce the rights which their election to rescind conferred upon them, and as consequential relief to procure the repayment of the £33,000. The writ was issued on Aug. 18, 1920. The respondents, according to the evidence, finding they had no defence to the action, settled it. On Nov. 30, 1920, the solicitors on both sides appeared before the district registrar for the Cardiff district, when, after hearing them, it was ordered that judgment by consent should be entered for the Hispano company for rescission of the contract of Mar. 13, 1920, and for the sum of £33,000 and costs when taxed. The formal order was not drawn up till Dec. 11, 1920. On Dec. 16, 1920, the Hispano company and the respondents to the present appeal entered into an agreement providing that the Hispano company would not take any steps to enforce this judgment until judgment should be given in an action brought by the present respondents in Scotland against the Abram Steamship Co., Ltd., the present appellants, and Thomas McLaren & Co., and that in consideration of this concession the respondents would pay interest at bank rate upon the sum of £33,000. This is, however, wholly

immaterial. For in truth it is not this judgment which really puts an end to the voidable contract of Mar. 13, 1920. That was done early in the month of July previous in the manner mentioned. This obviously brought it to an end, provided always that the British Hispano company was then entitled in law to take that course.

It was contended they were not entitled to take it because, with full knowledge of the deception which had been practised upon them, and of the essential error into which they had been led, they, by letter dated July 2, 1920, unequivocally expressed an intention to treat the contract of Mar. 13, 1920, as a subsisting contract then in full force and effect, and that this election so to treat it was final and decisive. This contention is based upon two letters, the first written by the builders of the ship to the solicitor of the respondents, and forwarded to the British Hispano company, and the second written by the latter company to the shipbuilders, the present appellants. The letters respectively run as follows. The respondents' solicitor wrote to the British Hispano company the following letter:

> "We have received the following letter from Messrs. Abram & Sons, Ltd. It is more or less an extract from one received from the Dublin Shipbuilders, Ltd.: 'With reference to the midship accommodation in the above vessel, we find that the altered arrangement which you approved some time ago does not work out very satisfactorily, as the pantry space under the winding stairs is practically valueless. We enclose blue-print showing an amended arrangement in which we have changed the entrance door to the starboard side, in lieu of the after end. The ladder under this arrangement is straight and a good pantry space is obtainable. Will you kindly advise us whether this arrangement meets with your approval per return?' We enclose herewith blue-print which will explain the letter. We think perhaps it would be advisable for you to reply direct to the Dublin Shipbuilders, Ltd."

The British Hispano company wrote to the Dublin Shipbuilders the following letter:

> "Referring to your letter addressed to the Abram Shipping company, we return herewith blue-print, and shall be pleased if you will proceed with the suggested re-arrangement. We shall also be obliged if you will let us know whether steamer has progressed since the writer had inspection of her some little time ago."

The law applicable to questions such as this is stated with admirable clearness and precision by MELLOR, J., when delivering the judgment of the Exchequer Chamber in *Clough* v. *London and North Western Rail. Co.* (8). He expressed himself thus (L.R. 7 Exch. at pp. 34, 35):

> "We agree with what seems to be the opinion of all the judges below that if it can be shown that the London Pianoforte Co. [the company alleged to have been defrauded] have at any time after knowledge of the fraud, either by express words or by unequivocal acts, affirmed the contract, their election has been determined for ever. But we differ from them in this, that we think the party defrauded may keep the question open as long as he does nothing to affirm the contract. The principle is precisely the same as that on which it is held that the landlord may elect to avoid a lease and bring ejectment, when his tenant has committed a forfeiture. If with knowledge of the forfeiture, by the receipt of rent or other unequivocal act, he shows his intention to treat the lease as subsisting, he has determined his election for ever, and can no longer avoid the lease. On the other hand, if by bringing ejectment he unequivocally shows his intention to treat the lease as void, he has determined his election, and cannot afterwards waive the forfeiture: *Jones* v. *Carter* (9). We cannot do better than cite the language of BRAMWELL, B., in *Croft* v. *Lumley* (10) (6 H.L.Cas. at p. 705), which precisely expresses what we mean."

He then cites at length the well-known passage from BRAMWELL, B.'s judgment, and states that it is applicable to the election to avoid a contract for fraud. In such cases he raises the question, "Has the person on whom the fraud was practised, having notice of the fraud, elected not to avoid the contract or has he elected to avoid it? or has he made no election?" All this reasoning is obviously quite as applicable to a case of essential error as it is to a case of fraud.

Turning for a moment to these analogous cases of the so-called waiver by the lessor of the forfeiture of a lease, one finds that the governing factor is the intention of the party purporting to waive it. All the cases on this point up to the year 1903 are collected in SMITH'S LEADING CASES (11th Edn.), p. 36 et seq., in the notes to *Dumpor's Case* (11). At the bottom of p. 38 it is stated that it is conceived that the mere receipt of subsequent rent does not, of its own proper force, operate as a waiver of a forfeiture. It is only evidence of the election of the lessor to retain the reversion and its incidents instead of taking possession of the land. The judgments of BRAMWELL, B., in *Croft* v. *Lumley* (10), and also of CROMPTON, J., are referred to in support of this statement. In these passages, both these learned judges refer to the strong expressions of LORD MANSFIELD in *Doe d. Cheny* v. *Batten* (12). In that case, the payment in peculiar circumstances of rent which accrued due after the alleged forfeiture, LORD MANSFIELD said: "The question is therefore quo animo the rent was received, and what the real intention of both parties was." BRAMWELL, B., qualifies this statement of the law by pointing out that where the intention of the parties is spoken of it is not meant that the landlord can do an act lawful only if he had a particular intention and yet say that he had it not.

The judgment of LORD CAIRNS in *Lamare* v. *Dixon* (5), already cited, points in the same direction. In that case, Lamare, the appellant, entered into an agreement to take a lease of a house, went into occupation of the house, and occupied it for two years. From time to time he called upon the landlord to fulfil certain promises made by him which had induced Lamare to enter into the contract. He (Lamare) paid the rent as it accrued due, but always under protest. It was held that these facts did not amount to such acquiescence as to prevent the tenant from ultimately refusing to perform his contract, but that the payments were meant to be treated as merely made in respect of the actual use and occupation of the house, and in no other character. While he was in possession of the house he wrote to the respondent a letter containing the following passage:

> "I beg hereby to give you notice that if you do not cause all the above matters [i.e., repairs] to be done upon the premises, or at least commenced, before this day fortnight, I shall myself do what is necessary and charge you with my outlay. I send you the last quarter's rent, but you will, of course, understand that I in no way abandon my claim against you for damages on account of the non-performance of your agreement in many respects."

The respondent replied saying he had done all he had agreed to do, and would not do any more. LORD CAIRNS, in giving judgment, said:

> "It is quite true that Lamare said in this letter that he would do the work and sue for damages. I do not at all hold him to be concluded by that. I apprehend that he was perfectly free a week after that letter, as he was a week before, to maintain and hold his position on the non-performance of the agreement to say, that although he had used the threat of doing the work, and suing for damages, he was not bound to pursue that course but was at liberty to repudiate the agreement in toto."

My Lords, I am clearly of opinion, having regard to these authorities, that the letter of the British Hispano company dated July 2, already quoted at length, cannot be regarded as such a positive and unequivocal expression of their election to treat the agreement of Mar. 13, 1920, as a valid, subsisting and effective agreement, as to disentitle them to repudiate it on July 3 and 7, 1920, as in fact they did. When the contract was rescinded and thus got out of the way, I think there

A was nothing to prevent the respondents from enforcing their rights against the appellants. I am of the opinion, therefore, that the appeal fails, and should be dismissed with costs.

LORD SHAW.—I have given much consideration to this appeal; but I cannot see any object to be served by my writing a separate opinion upon it. My reason B is that in the most careful judgment of the learned Lord President I find every statement in fact and proposition in law set out in a manner which I would not wish to alter in any particular.* I respectfully venture to adopt that opinion as expressive of my own views. I agree to the motion proposed.

Appeal dismissed.

Solicitors: *Botterell & Roche*, for *Smith & Watt*, W.S., Edinburgh; *John Steuart* C *& Gillies*, writers, Glasgow; *William A. Crump & Son*, for *Webster, Will & Co.*, W.S., Edinburgh; *Wright, Johnston & Mackenzie*, writers, Glasgow.

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

D *In the First Division of the Court of Session the Lord President, LORD CLYDE, delivered the following judgment: The defenders, having contracted with a firm of shipbuilders for the construction and delivery of a steam vessel, assigned the contract to the pursuers. The pursuers subsequently intimated their rescission of this assignation on the ground that a certain representation made to them by the defenders at the time they took the assignation was erroneous and misleading. They have accordingly brought this action to have the assignation reduced on the plea of essential error induced by misrepresentation, and to recover the price paid for it. Fraud, which was at first a ground of action, is now out of the case, and the E conclusion for damages accordingly disappears; *Manners* v. *Whitehead* (13).

There is no doubt that the defenders did misrepresent the stage which had been reached by the builders in the construction of the vessel at the time the assignation was agreed on, to an extent involving about six weeks' progress in construction. Whereas little more than the keel was completed, it was represented that the understructure was all but ready to receive the side frames. But the defenders argued that this misrepresentation was not material, and that any error it induced in the pursuers' minds as to the progress of the builders' contract was not F essential, in the sense explained by LORD WATSON in *Menzies* v. *Menzies* (14); that is to say, that but for it the pursuers would not have taken the assignation. It is obvious that LORD WATSON's description of the quality of essential error (for the purposes of a plea of essential error induced by innocent misrepresentation) covers any error material to the entering into the contract, and the consequent acceptance of its rights and obligations. It involves no closer relation with the essentials of the contract itself (as defined, for instance, in BELL'S PRINCIPLES, section 11) than is required in the case of fraudulent misrepresentation when pled as a ground for reducing a contract. The essential error—like the fraud—must have "elicited or induced" G the contract—these are LORD STAIR'S words in dealing with fraud (Inst. I. ix. 14). ERSKINE'S words in the same connexion (Inst. III. i. 16) are practically identical with those used by LORD WATSON in *Menzies* (14) with reference to essential error (20 R. (H.L.) at p. 142): "Where it appears that the party would not have entered into the contract had he not been fraudulently led into it." In accepting and following LORD WATSON'S description, the defenders properly insisted that the materiality of the misrepresentation, and the essentiality of the consequent error, must in each particular case be established to the satisfaction of the Court, and are not H established simply by the oath of the party who alleges his mistake. But no other or more general question was mooted by the defenders in relation to the qualities of essential error. I do not entertain any idea that the defenders could have helped their case by launching on a wider examination of the controversial topics which the plea of essential error induced by misrepresentation has raised during the last sixty years; but it appears from such cases as *Edgar* v. *Hector* (15) that these controversies are possibly not yet wholly concluded, and it is therefore right to note the precise conditions of the argument in the present case.

The defenders' contentions on materiality were based on the view, which finds much support I in the evidence, that the pursuers never intended to take delivery of the vessel when completed or to trade with her, but were speculative purchasers of the benefits of the builders' contract for purposes of re-sale at a profit. Taking it so, however, the benefits of a builders' contract, even for purposes of re-sale, depend on the prospective date of delivery of the completed vessel to the ultimate purchaser, whoever he may be, and it was undoubtedly material to the prospective date of delivery that progress to an extent representing six weeks' work or thereby should have been made by the builders. This seems to me to be sufficient to dispose of the argument that the error induced was not an essential one. The other arguments presented by the defenders arise out of a sub-assignation of the builders' contract, which was granted by the pursuers to a third party before they had become aware of the misleading character of the representation which had induced them to accept the original assignation.

There is no doubt that, if the pursuers had become aware of the essential error—under which they laboured in accepting the original assignation—before they sub-assigned, they would, by sub-assigning, have irrevocably lost their option to rescind the original assignation, and could never have succeeded in this action. The essential error made the original assignation voidable, but not void; and, when the pursuers became aware of the mistake into which the defenders' misrepresentation had led them, they would on the above hypothesis have been at once placed—vis-à-vis the defenders—in the position so well described by Lord President M'NEILL in *Panmure* v. *Crockat* (16) (17 Dunl. (Ct. of Sess.) at p. 92). They would, in short, have been put to their election. The effect of the doctrine of election, in the first stage of its application, is negative. The party who is put to his choice can be prevented from approbating and reprobating at the same time; but, while the other party has so far a hold on him, he cannot dictate the side on which the election is to fall. The second stage is positive in character, and is reached as soon as, either expressly, or by acts affording evidence of election, the party entitled to elect exercises his choice. The other party then becomes entitled to take him at his word, as it were; and, if the election is on the side of approbation, the contract is said to be homologated. Homologation in such cases has been called acquiescence (*Ex parte Briggs* (17)) or affirmance (*Clough* v. *London and North Western Rail. Co.* (8)) in England. Sub-assignation by the pursuers after they had learned of their mistake would have implied the clearest homologation, for in sub-assigning they would have deliberately taken the fullest benefit of the original assignation which they preferred not to rescind. But the pursuers sub-assigned before they became aware of their mistake, and before they were in a position to make an election at all. Nevertheless, the sub-assignation made it impossible for them to rescind as against the defenders—not because they had approbated the original assignation by sub-assigning (for they sub-assigned in ignorance of their mistake), but because they had disabled themselves from reprobating it. They were precluded, by granting the sub-assignation, from doing anything inconsistent with the right they had conferred on the sub-assignees, for what could be more inconsistent with that right than to impugn the original assignation upon the validity of which the sub-assignation depended? In short, the granting of the sub-assignation deprived the pursuers of their title to rescind or to sue for rescission. Moreover, by parting with the benefits of the builders' contract, they deprived themselves of the means of fulfilling a condition without which the law does not permit rescission of a voidable contract—the condition namely of restitutio in integrum. But the pursuers say that their title to rescind, and also their ability to make restitution, though temporarily lost by the sub-assignation, have been restored to them as the result of a subsequent rescission of the sub-assignation by the sub-assignees on grounds to which the pursuers could make no good answer in law. The legal questions thus raised are referred to, but not decided, in *Edinburgh United Breweries* v. *Molleson* (1).

In considering them regard must be had to the circumstances, which are as follows. The agreement for the original assignation by the defenders to the pursuers had been reached by telegram and letter on Feb. 17, 1920. The sub-assignation was agreed on and carried into effect nearly a month later, viz., on Mar. 13, 1920. In the meantime the pursuers had made neither inspection of the ship nor inquiry of the builders, and still believed the state of progress as at Feb. 17 to have been such as had been represented to them. It was not until about four months later still—namely, on July 3, 1920—that the sub-assignees wrote to the pursuers intimating their rescission of the sub-assignation. The sub-assignees founded on essential error on their part induced, as they alleged, by misrepresentations made to them by the pursuers. These misrepresentations, like those complained of by the pursuers against the defenders, concerned the state of progress in the construction of the ship, but (as the sub-assignees stated in their letter of July 3) were referable to the condition of matters as at Mar. 13 instead of as at Feb. 17. In point of fact practically no progress had been made with the ship since Feb. 17. But the pursuers, anxious to avoid the delay which inspection of the ship by the sub-assignees would cause, and no doubt relying on the letter and telegram for the state of progress a month before, represented on their own responsibility that the framing was now (Mar. 13) so near completion that the framing instalment of the price would be due in a week or so. I agree with the Lord Ordinary in his remarks about the evidence on this part of the pursuers' case—one of crucial importance to them on the facts. The mere exhibition of the letter and telegram of Feb. 17 inferred no representation except as to the genuine character of the documents; and expressions of honest opinion, if clearly such, do not amount to misrepresentations. The evidence led by the pursuers has caused me some misgivings, but I do not think I should be justified in differing from the learned Judge who heard it; and on the whole I have myself arrived at the conclusion stated above. The sub-assignees did not ascertain the true state of matters until the middle of June. They then informed the pursuers of their discovery, but intimated no rescission of the sub-assignation pending communication by the pursuers with the defenders. The pursuers in turn wrote a letter of complaint to the defenders on June 21 which the latter answered by a denial of any misrepresentation on their part. Then followed the letter by the sub-assignees to the pursuers of July 3 intimating their rescission of the sub-assignation, to which the pursuers replied insisting that the sub-assignation must stand good. And finally, the pursuers, after getting a report for themselves on the state of progress, wrote to the defenders on July 24 intimating rescission of the original assignation, to which the defenders replied holding the pursuers to their bargain. The next step was the institution of proceedings in the English Courts on Aug. 17, 1920, at the instance

A of the sub-assignees against the pursuers, to have the sub-assignation set aside on the ground of misrepresentation. It is, I think, sufficiently clear that, by this time, the pursuers had decided not to contest the rescission by the sub-assignees. The suit was a friendly one, and the sub-assignation was formally rescinded by order dated Dec. 11, 1920. Meantime, on Nov. 5, 1920, the pursuers had raised the present action. During all this time progress in the builders' yard was very slow, and the framing instalment did not become due until January, 1921. It was not paid by any of the parties who were, or might ultimately be, interested in the delivery of the ship, and she was accordingly sold by the builders. The questions thus come to be B whether the pursuers, when they came into Court (Nov. 5, 1920), (i) had a good title to sue for rescission, and (ii) were in a position to restore the benefits of the builders' contract to the defenders.

If the pursuers had re-acquired the benefits of the builders' contract by purchase, they would have put themselves in no better position to rescind, or to make restitution, than they were in at any time after the sub-assignation. Re-acquisition by such means would have vested them in the benefits of the builders' contract under a title acceptance of which was not in any way C induced by the defenders' misrepresentations, and which, being their own voluntary and deliberate act, could give them no right to throw the subject thus acquired back on the defenders. If the subject was an undesirable one, their re-acquisition of its disadvantages would have been the pursuers' own choice, not the result of any misrepresentations by the defenders. But the case which has occurred is one, not of re-acquisition from the sub-assignees, but of rescission of the sub-assignation itself. The sub-assignation is swept out of existence, and the pursuers are thus put into exactly the same relation with the builders' contract as D they were in before. Why in these circumstances should not the pursuers' title to rescind revive along with their ability to restore the subject? I cannot see that it makes any difference that the misrepresentations which proved fatal to the sub-assignation were not identical with those which are alleged against the defenders. They were related to them no doubt; but suppose they had been concerned with some completely different matter, I think the result would have been the same. I say nothing as to the position which would have arisen if the misrepresentations which laid the sub-assignation open to attack had been fraudulent.

The defenders further contended that the pursuers were not actually reinstated in the bene- E fits of the builders' contract until the order of Dec. 11, 1920, was pronounced in the English Court. They pointed to the fact that nothing was proved to have occurred at the time the present action came into Court (Nov. 5, 1920) which bound the pursuers to accept rescission of the sub-assignation, or prevented the sub-assignees from recalling their intimation to rescind, abandoning the English action, and electing to hold by the sub-assignation after all. But the genuine and bona fide character of the English proceedings is not challenged; and, if the pursuers had no good answer to the sub-assignees' action, I cannot see that they were bound F to postpone raising action in this Court until the rescinding order was actually pronounced. All that actually stood between them and reinstatement in the benefits of the builders' contract was the pronouncement of this order which the sub-assignees were moving the English Court to make, and which, if the above stated hypothesis is correct, the pursuers had no means of resisting. I think in these circumstances the pursuers may properly be regarded as having a substantial title to sue, and as being substantially in a position to offer restitution to the defenders. If this be so, the circumstance that the substantial right was not actually completed at the initiation of proceedings is not material; see *Symington* v. *Campbell* (2).

G The defenders, however, did contend that the pursuers had a good answer to the sub-assignees' claim to rescind, and to their action in the English Courts. This answer, if it was a good one, was open to the pursuers in the English proceedings at the time the present action was raised. I think, if the defenders could establish that the sub-assignees were not entitled to rescind as against the pursuers, but that, on the contrary, the sub-assignees had homologated the sub-assignation or could not have made restitution to the pursuers, the defenders would be justified in their contention that the pursuers were neither entitled to sue nor in a position to offer restitution to them. Unfortunately for the defenders the point on which this H contention is based is not set forth on record. On the other hand, the evidence with regard to it was allowed to be led without objection, and the Lord Ordinary dealt with it. In these circumstances I think we are bound to entertain it. The fact is that on July 2, 1920—fully a fortnight after the state of progress in the builders' yard was known to the sub-assignees, and had been communicated to the pursuers, and only a day before the sub-assignees wrote to the pursuers intimating rescission of the sub-assignation—the sub-assignees approved or instructed an alteration of the general arrangement plan of the steamer amidships. In accor- I dance therewith, the deckhouse was to be shifted several feet, and a passage was to be removed from its after end to its forward end. This alteration was a relatively trifling one, and involved little expense. But its importance lies less in the magnitude of the change than in the quality of the act by which the sub-assignees approved or instructed it. For such approval or instruction undoubtedly wore the aspect of an assertion of right to the benefits of the builders' contract. On the other hand, it must be kept in mind that the construction of the ship was progressive, or at least was normally so, from day to day. This was the case, whoever might turn out in the end to be entitled to the benefits of the contract, or to the completed ship; and cl. 4 of the builders' contract provided the usual means for effecting minor deviations from the original plan while construction was in progress. It must be admitted that it would have been no more than prudent if approval of any change, however unimportant in itself, had been

made subject to the pursuers' sanction for any interest they might have, for the circumstances were such that any change had to be made for whom it might concern. But under cl. 4 the change itself was not irrevocable, and in point of fact it was never carried out. Further, although this is not an infallible test on the question of homolgation, the change (even if it had been carried out) would not, in my opinion, have been such as to make restitution inequitable. I think the law is that, provided the thing offered to be restored is the same thing as that which was the subject of the assignation under rescission, and not a substitute for it—*Western Bank of Scotland* v. *Addie* (18), and *Glasgow and South-Western Rail. Co.* v. *Boyd and Forrest* (19)—it is enough that the circumstances of the subject and the relations of the parties to it are such as to make it not inequitable to reinstate the original owner in possession—*Glasgow and South-Western Rail. Co.* v. *Boyd and Forrest* (19), per LORD ATKINSON, 1915 S.C. (H.L.) at pp. 29 and 31. *Adam* v. *Newbigging* (20). I think the Lord Ordinary was right in regarding this action of the sub-assignees as insufficient to amount to an homologation by them of the sub-assignation, or as disabling them from offering restitution to the pursuers.

It remains to deal with the plea of bar stated for the defenders. A slump in shipping values occurred in June, 1920, and an appreciable and progressive further fall occurred during the later half of the year. The defenders argued that the pursuers' delay in raising the action was to their prejudice in consequence of the depreciation in the value of the benefits of the builders' contract, and barred the action. They said this prejudice rendered restitution inequitable, and they maintained with force that, when the pursuers intimated rescission of the original assignation on July 24, they had not accepted the sub-assignees' rescission of the sub-assignation, and must therefore bear whatever burden of responsibility might be involved in delay. But I do not think the fall in the speculative value of the builders' contract raised any bar or imported any inequity into the proposed restitution. Prices are always changing; and, after all, the builders' contract was to deliver a definite and useful commercial subject, to wit, a steam vessel, however much its price in the market might be affected from time to time by current rates or freight: *Western Bank of Scotland* v. *Addie* (18); *Erlanger* v. *New Sombrero Phosphate Co.* (21). In the result, I think, the interlocutor of the Lord Ordinary should be affirmed.

BRANDT & CO. AND OTHERS *v.* LIVERPOOL, BRAZIL AND RIVER PLATE STEAM NAVIGATION CO., LTD.

[COURT OF APPEAL (Bankes, Scrutton and Atkin, L.JJ.), November 16, 19, 1923]

[Reported [1924] 1 K.B. 575; 93 L.J.K.B. 646; 130 L.T. 392; 16 Asp.M.L.C. 262; 29 Com. Cas. 57]

Shipping—Bill of lading—Endorsement to pledgees—Right of endorsees against shipowner—Implication of terms of bill of lading—Statement in bill of lading that goods shipped in good condition—Goods damaged and delivered late through being re-conditioned—Estoppel of shipowner from pleading goods damaged before being loaded.

Goods were shipped on board a ship belonging to the defendants for carriage from Buenos Aires to Liverpool under a bill of lading given by the shipowners in which the goods were described as having been received "in apparent good order and condition." After the goods had been put on board, a portion was ascertained to be in a defective condition, and the goods were thereupon taken out of the ship to be re-conditioned. When that had been done they were re-shipped and conveyed to Liverpool, where they arrived some four months after the time when they should have arrived, by which time there had been a fall in market values. The plaintiffs, who were the endorsees of the bill of lading as pledgees, having made an advance on the goods to the shippers, claimed the goods on their arrival at Liverpool and paid the freight, but they also had to pay, under protest, to the shipowners the amount which had been expended on re-conditioning the goods at Buenos Aires. The plaintiffs thereupon brought an action against the shipowners claiming to recover the cost of the re-conditioning of the goods, and also seeking damages for delay in delivery.

Held: although the plaintiffs were not parties to the bill of lading, the contract which arose from their offer to take delivery of the goods being accepted by the shipowners was for the delivery of the goods on the terms of the bill of lading; the bill of lading contained a statement that the goods had been received "in good order and condition"; and, therefore, the shipowners were estopped as against the plaintiffs from (a) denying that fact and saying that the damage to the goods had been caused before they had been put on board, and relying on conditions in the bill of lading which in those circumstances would have exempted them from liability; (b) being entitled to claim from the plaintiffs the cost of re-conditioning the goods.

Notes. Applied: *Silver* v. *Ocean Steamship Co., Ltd.*, [1929] All E.R.Rep. 611. Considered: *R. & W. Paul, Ltd.* v. *National Steamship Co.* (1937), 43 Com. Cas. 68. Referred to: *Evans* v. *Webster* (1928), 45 T.L.R. 78; *The St. Joseph*, [1933] All E.R.Rep. 901; *H. M. Thomson* v. *Micks Lambert & Co.* (1933), 39 Com. Cas. 40; *Brown, Jenkinson & Co., Ltd.* v. *Percy Dalton (London), Ltd.*, [1957] 2 All E.R. 844.

As to the transfer of a bill of lading by way of pledge and its effect, see 30 HALSBURY'S LAWS (2nd Edn.) 397–404; and for cases see 41 DIGEST 387, 388, 393 et seq.

Cases referred to:

(1) *Stindt* v. *Roberts* (1848), 5 Dow. & L. 460; 2 Saund. & C. 212; 17 L.J.Q.B. 166; 12 Jur. 518; 41 Digest 399, *2443*.

(2) *Young* v. *Moeller* (1855), 5 E. & B. 755; 4 W.R. 149; 119 E.R. 662; sub nom. *Möller* v. *Young*, 25 L.J.Q.B. 94; 26 L.T.O.S. 183; 2 Jur.N.S. 393, Ex. Ch.; 41 Digest 627, *4582*.

(3) *Allen* v. *Coltart* (1883), 11 Q.B.D. 782; 52 L.J.Q.B. 686; 48 L.T. 944; 31 W.R. 841; 5 Asp.M.L.C. 104; 41 Digest 525, *3542*.

(4) *Compania Naviera Vasconzada* v. *Churchill and Sim*, *Same* v. *Burton & Co.*, [1906] 1 K.B. 237; 75 L.J.K.B. 94; 94 L.T. 59; 54 W.R. 406; 22 T.L.R. 85; 50 Sol. Jo. 76; 10 Asp.M.L.C. 177; 11 Com. Cas. 49; 41 Digest 379, *2254*.

(5) *Martineaus, Ltd.* v. *Royal Steam Packet Co., Ltd.* (1912), 106 L.T. 638; 28 T.L.R. 364; 56 Sol. Jo. 445; 12 Asp.M.L.C. 190; 17 Com. Cas. 176; 41 Digest 383, *2287*.

(6) *Sanders* v. *Vanzeller* (1843), 4 Q.B. 260; 3 Gal. & Dav. 580; 12 L.J.Ex. 497; 114 E.R. 897, Ex. Ch.; 41 Digest 626, *4581*.

(7) *Cock* v. *Taylor* (1811), 13 East, 399; 2 Camp. 587; 104 E.R. 424; 41 Digest 626, *4576*.

(8) *Sewell* v. *Burdick* (1884), 10 App. Cas. 74; 54 L.J.Q.B. 156; 52 L.T. 445; 33 W.R. 461; 1 T.L.R. 128; 5 Asp.M.L.C. 376, H.L.; 41 Digest 372, *2186*.

Appeal from an order made by GREER, J., in an action tried by him without a jury.

The action was brought by Brandt & Co., a firm of merchants carrying on business in London, for damages for delay in delivery of the goods specified in a bill of lading dated Mar. 23, 1920, and for the return of £748 10s. paid under protest to the defendants, owners of the steamship *Bernini*. There was a similar claim by F. W. Vogel & Co., of Buenos Aires, the shippers of the goods. The plaintiffs alleged that the defendants, having received from the shippers on board the *Bernini*, at Buenos Aires, in March, 1920, about 6,000 bags of zinc ash, for carriage from Buenos Aires to Liverpool, wrongfully discharged some 5,600 of the bags at that port and only forwarded the same, after unreasonable delay, in the steamship *Cavour*, which left Buenos Aires on July 15, 1920, and that the plaintiffs were compelled, in order to get delivery, to pay a sum of £748 10s., the amount of alleged expenses for re-conditioning the bags at Buenos Aires between the time of their discharge and the time of their re-shipment on the *Cavour*, in respect of which the defendants claimed a lien. The defence was that the defendants were justified in discharging the 5,600 bags at Buenos Aires because they had been damaged by water

before being put on board; that the bags heated in the hold, and it was necessary for their own preservation and for the protection of the other cargo on board that they should be put ashore, warehoused, and re-conditioned; that they (the defendants) were guilty of no unreasonable delay in dealing with the goods after their discharge; and that they were, therefore, not liable for the consequences of any delay in the carriage of the goods to Liverpool, the port of discharge. They counter-claimed for £167 3s. 2d., being the difference between £915 13s. 2d., the actual cost of re-conditioning, and £748 10s. which had been paid to them in discharge of their lien. By their reply the plaintiffs said that the defendants were estopped from contending that the goods were or became dangerous by reason of a defect which could have been observed on shipment as the bill of lading, of which they were the endorsees, stated that the goods were shipped "in apparent good order and condition." GREER, J., gave judgment for the plaintiffs, Brandt & Co., upon the claim and counter-claim, and the defendant shipowners appealed.

Raeburn, K.C., Singleton, K.C., and *MacIver* for the defendants.
Wright, K.C., and *James Dickinson* for the plaintiffs.

BANKES, L.J.—This is an appeal from a judgment of GREER, J., in an action raising an interesting and important question which the learned judge dealt with in a very clear and exhaustive manner, and, in my opinion, quite correctly.

A firm of Vogel & Co., trading at Buenos Aires, were the shippers of a large number of bags of zinc ash. They proposed to ship these goods on a vessel of the defendants called the *Bernini*. The other plaintiffs, Brandt & Co., were the London correspondents of Vogel & Co. They had acted as such for many years, selling goods on behalf of Vogel & Co. in return for a commission, and financing the transactions by accepting bills of exchange for 90 per cent. of the invoice price of the goods. After the ash had been shipped on board the *Bernini* it was ascertained that a number of the bags had heated, and apprehension was felt lest they should prove dangerous, not only to the other goods on board, but possibly to the vessel. Lloyd's agent was called in; he examined the goods and reported that he found the top layers of bags very seriously heated, and in his report he stated that from the condition of those bags it was apparent to him that the bags below must be heated probably to a much more dangerous extent than those he was able to examine. As the result of that examination and report the bags were taken out of the vessel, and after a time they were re-conditioned—or some of them were—and those bags were not re-shipped until after the lapse of a very considerable time. There was a small number of bags, 385 bags, which were a separate lot put into a different hold; they were undamaged, and were taken by the *Bernini* upon the contemplated voyage from Buenos Aires to Liverpool. On their arrival at Liverpool the plaintiffs, Messrs. Brandt, on presentation of the documents to them paid the bills—they had re-sold the goods—and took delivery of the 385 bags. The remainder of the bags which had been taken off the vessel at Buenos Aires and re-conditioned did not arrive in this country till August, when Messrs. Brandt took delivery of them. The defendants, the shipowners, claimed a sum of £700 odd for the re-conditioning of these goods, and Messrs. Brandt had to pay that in order to obtain delivery. The action was brought by Vogel & Co., and Brandt & Co. claiming damages for the delay in the delivery of these goods and for a return of the amount which they had had to pay for re-conditioning. The main question in the action tried in the court below was whether Messrs. Brandt had a cause of action against the shipowners arising from the fact that they were the bill of lading holders and had presented the bills of lading. They claimed to have a right of action on one or both of two grounds. One was that in the circumstances of the case the general property in the goods had passed to them; and the other was that in the circumstances of the case there was an implied contract, arising from their taking delivery of the goods, on the terms of the bill of lading so far as they were applicable to the circumstances at the time they took delivery. GREER, J., decided against Messrs. Brandt's contention, founded upon the general property in the

goods having passed to them. I agree with that view, and it is unnecessary to express any opinion about it, or to go into the facts in relation to it.

The argument has been mainly directed to the question whether there was a contract between Messrs. Brandt and the shipowners which entitled Messrs. Brandt to sue for damages for the delay in delivery of these goods and for the return of the money they had had to pay for re-conditioning them. It is quite true that there is no authority expressly covering the question how far the contract, which has been held to arise from the offer to take delivery of the goods made by the holder of a bill of lading and accepted by the shipowner, binds the shipowner. To what extent does it bind him? Does it bind him only to the extent of an obligation to deliver the goods, or does it bind him to the extent of the contract as contained in the bill of lading so far as the terms of that bill of lading are applicable to the circumstances of the case? We have been referred to three authorities, *Stindt* v. *Roberts* (1), *Young* v. *Moeller* (2), and *Allen* v. *Coltart* (3). By these authorities it has been clearly established that where the holder of a bill of lading presents it and offers to accept delivery, if that offer is accepted by the shipowner, the bill of lading holder does come under an obligation to pay the freight and to pay the demurrage, if any, and there are general expressions in all those three cases, I think, in which the learned judges have said that the contract so made by that offer and acceptance extends to include the terms of the bill of lading. In my opinion, in this case the contract must include the terms and conditions of the bill of lading, and for this reason. The bill of lading holder offered the freight before the goods were delivered, and in fact paid it, and in those circumstances it seems to me that the subsequent delivery by the shipowner is an acceptance of an offer to accept the goods as described upon the terms of the bill of lading. I think from the shipowner's point of view it must necessarily include the whole of the terms of the bill of lading, because, in accepting such an offer, the shipowner must desire that he should be covered by the exceptions in the bill of lading in respect of which the offer of the bill of lading holder is made. I think, therefore, that the learned judge is right when he states, as he does, his conclusion that on the facts in this case it is sufficient to say that it was a promise by the shipowners to deliver the goods to Messrs. Brandt in the condition in which they ought to be delivered under the bill of lading. So much, therefore, for the contract point. I entirely agree with the learned judge's conclusion in reference to that very important matter.

The next point that arises is this. Assuming that that is the correct conclusion in law, are the shipowners in the circumstances of this case entitled to rely upon the exceptions in the bill of lading? The facts in relation to that are that the damage to these goods was caused by rain while they were waiting for shipment, and, although they had been damaged by rain while waiting for shipment, the shipowners issued a clean bill of lading under which they admitted that the goods were received in good order and condition. The case for Messrs. Brandt was that in those circumstances the shipowners were estopped from alleging that the damage to these goods was caused before the goods were put on board, and that as a consequence they could not rely upon the conditions in the bill of lading which otherwise would have covered the facts. The learned judge went into that question of fact, and he found, and in this I agree with him, that Messrs. Brandt materially altered their position to their detriment by acting on the assumption that they had a clean bill of lading. I have stated the facts which, in my opinion, support that finding of the learned judge. The result, therefore, so far is that Messrs. Brandt have a right of action arising out of the contract for damages due to the delay in the delivery of these goods.

I should add this. Upon that point counsel for the shipowners complained of the learned judge's judgment in one or two particulars. He said that the shipowner ought not to be held responsible for the delay that occurred while these goods were being re-conditioned or before they were re-conditioned, because it was putting too high a duty upon the captain to hold that he was negligent in taking

these goods out of the ship in the circumstances in which he was placed. It is quite true that he was in a difficult position, because he had had this report from Lloyd's agent, which indicated that the lower tiers of bags were, in his opinion, in a much more dangerous condition than those which he was able to inspect; but the fact remains that the lower tiers of bags were apparently in a perfectly satisfactory condition, undamaged and dry, and any examination of the bags during the time that they were being unloaded, or any examination of the bags after they had been placed on shore, would have disclosed the fact that the surveyor had been under a misapprehension in coming to the conclusion at which he arrived. In those circumstances it seems to me that the learned judge was quite justified in coming to the conclusion that the delay was the fault of the shipowners, and that Messrs. Brandt, being entitled, in his view, to sue upon the contract, had proved that they had suffered damage by reason of breach of contract.

The other point in the case was in reference to the claim to recover the amount which Messrs. Brandt had been forced to pay in order to obtain possession of the goods, and that was the amount which the shipowners paid for re-conditioning the goods. I think there is something to be said for the view that, the whole amount being claimed, at any rate as against Messrs. Vogel, the shipowners have a right to say that the whole amount should not be irrecoverable because, at any rate, the cost of re-conditioning the portion that was damaged ought to be allowed; but their counsel admits that that matter was not specifically raised upon the pleadings, and I do not think that we ought at this date to allow an amendment in reference to it.

That disposes of all the matters that were raised, except one. It was said: Assuming that Messrs. Brandt have a right of action in contract, and assuming that the shipowners are estopped from saying that the goods were damaged by rain before they were placed on board because of the fact that a clean bill of lading was given, still, upon the assumption that the contract between Messrs. Brandt and the shipowners includes all the relevant clauses and conditions of the bill of lading, there is a condition contained in cl. 1 which excludes the liability of the shipowners. That clause contains, among other things, the conditions upon which the ship could not be liable for delay. It is a very long and rather confused clause, and owing to the fact that it is so long and is not split up it is not very easy at first sight to see the construction which one ought to place upon it; but after the discussion which has taken place I am satisfied that the only condition upon which the ship is entitled to rely is the condition which provides for non-liability in the event of a prolongation of the voyage owing to any of the matters which are set out in the clause. That raises a question of construction and a question whether, in the events which have happened here, it can be said that the taking of these goods out of the *Bernini* before she started and retaining them on shore for a very considerable time until they were re-conditioned can, with any reasonable meaning of the expression "prolongation of the voyage" in this clause, be considered to be a prolongation of the voyage. In my opinion, the facts do not bring this case within the exception, because I do not think, in the events proved, it can reasonably be said that there was here any prolongation of this voyage at all. What happened was that the voyage that was referred to in the bill of lading did not commence. In these circumstances, in my opinion, the view taken by the learned judge was on all points correct, and I think his judgment must be affirmed, and the appeal dismissed with costs.

SCRUTTON, L.J.—I substantially agree with the judgment of GREER, J., which is marked by his usual carefulness and accuracy, and I only give some reasons in my own words for that judgment because some of the matters involved are matters of considerable commercial importance.

The dispute arises in this way. Messrs. Vogel, in South America, were going to ship a parcel of zinc ash in bags, and through carelessness they shipped them wet. Zinc ash is a material in which, if it gets wet, a certain amount of heat is pro-

duced. While Messrs. Vogel were careless in shipping these goods wet, the ship was careless in that it gave a bill of lading stating they were shipped "in apparent good order and condition" when they were not, because they were externally wet, which could be seen. The result was that the shipowners put into circulation a document which they knew might be passed on to other persons for value and on which other persons might act, which contained an untrue and material statement "in apparent good order and condition." The result, according to a well-known decision which has been repeatedly followed, was that persons taking such a bill with a statement in it of that character could, in any complaint against the shipowner who had issued it, rely on that statement and prevent the ship from proving the true fact which had not been correctly stated in the bill. That was the decision in *Compania Naviera Vasconzada* v. *Churchill and Sim* (4), and one of the many cases in which that has been followed is *Martineaus, Ltd.* v. *Royal Steam Packet Co.* (5).

After this bill of lading had been given, the zinc ash, being on board the ship in the port in South America, heated. The bags containing the ash were stowed in a hold with cotton. The captain called in Lloyd's agent, and Lloyd's agent took the correct view that the heat might damage the cotton and the incorrect view that it might damage the ship, and recommended that the whole of the zinc ash should be discharged. As a matter of fact, the learned judge finds that only the top third of the zinc ashes were heated and wet, and that the remaining two-thirds might quite safely have been allowed to remain in the ship. Anyhow, the whole of the ash was taken out, and someone was very careless, the captain, and probably Lloyd's agent, in not inspecting the goods while they were being discharged. If they had done so, on the facts found by the learned judge, they would have found out that the bottom two-thirds were not heated and might just as well stay in the ship. But this large parcel was taken out of the ship, and a warehouse was found for it. It was spread out; and it was some three months or more before it got back into a Lamport and Holt steamer to go to the United Kingdom; when it got there, there was, of course, a considerable sum that had been spent on re-conditioning it. Messrs. Brandt were the consignees of the goods in England and advanced nine-tenths of their value, and when the bill of lading was presented to them they had heard that there was some difficulty after shipment. They looked critically at the bill of lading to see what it stated about the condition of the goods, and found that the goods were stated to be "in apparent good order and condition," and on the faith of that untrue statement they presented the bill of lading and received the goods. In order to get the goods they had to pay, under duress, the £700 odd expenses of re-conditioning. They then claimed upon the shipowners, first of all for damages for delay in that the goods ought to have got to England in May, and did not get there until August, by which time the market had fallen; secondly they claimed to recover back the sum that they had paid under duress—the £700 odd for re-conditioning the goods.

The first line of defence made was: "You, Messrs. Brandt, are not in any way parties to the bill of lading so as to be able to rely on the estoppel contained in it." That raises a somewhat novel position which has not in terms got into the authorities, as far as I know. Before the Bills of Lading Act was passed in 1855, while by the custom of merchants the endorsement of the bill of lading passed the property in the goods contained in it, the endorsement had no effect itself on the contract contained in the bill of lading, and, therefore, the person who owned the goods could not merely by reason of the endorsement sue the shipowners upon the contract that the shipowner had made which was evidenced in the bill of lading. Before 1855 a long series of decisions had been given—of which two of the leading cases were *Sanders* v. *Vanzeller* (6) and *Cock* v. *Taylor* (7)—the general lines of which were that while one could not as a matter of law say that the presenting of the bill of lading made the person who presented it liable to the terms of the bill of lading, one might find as a matter of fact a contract from taking the bill of lading; and I believe in every case that is reported this question was discussed:

Was the person who presented the bill of lading and took the goods bound to comply with the condition which had to be performed by the owner of the goods? Was he bound to pay freight? Was he bound to pay demurrage? Was he bound to pay any other specific matter mentioned in the bill of lading? The question of what were his rights against the shipowner, as far as I know, was never expressly raised in the cases, and I think there is a reason why it should not be so. If he had property in the goods—any property, not merely the whole property, but any property—he could sue the shipowner in tort, and it was obviously to the interest of the shipowner to say that the person who took the goods was bound by the whole bill of lading, including those terms which had to be performed by the shipowner and those exemptions from liability which were contained for the benefit of the shipowner.

Probably that is the reason why there is no express authority. But when one comes to consider what the contract implied was—a contract by the person who took delivery to perform the terms of the bill of lading—and asks oneself what was the consideration moving from the shipowner for that promise, one sees it was to deliver the goods on the terms of the bill of lading. The bill of lading was the document which contained the terms on both sides which were implied from presenting the bill of lading and taking delivery under it. When the Bills of Lading Act was passed in 1855 this part of the difficulty was remedied in that when the property—the whole property—passed by the endorsement to the endorsee, the contract also passed. That left untouched the question where the whole of the property did not pass to the endorsee, but some property did which would enable him to sue in tort for damage to his goods, or conversion of his goods, or non-delivery of his goods. In *Sewell* v. *Burdick* (8) the question was raised: What is the position of a bank which has taken a bill of lading as a pledge, as security for an advance, and never presents the bill of lading because its advance is small and the presenting of the bill of lading would render it liable for a much larger amount? The House of Lords decided that a bank pledgee, not having the whole property and not presenting the bill of lading, and not taking delivery under it, was not liable to perform the conditions of the contract in the bill of lading. LORD SELBORNE expressed the view that, if the bank did present the bill of lading, it might then be liable on the contract contained in the bill of lading. It seems to me that such a case is to be governed by the old law which existed before the passing of the Bills of Lading Act. Can you, by presenting the bill of lading when you have some property in the goods, imply a contract on each side to perform the terms of the bill of lading? The view that GREER, J., has taken is that you can and ought to in this case, and I take the same view. It follows, therefore, that Messrs. Brandt are entitled on the bill of lading to the benefit of the estoppel which is contained in the statement: "In apparent good order and condition."

Then comes the question what is the effect of that estoppel on the claims in this case. Messrs. Brandt claim, first of all, damages for delay, that is to say, damages in that the goods should have arrived at a particular date and did not arrive till much later, by which time the market had fallen. There might be an answer to that, because the shipowner could say: "I am protected by an exception." But when the shipowner tries to protect himself by the exception he is in the difficulty that he cannot prove what has caused the delay; he cannot prove that it was caused by damage to the goods before he shipped the goods, because he has stated that they were shipped "in apparent good order and condition" and is estopped from disproving it. He has proved, as the learned judge finds, that it was not caused by anything that happened to the goods, any fresh cause acting on the goods, after they were shipped, and, therefore, he is in the unfortunate position that he cannot prove that any matter which caused the delay comes within any of the exceptions which protect him. He might be able to say this, and this is the matter which has given me most difficulty in the case. There is a clause in the bill of lading that the ship shall not be liable for any delay, loss, or damage caused by prolongation of the voyage, whether or not it arises from negligence, or errors

in judgment of agents, masters or surveyors. I myself am inclined to think—I am not quite sure that I agree with my Lord in this—that prolongation of the voyage might apply to facts like this. The bill of lading contract is to ship by the *Bernini* or to tranship the goods into any other ship before the commencement of any period of the voyage; and I think that prolongation of the voyage might very well relate to the voyage by the *Bernini* or by a ship into which the goods were transhipped; and it might be said that the prolongation by transhipment, or the taking of the goods out of the *Bernini*, was due to the negligence, error of judgment, or wrong decision of the agent, master, or surveyor. But the ship is in the difficulty that not only was there a taking out of the ship through negligence and error of judgment, but that after the goods were taken out there was an unreasonable delay in putting them back again, and it appears to me that the result of those two unreasonable acts is that there is sufficient delay to amount to a deviation, and once a deviation takes place the shipowner cannot rely on any of the exceptions. From that point of view, therefore, I find it unnecessary to decide positively whether prolongation of the voyage does or does not cover this taking out of one ship and transhipping into another.

The result, therefore, is that the shipowner who has delayed and brings the goods at a later date than he ought to have done is unable, owing to the estoppel, to prove the true facts; he is unable to show any cause of delay which brings him within the exceptions, and, consequently, is liable for the damages for delay because he cannot excuse himself under the terms of the bill of lading. The same reasoning shows that Messrs. Brandt can recover back the sum which they had to pay under duress for re-conditioning the goods, because the shipowner is unable to prove that he is protected by any of the exceptions in the circumstances which gave rise to the re-conditioning of the goods. He cannot prove that the necessity for re-conditioning arose from the condition in which the goods were brought to the ship by the shipper, because the estoppel prevents him. He has proved that the circumstances which required the taking of the goods out of the ship did not result from anything which happened to them after they got into the ship, and, consequently, he is unable to prove any circumstances which give rise to the necessity for expenditure in re-conditioning, and in relation to which he is protected. Those two matters cover the whole claim put forward in this case, and, in my view, for the reasons which I have endeavoured to state shortly and which I think are substantially the same as those of GREER, J., the learned judge came to the right conclusion. This appeal, therefore, must be dismissed.

ATKIN, L.J.—I agree. I assume for this purpose that Messrs. Brandt are not in a position to sue the ship under the Bills of Lading Act—that is to say, they cannot prove that the property in the goods passed to them as endorsees of the bill of lading. Then the question arises whether any and what contract arises between them and the ship in the circumstances in which Messrs. Brandt did in fact take delivery. I am inclined to agree with the criticism addressed by GREER, J., to the dictum of LORD SELBORNE in *Sewell* v. *Burdick* (8); and for my part I have great difficulty in seeing how a pledgee of the goods who, under the decision in *Sewell* v. *Burdick* (8), does not get a title under, or the right to sue on the contract under, the Bills of Lading Act, can improve his position by doing that which it was necessary he should do as pledgee of the bill of lading—namely, taking delivery of the goods when the ship arrives. That seems to me to be merely asserting his limited right of possession in order to continue to act as pledgee, but his position may for all that be very much strengthened by the circumstances under which he takes delivery.

Before the Bills of Lading Act it had been held in a series of decisions that the endorsee of the bill of lading, who came to the shipowner and claimed delivery under the bill of lading, was liable to the shipowner in respect of liabilities, which, I think, on the decisions, gradually increased. The first class of decision, I think,

arose by reason of the terms of the bill of lading which stipulated for delivery to order and referred to assignees, he or they paying freight, and it was said that if a person came to the shipowner and said to him: "I am assignee of the bill of lading, deliver me the goods," then the shipowner was entitled to infer a contract by him that he would, in the terms of the bill of lading, as such assignee pay the freight. He was, therefore, held bound to pay the freight on an indebitatus assumpsit on the delivery of the goods. Later on, that obligation was extended to paying charges other than freight in cases where those charges were not mentioned in the contract expressly as being payable by an assignee, as, for instance, to payment of demurrage or other charges, and there the contract obviously becomes a contract to be implied from the circumstances of the delivery being taken by the assignee of the bill of lading. Is there any corresponding obligation on the part of the shipowner in that contract? It appears to me that just as plainly as the assignee is bound by an implied contract, so is the shipowner, and the shipowner's obligation, it appears to me, in the case where freight has in fact been paid by the holder of the bill of lading, is that he will deliver the goods. What other contract could be inferred from the fact that an assignee of a bill of lading goes to the shipowner's representative and offers him the bill of lading freight, which is accepted by the shipowner? It appears to me the necessary implication is that the shipowner says: "I will take the bill of lading freight, and in consideration of that I will deliver to you the goods which I have on board under the bill of lading." Is it a contract to deliver the goods on the terms of the bill of lading? If you were to ask a shipowner and suggest to him that possibly he has come under an absolute obligation to deliver the goods and not an obligation qualified by the exceptions in the bill of lading I have no doubt you would administer to him a very severe shock; because shipowners are entirely unaccustomed to having a burden put upon them in reference to the carriage of goods unaccompanied by the qualification of exceptions, and no other contract, I think, could properly be inferred. After all, the bill of lading freight is the freight which has been assessed and calculated upon the footing of a contract of carriage qualified by the exceptions; and I cannot imagine that a greater hardship could be put upon a shipowner than to say: "You have received the bill of lading freight which is based upon an obligation to carry qualified by all the exceptions, and, having taken it, you must accept an obligation to deliver the goods not qualified by any of the exceptions."

I have no doubt at all that the obligation on the shipowner is an obligation to deliver on the terms of the bill of lading. I think it follows that the implied contract that arises in cases such as this is that the holder of the bill of lading and the shipowner make a contract for the delivery and acceptance of the goods on the terms of the bill of lading, so far, of course, as they are applicable to discharge at the port of discharge. In those circumstances it appears to me that the endorsee of the bill of lading is substantially in precisely the same position as though in fact he came under the Bills of Lading Act, and I see no reason why he should not have the benefit of the estoppel which is created by the representation of the shipowner in the bill of lading that the goods have been received "in apparent good order and condition." That is the representation which, as the learned judge says, the shipowner must contemplate will be made and repeated to every successive holder of the bill of lading, and which the shipowner must know will be acted upon by each successive holder of the bill of lading and each endorsee who does in fact take delivery under the bill of lading. In this case Messrs. Brandt have acted upon it, in the first place by taking the bill of lading and accepting the draft, and, in the second place, by paying the freight and getting the promise of the shipowner to deliver the goods, I think that all the conditions for creating an estoppel exist. The result is, therefore, that the normal conditions applicable to such an estoppel apply and the shipowners are precluded from saying that the goods were not in apparent good order and condition when they were shipped. The result of that is, I think, to establish an obligation upon the shipowners—that is to say, that they commit a breach of their implied contract by not delivering the goods in the

same condition as they must be taken to have been in when they arrived on board of ship.

The further question arises whether or not the shipowners are protected, in the circumstances which have arisen, from the claim by reason of delay. I have dealt with this case as though it were a case of goods being delivered in a damaged condition because, I think, the contractual rights of the parties are precisely as though that was what had actually happened, but the actual damage arose because the goods were taken out of the ship and re-conditioned, and put some two or three months after upon another ship and so brought to this country. Are the shipowners entitled to rely upon any of the exceptions in respect of that delay? When the matter is ventilated it appears that the only condition upon which they can rely is delay caused by prolongation of the voyage. I agree with SCRUTTON, L.J., that it is not necessary to determine that matter, and, therefore, I do not propose to determine it; but I think I ought to say in reference to it, as the matter has been mentioned in argument, that my own view at present would be that this is not a case of prolongation of the voyage but rather of postponement of the voyage. I for my part have considerable difficulty in seeing that in the month of June, when these goods were certainly not on the *Bernini* and certainly not on the *Cavour*, but were lying in the warehouse, or were in the course of being re-conditioned, they were on any voyage at all. I do not think they started on their voyage in fact until they got on the *Cavour*, and, therefore, what really happened was that the voyage was postponed rather than prolonged. But even if it was prolonged, I think here there was a plain deviation. The delay was such as to cause, to my mind, a voyage entirely different from the bill of lading voyage. What was contemplated was a voyage by the *Bernini*, or by some other ship which might be substituted for the *Bernini* at or about the time of the voyage contemplated, and I think, therefore, that in view of there being a deviation the shipowner could not rely upon the exception. I think that that deviation is applicable and effective in the case of any implied contract as much as it would be in the original contract under the bill of lading. I think this appeal should be dismissed with costs.

Solicitors: *Stokes & Stokes*, for *Cameron & MacIver*, Liverpool; *William A. Crump & Son.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

Re SHREWSBURY ESTATE ACTS. COUNTESS OF SHREWSBURY *v.* EARL OF SHREWSBURY AND OTHERS

[Court of Appeal (Sir Ernest Pollock, M.R., Warrington and Sargant, L.JJ.), October 19, 23, 24, 1923]

[Reported [1924] 1 Ch. 315; 93 L.J.Ch. 171; 130 L.T. 238; 40 T.L.R. 16; 68 Sol. Jo. 79]

Income Tax—Annuity—Free of income tax—"Clear of all deductions whatever for taxes or otherwise."

By the Shrewsbury Estate Act, 1843, the estates of the Earl of Shrewsbury and Talbot were settled. By s. 7 the person in possession or entitled to the rents and profits of the estates was given power to appoint to any wife a jointure rentcharge not exceeding £3,000 a year "clear of all deductions whatever for taxes or otherwise." By ss. 8 and 9 it was provided that the amount of the jointure rentcharges for the time being chargeable should not exceed £6,000 a year, and that if there should be three or more rentcharges chargeable, then the amount of the first two rentcharges should not exceed £5,000 a year. In 1910 the then Earl of Shrewsbury appointed to his wife a jointure rentcharge of £1,500 a year during her life payable from the date of his death, and after the death of his mother (who died in 1912) a further rentcharge of £1,500 a year during her life, payable from the date of the death of the survivor of the said earl and his mother, both rentcharges to be "clear of all deductions whatsoever for taxes or otherwise." The earl died on May 17, 1921, leaving his wife him surviving. The trustees of the settled estates, before paying to the countess her rentcharges, deducted from them the amount of income tax payable in respect thereof.

Held: on the true construction of s. 7 of the Act of 1843 the trustees were not entitled to deduct the amount of the income tax from the rentcharges.

Lord Lovat v. *Duchess of Leeds (No. 1)* (1) (1862), 2 Drew. & Sm. 62, approved.

Re Loveless (2), [1918] 2 Ch. 1, explained.

Decision of Astbury, J., [1923] 1 Ch. 486, reversed.

Notes. Considered: *Shrewsbury and Talbot* v. *I.R.Comrs.*, [1936] 2 All E.R. 101. Referred to: *Re Best, Belk* v. *Best*, [1942] Ch. 77.

As to freedom from deductions for taxes, see 20 Halsbury's Laws (3rd Edn.) 45 et seq.; and for cases see 28 Digest (Repl.) 195 et seq.

Cases referred to:

(1) *Lord Lovat* v. *Duchess of Leeds (No. 1)* (1862), 2 Drew. & Sm. 62; 31 L.J.Ch. 503; 6 L.T. 307; 10 W.R. 397; 62 E.R. 545; 28 Digest (Repl.) 198, *829*.

(2) *Re Loveless, Farrer* v. *Loveless*, [1918] 2 Ch. 1; 87 L.J.Ch. 461; 119 L.T. 24; 34 T.L.R. 356; 62 Sol. Jo. 470, C.A.; 39 Digest 167, *585*.

(3) *L.C.C.* v. *A.-G.*, [1901] A.C. 26; 70 L.J.Q.B. 77; 83 L.T. 605; 65 J.P. 227; 49 W.R. 686; 17 T.L.R. 131; 4 Tax Cas. 265, H.L.; 28 Digest (Repl.) 191, *790*.

(4) *Turner* v. *Mullineux* (1861), 1 John. & H. 334; 70 E.R. 775; 39 Digest 167, *579*.

(5) *Wall* v. *Wall* (1847), 15 Sim. 513; 16 L.J.Ch. 305; 11 Jur. 403; 60 E.R. 718; 39 Digest 166, *574*.

(6) *Lethbridge* v. *Thurlow* (1851), 15 Beav. 334; 21 L.J.Ch. 538; 51 E.R. 567; 39 Digest 166, *575*.

(7) *Sadler* v. *Rickards* (1858), 4 K. & J. 302; 31 L.T.O.S. 396; 6 W.R. 532; 70 E.R. 126; 39 Digest 166, *576*.

(8) *Festing* v. *Taylor* (1862), 3 B. & S. 235; 1 New Rep. 32; 32 L.J.Q.B. 41; 7 L.T. 429; 27 J.P. 281; 9 Jur.N.S. 44; 11 W.R. 70; 122 E.R. 89, Ex. Ch.; 28 Digest (Repl.) 199, *830*.

(9) *Re Bannerman's Estate, Bannerman* v. *Young* (1882), 21 Ch.D. 105; 51 L.J.Ch. 449; 39 Digest 167, *583*.

(10) *Peareth* v. *Marriott* (1882), 22 Ch.D. 182; 52 L.J.Ch. 221; 48 L.T. 170; 31 W.R. 68, C.A.; 39 Digest 166, *577*.

(11) *Gleadhow* v. *Leetham* (1882), 22 Ch.D. 269; 52 L.J.Ch. 102; 48 L.T. 264; 31 W.R. 269; 39 Digest 167, *581*.

(12) *Re Saillard, Pratt* v. *Gamble*, [1917] 2 Ch. 401; 86 L.J.Ch. 749; 117 L.T. 545, C.A.; 39 Digest 167, *584*.

(13) *Pole-Carew* v. *Craddock*, [1920] 3 K.B. 109; 89 L.J.K.B. 507; 123 L.T. 309; 36 T.L.R. 447; 7 Tax Cas. 488, C.A.; 28 Digest (Repl.) 313, *1368*.

Appeal from an order of ASTBURY, J., reported [1923] 1 Ch. 486.

The Shrewsbury Estate Act, 1843, was passed for the purpose of vesting part of the settled estates annexed to the Earldom of Shrewsbury and Talbot, situate in the counties of Oxford, Chester, Salop, Worcester, and Stafford, in trustees to be sold, and for laying out the purchase money in the purchase of other estates to be settled as therein provided, and for other purposes therein mentioned. By s. 7 it was enacted that it should be lawful for the persons to whom the hereditaments therein dealt with were respectively limited, as and when they should respectively be in possession or entitled to the receipt of the rents and profits thereof, "by any deed or deeds or instruments in writing with or without power of revocation" executed as therein provided, "to grant limit and appoint unto and to the use of any woman or women with whom they respectively may marry, or may have married, for the life or lives of such woman or women respectively, and for her or their jointure or jointures, an annual sum or yearly rentcharge or annual sums or yearly rentcharges not exceeding in the whole for any one woman the yearly sum of £3,000, clear of all deductions whatsoever for taxes or otherwise, to be issuing out of and charged and chargeable upon all or any part of" the hereditaments therein dealt with "and to be paid and payable by equal half-yearly payments on the 1st day of August and the 1st day of February in every year, and the first half-yearly payment thereof respectively to be made on such of the said days as shall first happen after the decease of the person by whom such grant limitation or appointment shall be made." Section 9 was as follows:

> "From time to time when and so often and so long as the manors and other hereditaments hereinbefore made chargeable as aforesaid or any of them shall be, or if this present proviso had not been inserted in this Act would have been, subject at one and the same time to the payment of more than the yearly sum of £5,000 for or in respect of any jointures which shall have been made to three or more women, in pursuance of the power hereinbefore in that behalf contained,"

then the payments to be made should abate as therein provided, the aggregate of the first two jointures made being limited to £5,000. Section 10 provided that the hereditaments thereby made chargeable as aforesaid

> "shall not at any one and the same time be subject to the actual payment of more than the yearly sum of £6,000 for or in respect of any jointures which shall be made in pursuance of the power hereinbefore in that behalf contained,"

and the section made provision for the abatement of the excess.

By s. 3 of the Shrewsbury Estate Act, 1862 (25 & 26 Vict., c. v), it was provided that

> "Any Earl of Shrewsbury, at any time or from time to time after the passing of this Act, may jointure the wife of the person being his heir apparent to any extent not exceeding in the whole £1,000 a year for her life, and the jointure shall be payable from and after the time of the decease of such heir apparent, leaving her his widow; but if he survive the Earl of Shrewsbury appointing the jointure, and himself become Earl of Shrewsbury, then the jointure so appointed shall be deemed to be part of the jointure which he, so having become Earl of

Shrewsbury, might appoint for her, and the power of jointuring wives created by the Shrewsbury Estate Act, 1843, is by this Act amended, so that it shall have effect for the purposes of this enactment; and jointures appointed in accordance with this enactment shall accordingly be deemed to be appointed under that power as amended by this Act; Provided that this Act shall not extend the limit of £6,000 a year fixed by that Act for the total amount of several jointures in force at any one and the same time."

The section did not contain, in respect of any jointure limited thereunder, the qualification as to freedom from deductions contained in s. 7 of the Shrewsbury Estate Act, 1843.

By an indenture dated July 20, 1910, and made between the Right Hon. Charles Henry John Earl of Shrewsbury and Earl Talbot (hereinafter called "the said earl"), of the one part, and his wife, the Right Hon. Ellen Mary Countess of Shrewsbury and Countess Talbot (hereinafter called "the said countess"), of the other part, the said earl, in exercise of the power of that purpose by the Shrewsbury Estate Act, 1843, and the Shrewsbury Estate Act, 1862, given, irrevocably granted, limited, and appointed unto and to the use of the said countess for her life and for her jointure, first, the annual sum or yearly rentcharge of £1,500 clear of all deductions whatsoever for taxes or otherwise to issue out of and charged and chargeable upon all the hereditaments settled as mentioned in s. 7 of the Shrewsbury Estate Act, 1843, and payable as in that section mentioned; and secondly, the further annual sum or yearly rentcharge of £1,500 clear of all deductions whatsoever for taxes or otherwise, and to be in addition to the firstly therein before mentioned annual sum or yearly rentcharge of £1,500, and to issue out of and be charged and chargeable on the same hereditaments and to be paid and payable from and after the time of the decease of the survivor of the said earl and of his mother, Theresa Anna Dowager Countess of Shrewsbury, and to be payable at the date therein mentioned; and it was provided that such jointure was made and should be in full satisfaction of the dower and thirds at common law which the said countess might otherwise have or claim, and with all powers of distress or otherwise in the event of the jointure being in arrear given by the Shrewsbury Estate Act, 1843, and subject to the provisions of s. 3 of the Shrewsbury Estate Act, 1862.

Theresa Anna, Dowager Countess of Shrewsbury, died on July 29, 1912. The said earl died on May 17, 1921; and thereupon his infant grandson, John George Charles Henry Alton Alexander, son of the late Viscount Ingestre, became Earl of Shrewsbury and Earl Talbot, and entitled as tenant in tail male in possession to the hereditaments charged by the said indenture with the said two yearly rentcharges of £1,500. The said hereditaments were not subject to the actual payment of more than the yearly sum of £6,000 for or in respect of any jointures. The trustees had, since the decease of the said earl, paid to the said countess the amount of the said two rentcharges, after deducting therefrom the amount of income tax for the time being payable in respect thereof, and claimed that they were entitled to make such deduction, and also to deduct the amount of the supertax payable by the countess in respect thereof. The countess claimed that, under the direction that the said rentcharges should be paid "clear of all deductions whatsoever for taxes or otherwise" she was entitled to be paid the said rentcharges free of income tax or supertax. She accordingly took out this summons for the determination of these questions, to which the infant Earl of Shrewsbury and Earl Talbot and the trustees were defendants.

Astbury, J., held that the plaintiff's rentcharges were not payable free of income tax or supertax. The plaintiff appealed on the decision in respect of income tax only.

Maugham, K.C., *Bremner* and *Dighton Pollock* for the appellant.

Clauson, K.C., and *Ashworth James* for the respondents.

SIR ERNEST POLLOCK, M.R.—This is an appeal from the judgment of Astbury, J., given on Mar. 22, 1923, on an originating summons which was taken

out in order to have determined what was the effect of certain words in s. 7 of the Act of 1843, an Act which has been called the Shrewsbury Estate Act of that year. The point is a short one, but difficulties arise from the fact that there have been a number of cases in which analogous points have arisen, and which it has been necessary for us to go through.

The facts are quite short. In 1843 an Act was passed which contained a number of recitals, and finally in s. 7 gave a new power of jointure to the extent of £3,000 per annum. It is a power given to the tenant for life to jointure in favour of the Countess and Dowager Countess of Shrewsbury, as the case may be, or successively of the several wives of the tenant for life of the Shrewsbury estate. By jointure deed of July 20, 1910, made between the Earl of Shrewsbury, of the one part, and Lady Shrewsbury, the plaintiff, of the other part, the earl exercised his powers under s. 7 of the Shrewsbury Estate Act, 1843, and appointed to his wife for her life for her jointure first of all the sum of £1,500 (following the words of the Act) clear of all deductions whatsoever for taxes or otherwise; and, secondly, a further annual sum of yearly rentcharge of £1,500, expressed also to be paid clear of all deductions whatsoever for taxes or otherwise charged on the estates which, under s. 7 of the Act, he had the power of charging, and those sums were to be paid in accordance with the terms of the statute and the jointure deed half-yearly. The fact, therefore, is that a jointure has been made for the amount of £3,000, the full amount allowed under s. 7 of the Act of 1843 in favour of the Countess of Shrewsbury, and that sum is to be paid half-yearly clear of all deductions whatsoever for taxes or otherwise; and the question arises whether or not among the deductions which are not to be made from the total sum of £3,000 income tax is included. It is a short point, therefore, viz., does s. 7 of the Shrewsbury Estate Act, which gives this power to the tenant for life, when it says that the annuity is to be paid clear of all deductions whatsoever for taxes or otherwise, mean that the annuity is to be paid without any deduction for income tax, or is it that the balance is to be paid after the sum necessary to satisfy the income tax on £3,000 has been paid? These words are wide: "Free of all deductions whatsoever for taxes or otherwise," and the provision is that that sum of £3,000 without those deductions is to be paid half-yearly, so that a layman would say at first sight that words had been used sufficient and were intended to release the annuitant from income tax. But the words may have been interpreted and decided in the courts to have a meaning different from what they appear to have at first sight. That is what counsel for the respondents contends. He argues that the difference between what is the sum stated in the settlement and directed to be the amount of the annuity and the sum annually received by the annuitant is not a deduction, but a payment, a payment not the less such because the money is paid to the revenue and not direct to the annuitant. He says that it is money paid on behalf of the annuitant, money for which she is ultimately liable, and so money in respect of the payment of which she receives value. Counsel claims as authority for his argument sections of the Income Tax Acts and several decisions in the courts in what have been comprehensively described as the will cases, and more particularly perhaps I may mention in *Re Loveless* (2). He says that the scheme of the Income Tax Acts is that the grantee of the annuity should bear the tax, that the person who pays it should collect it and pay it over to the revenue, but that as between the payer and the grantee of the annuity the money collected for the revenue is to be deemed to be and is, for the purpose of the present case, a payment and not a deduction.

Let me examine the relevant Income Tax Acts and the authorities, and I pass at once to the important s. 102 of the Income Tax Act, 1842. It is to be observed that the Income Tax Act, 1842, was passed before and was in existence when the Shrewsbury Estate Act, 1843, was passed. Section 102 provides that

> "Upon all annuities, yearly interest of money, or other annual payments, whether such payments shall be payable within or out of Great Britain . . . there shall be charged for every 20s. of the annual amount thereof [the tax

for the year net without deductions] according to and under and subject to the provisions by which the duty in the Third Case of Sched. D may be charged."

That is the charging section and it is a charge on the sum generally.

"Provided that in every case where the same shall be payable out of profits or gains brought into charge by virtue of this Act no assessment shall be made upon the person entitled to such annuity, interest, or other annual payment, but the whole of such profits or gains shall be charged with duty on the person liable to such annual payment, without distinguishing such annual payment."

That is a very important provision, because, unlike other cases, there is to be no assessment on the annuitant, but the charge is on all the profits and gains from which and out of which the annuitant receives the annuity. All are charged and made liable to the duty. It further provides that the person who is liable to pay shall be authorised to deduct out of such annual payment at the annual rate, whatever it may be, for every 20s. of the amount thereof, and the person to whom such payment liable to deduction is to be made shall allow such deduction at the full rate of duty thereby directed to be charged, on the receipt of the residue of such money, and under the penalty thereinafter contained,

"and the person charged to the said duties having made such deduction shall be acquitted and discharged of so much money as such deduction shall amount unto."

Let me pause there for a moment. It is clearly contemplated, therefore, under the section, that the whole of the moneys from which the annuity is payable are charged with the duty; the payment in respect of the duty is to be paid by the person who has to pay the annuity. There is to be no assessment on the annuitant, but the annuitant is to allow the deduction which is authorised to be made from the annuity and on receipt of the residue, i.e., the residue of the annuity after the deduction, the person who is to pay is to be acquitted and discharged of his liability to pay the annuity. That is the scheme, and s. 102 goes on:

"as if the amount thereof had actually been paid unto the person to whom such payment shall have been due and payable."

It appears, although the statute provides for the allowance of the deduction which is authorised, it does not turn a deduction into an actual payment, although as between the payer of the annuity and the annuitant the deduction is to be treated as if the amount had actually been paid, which in fact it had not been.

Section 40 of the Act of 1853 provides:

"Every person who shall be liable to the payment of any rent, or any yearly interest of money, or any annuity or other annual payment, either as a charge on any property or as a personal debt or obligation by virtue of any contract, whether the same shall be received or payable half-yearly or at any shorter or more distant periods shall be entitled and is hereby authorised on making such payment, to deduct and retain thereout the amount of the rate of duty which at the time when such payment becomes due shall be payable . . . and the person liable to such payment shall be acquitted and discharged of so much money as such deductions shall amount unto, as if the amount thereof had actually been paid unto the person to whom such payment shall have been due and payable."

The same words are used as to deduction, and the same words are used as to the effect of the deduction, which, although it be a deduction, is to be treated as if the amount thereof had been actually paid, which in fact it was not. The value of s. 40 was that it gave every person who was liable to make a payment of an annuity the right to deduct without any difficulty or without requiring a certificate which had been necessary in certain cases under s. 102. Section 102 had provided that a certificate should be required in certain cases, although not, I think, in the

particular case which has arisen here. It is also to be observed that the charging section is unaffected by the Act of 1853 : the difference is only one of machinery.

It is important to call attention to the words of Lord Macnaghten as to what is the effect of this system on the statutes. In *L.C.C.* v. *A.-G.* (3), in giving his decision, he says ([1901] A.C. at p. 38) :

> "The charging section is s. 102. It extends to all annual payments. The charge is to be according to and under and subject to the provisions by which the duty in the third case of Sched. D may be charged. Then there is a provision that . . . no assessment is to be made upon the person entitled to the annual payment. The whole of the profits and gains are to be charged, and the person charged in respect thereof is entitled to deduct a proportional part of the duty when he comes to make the annual payment to which he is liable. In every other case the annual payment is charged with duty in the hands of the recipient."

Lord Macnaghten clearly points out that s. 102 had provided that, in this particular matter, the payment of an annuity, the tax is paid on all the profits and gains which are the source from which the annuity has been paid. There is no assessment on the annuitant herself. All profits and gains are liable to and have to provide the full amount of the tax, but the provision for deduction remains, and Lord Macnaghten points out that in this case, inasmuch as there is no assessment on the annuitant, it is different from all other cases. There is no assessment upon the annuitant, and as he puts it, "In every other case the annual payment is charged with duty in the hands of the recipient." The section which is now the charging section is s. 2 of the Act of 1853, but that does not make any difference.

It seems to me that the effect of s. 102 of the Act of 1842 is to provide for deductions to be made. No doubt the person paying the income tax and making the deduction is acquitted and discharged as if payment had been made to the annuitant, but the duty that falls on the person responsible for paying the annuity is, first of all, to make a deduction. Stopping, therefore, at the Income Tax Acts, it appears to me that a deduction has been made out of such annual payment in respect of the duty, for those are the words of the section—in respect of the duty which has to be paid, the duty of income tax. The words of s. 40 of the Act of 1853 are deducting "thereout the amount of the rate of duty which at the time when such payment becomes due shall be payable," and it is to be allowed by the annuitant who "upon the receipt of the residue of such money," that is the residue of the annuity, is to accept that residue in full satisfaction as if the whole annuity had been paid to her. It is the residue that is paid and a deduction from the total has been made by paying the residue. It does not seem that the person liable to pay the annuity has paid it clear of all deductions whatsoever for tax or otherwise, and under the Shrewsbury Estate Act, 1843, that is what has to be done. What has been effected is payment of the residue after a deduction has been made. It would primâ facie seem that there had been in this case, if the £3,000 is not paid to the annuitant, a deduction made for the tax or duty required to be paid under the Property Tax Acts.

Another argument is presented by counsel for the respondents. He says, supposing that is the meaning of s. 7 of the Shrewsbury Estate Act, 1843, that is not really a valid provision overriding the usual result; you cannot, in other words, allow an annuitant who ought to pay her own income tax to be released from that payment. This s. 7 is not affecting to do that, and he calls attention to s. 187 of the Income Tax Act, 1842. In my opinion s. 187 does not assist counsel's argument at all. It is quite true that in that section a provision is made that

> "no statutes granting any salary, annuity, or pension, shall be construed or taken to exempt any person, city, borough, or town corporate . . . from the burden and charges of any of the duties granted by this Act."

That seems to point to existing statutes, existing at the time when that section was passed. More than that, I have grave doubt whether the words "any salary,

annuity, or pension" are effective to deal with an annuity of the nature of that which we are dealing with in this case. It points, to my mind, rather to some salary, annuity, or pension which is made by some statute for a public purpose, and where there has been a grant of a salary or an annuity or a pension to a person who engaged in the public service, and it does not appear to me to cover this particular case. However, I do not think that it can be said to have been intended to prevent Parliament afterwards, by an Act passed later, from dealing with the matter as it pleases, for the supremacy of Parliament cannot be fettered by the section. This section was passed in the Act of 1842, and we are dealing with s. 7 of the Act of 1843. Counsel then says that the meaning must be considered by reference to other sections in the Shrewsbury Estate Act, and he calls attention to s. 9 and s. 10 in which a limit is put placing a burden on the estate under the Act, and he suggests that curious, if not absurd, results would arise if the construction put on s. 7 is such as to allow the full sum of £3,000 to be paid to the annuitant without any deduction at all of income tax. It is to be observed that s. 9 and s. 10 follow s. 7 for the purpose of dealing with possible results in the family life of the Shrewsburys, but I cannot see how s. 9 or s. 10 can impose a limitation on the words contained in s. 7. Perhaps it is not irrelevant to observe that in the long recital to this Act there had already been used in reference to a deed of Dec. 31, 1829, the expression "an annual income clear of all deductions whatsoever," and when we come to s. 7 we find a much wider clause used. But whether that is of any importance or not, in my judgment, you cannot cut down the effect of s. 7 by looking to other sections which are to be used under different circumstances and for different purposes.

One may call attention to *Turner* v. *Mullineux* (4), where successive words are used of a somewhat different character, and SIR WILLIAM PAGE WOOD, V.-C., points out that once one has placed a definite interpretation on the words first used, the other words can be used as a short expression meaning the same thing; the reference is to the earlier and more complete sentence, but the effect is not to be changed by a subsequent and rather altered phrase. So here s. 9 and s. 10 do not seem to me in any way to detract from the effect which ought to be given under s. 7 to the words which we have got to construe. On the statutes, therefore, I should be of opinion that a deduction is made in respect of income tax, although for certain purposes it was a payment, and that the words in s. 7 were sufficient to include and to prevent a deduction in respect of income tax. Counsel for the respondents turns first to the authorities which are comprehensively called the will cases, and he cites *Wall* v. *Wall* (5), a case before SHADWELL, V.-C., where

> "A testator gave to his wife an annuity or clear yearly rental charge of £1,800 clear of all taxes and deductions. Held, that the annuity was subject to property tax."

The Vice-Chancellor's decision is given somewhat tersely. Other cases are *Lethbridge* v. *Thurlow* (6) and *Sadler* v. *Rickards* (7), where the Vice-Chancellor followed the previous cases of *Wall* v. *Wall* (5) and *Lethbridge* v. *Thurlow* (6); and then we come to *Turner* v. *Mullineux* (4), where the words were: "free from income tax, or property tax, or any other deduction." The words in each of those cases differ somewhat, but in all of them the freedom which was given did not include freedom from income tax. But there was another case, *Festing* v. *Taylor* (8), which went to the Exchequer Chamber. The words in that case were:

> "without any deduction or abatement whatsoever on account of any taxes, charges, impositions, or assessments already or to be thereafter taxed, charged, assessed or imposed on the same hereditaments, or on the said rentcharge . . . by authority of Parliament or otherwise howsoever."

The words are very wide indeed, and it was admitted in the course of the case that the intention of the words was to prevent a deduction in respect of income tax. The real point decided was that s. 103 of the Act of 1842 does not prohibit a testator from directing that a rentcharge created by will shall be free from income

tax. That was the real decision. But it is to be observed from an admission made in that case that the words were effective to include income tax and the court accepted that deduction as having been properly and rightly made. It is quite true, therefore, that it is not an actual decision on the point, but it is to be noted that it was Mr. Coleridge, the late Lord Chief Justice of England, who made the admission, and it may have been made because he felt it was not possible to argue that these very wide words would not include income tax. All those cases had been decided in which the words that had come before the court had not been operative to include the income tax. *Lord Lovat* v. *Duchess of Leeds* (*No. 1*) (1) came before Kindersley, V.-C. There it was held that the term "rents and profits" meant only rents and profits. It was a direction

> "to pay and defray all taxes—parliamentary, parochial or otherwise—affecting the hereditaments given to his wife. Held, that income tax came within the words 'taxes affecting the hereditaments'; that such direction did not contravene the terms of the Income Tax Acts; and, therefore, that the trustees were bound to pay an income or property tax payable in respect of the widow's interest in such hereditaments."

It is quite true that Kindersley, V.-C., decided the case on the particular words "taxes affecting the hereditaments," but from that time onwards a different view was taken, and, indeed, apparently accepted by the court, as to whether or not the burden of income tax is excepted by these words "excepting deduction of income tax."

In *Re Bannerman's Estate* (9) Hall, V.-C., follows the view presented by Kindersley, V.-C., and holds that the words

> "free from all deductions in respect of any present or future taxes, charges, assessments or impositions, or other matter, cause or thing whatsoever"

enabled the widow to be paid the annuities in full, free from and without any deduction for income tax definitely following *Lord Lovat* v. *Duchess of Leeds* (*No. 1*) (1).

There are two more cases, *Peareth* v. *Marriott* (10) and *Gleadhow* v. *Leetham* (11). The latter case, *Gleadhow* v. *Leetham* (11), has been somewhat fully discussed, and in that case the words were "the clear yearly sum of £600"; no more; no particular references to taxes, but Kay, J., although he decides that the annuitant was bound to pay income tax, says (22 Ch.D. at p. 274):

> "I confess that but for the authorities referred to, I should have felt a little more difficulty than I do, because the annuity being given by the testator to his wife, I do not see what the direction was aimed at if not the income tax."

He therefore appears to find himself bound by the authorities, but his own view would be to give a wider interpretation to the words used in that particular case, which were certainly nothing like so wide as the words we have to construe. As Warrington, L.J., has pointed out, it is important to observe that in a case which counsel for the respondents relied on, *Re Loveless* (2), Swinfen Eady, L.J., says ([1918] 2 Ch. at p. 5) that he thought *Peareth* v. *Marriott* (10), before Bacon, V.-C., who allowed the deduction for income tax in that case, and *Gleadhow* v. *Leetham* (11), before Kay, J., were sound decisions, and that the rule there laid down was the rule that must prevail. Those decisions really follow, if not in terms, on the decision of Kindersley, V.-C., although by reason of the narrow ambit of the words that had to be discussed in *Bannerman's Case* (9) and *Gleadhow* v. *Leetham* (11), the words were not wide enough to allow the deduction of income tax.

In *Re Saillard* (12) the words were "free of all duties," and no reference to the word "taxes," and it was held that the sum was to be paid subject to, and not free from, income tax. That follows the sequence of authorities.

Re Loveless (2) was a decision of this court, in which Swinfen Eady and Bankes, L.JJ., give the decision. It is important to observe that although

SWINFEN EADY, L.J., refers to s. 102 of the Income Tax Act, 1842, and s. 40 of the Act of 1853, there appears to have been no argument on the meaning of those sections of the Income Tax Acts. They do not appear to have been discussed at length, and, therefore, what was said may be a little wider than was necessary for the purposes of the decision of that case. All that had to be decided was where, under a will, a payment was to be made to the testator's wife out of the income of a clear annuity, whether that word "clear" was sufficient to enable the annuitant to escape income tax, and it was held not to be sufficient. But the suggestion has been made that some of the observations made by the learned lords justices are contrary to the appellant's view presented in this case. BANKES, L.J., at the end of his judgment, makes the observation ([1918] 2 Ch. at p. 6) that the payment which is made of the income tax is made

> "as the statutory agent for the annuitant; and the amount which the agent receives, though less by the amount of the income tax, is none the less a payment, by the person liable to pay, of a clear annuity of the full amount."

I think that that was true in the case as between the annuitant and the person who pays the annuity, but I do not think BANKES, L.J., was applying his mind to the question whether or not such a payment can ever be a deduction; and *L.C.C.* v. *A.-G.* (3) was not brought to his notice. In my view, therefore, *Re Loveless* (2) is not a decision which we are bound to follow, because it is not a decision on the point that we have to construe. Perhaps, therefore, I may summarise it thus: that whereas the earlier view presented in *Wall* v. *Wall* (5), *Lethbridge* v. *Thurlow* (6) and *Sadler* v. *Rickards* (7), and the other cases which I have referred to up to the time when KINDERSLEY, V.-C., gave his judgment in *Lovat* v. *Leeds* (1), may go a long way to support the argument of counsel for the respondents, we come to the turn of the tide in *Lovatt* v. *Leeds* (1) and subsequent cases. It may be said that where there is a clause including the word "taxes," it may well be that the words are sufficient to include income tax, but, if there is no reference to the word "taxes," the decisions may well stand in which it is held that a deduction for income tax cannot be made.

It is to be observed that before ASTBURY, J., no reference was made to the more recent case before this court of *Pole-Carew* v. *Craddock* (13). That was a case in which the question which had to be decided was whether or not the words contained in an Act under which was established a ferry and which contained a provision

> "that the then proprietors or their respective heirs or assigns, 'shall not be rated or assessed for or toward the payment of any tax, rate, or assessment whatsoever, parliamentary or parochial, for or in respect of the said ferry,' "

were apt to release the proprietors from the payment of income tax, and it was held

> "that the exemption granted by the statute extended to parliamentary taxes whether in existence at the date of the Act or not, and, therefore, included income tax."

The case perhaps is the logical conclusion of a number of authorities to which I have referred and some others, but it is important to observe that this court definitely held that even in the case of a statute passed long before the Income Tax Act, immunity was granted to the proprietors from the Income Tax Act under the words which granted them immunity from the payment of taxes, parliamentary or parochial. LORD STERNDALE, in giving his judgment, said ([1920] 3 K.B. at p. 123) that it seemed to him that

> "it is quite clear that the words 'payment of any tax, rate or assessment whatsoever, parliamentary or parochial' mean what they say, that the exemption is not to be confined to parochial taxation or parochial rating, but extends to general parliamentary taxation such as is defined in the pages to which I have referred, and such general parliamentary taxation includes the income tax."

Although that case summarises the law which had been previously stated in a number of cases, and is a logical conclusion of them, it seems to me that that is a very definite conclusion on this point that the parliamentary tax includes income tax.

I have been through the authorities at some length because they have been fully discussed before us, but the point really is a short one. In my opinion, as the words stand, having regard to the date at which the Shrewsbury Estate Act was passed, primâ facie I think s. 7 was intended to deal with any deduction for income tax as provided for or made allowable by s. 102 of the Act of 1842. From the number of cases which I have referred to it seems quite clear that deductions in respect of taxes may well include income tax. Under the Income Tax Acts themselves it appears that the proper word in respect of the payment of the tax in this case is "deduction," although for certain purposes it may also be said to be a payment; and when one comes to the final case of *Pole-Carew* v. *Craddock* (13), it seems to me that words such as "all deductions whatever for taxes" are wide enough to and must be interpreted to include income tax. The learned judge had not the advantage of having the matter so fully discussed as it has been before us or of having his attention called to some of the more recent cases. I confess that I do not quite agree with some of the statements or some of the propositions to which he gives his assent as to the working of the system of the Income Tax Acts, but I need not dwell on those Acts. For the reasons which I have already given I think the interpretation which we ought to place on these words is that income tax is included, and for these reasons the appeal ought to be allowed.

WARRINGTON, L.J.—I am of the same opinion and as we are differing from the judgment of the learned judge I propose to express the view at which I have arrived in my own words, and as shortly as possible.

The appellant, the Dowager Countess of Shrewsbury and Talbot, is entitled, under a covenant made by virtue of powers conferred on her husband by the Shrewsbury Estate Act, 1843, to a jointure charge on the estates settled by that Act. The question is whether she is entitled to be paid the full amount of that jointure, £3,000, or whether all she is entitled to receive from the persons in possession of the estate is £3,000 less the income tax for the time being on that sum. The words of the Act conferring the power of jointure are these. It is a power to limit a jointure of any annual sum or yearly rentcharge or "annual sums or yearly rentcharges not exceeding in the whole for any one woman the yearly sum of £3,000 clear of all deductions whatsoever for taxes or otherwise." The question we have to determine is one of construction simply. Are the persons entitled to the estate entitled to deduct from the jointure which they have to pay the amount of the income tax chargeable on that annuity of £3,000?

At the date of the passing of the Shrewsbury Estate Act there was in existence a tax, which we all know has since that date been annually renewed, called income tax. The appellant says the income tax is a tax and it certainly is. By virtue of the provisions of s. 102 of the Income Tax Act, 1842, the owners of the estate charged with the particular fund are authorised to deduct out of this jointure the amount of the income tax on the jointure, and it is provided that the annuitant is to allow such deduction and the persons charged with duties having made such deduction are to be acquitted and discharged of so much money as such deduction shall amount to as if the amount thereof had actually been paid to the person to whom such payment shall have been due and payable. The meaning of this provision is this. Under Sched. A of the Act the whole estate is subject to what is commonly called property tax, but is really only income tax under another name. By the provisions of the Act a person entitled to an annuity such as this jointure is to be separately assessed with the tax. The owners of the estate are assessed to the tax and for the purpose of that assessment they are not entitled to distinguish the annuity from the rents and profits of the estate. They are to assess the whole of the rents and profits without taking out the annuity and they have to

pay to the Crown the whole of the taxes which includes income tax on the annuity. But in the ordinary case they are entitled, under the provisions to which I have just referred, in paying the annuity, to deduct the amount of income tax on it, and they are to be entitled to be allowed that payment as if they had paid the annuity in full. In the absence of any authority it would seem to me fairly clear that where an annuity is to be paid clear of all deductions whatsoever for taxes or otherwise, if the persons whose duty it is to pay that annuity deduct from it the amount of that particular tax which is called income tax, they would be making a deduction which, by the provision of the Act, they are not entitled to make. To an ordinary man, knowing of the provision of the Income Tax Act, 1842, and reading these words, it would be reasonably plain that if he deducts the amount of the income tax he is making a deduction for the purposes of the Act, and that is a deduction which the Act of Parliament says he is not to make. But there are, no doubt, authorities which have been accepted as good decisions for many years and have been so accepted in this court, which cause a considerable amount of difficulty. Two principles emerge as the result of those authorities. One of those is this—they are all authorities under wills, I may say—that a mere gift of a clear annuity or an annuity clear of all deductions is not sufficient to discharge the annuitant to whom the annuity is paid of any liability under the Acts to pay the tax on his own income. The last case in this court which affirms that principle is *Re Loveless* (2). But another principle emerges from those authorities, and that is that the question is one purely of the construction of the particular document which comes under consideration in the particular case, and that if there appears on the face of that document an intention that income tax shall be included in the expression "deductions," for the purpose of the instrument which has to be interpreted, then it will be so interpreted; and if there appears a reference to taxes in connection with the expression "deductions," it may and in some cases has been held enough to indicate the intention to which I have referred, viz., although income tax is not usually included in the expression "deductions" unqualified, yet where there is that connection it may be so included. Instances to which the principle just referred to has been applied are found in *Re Bannerman's Estate* (9), in *Turner* v. *Mullineux* (4), and in *Peareth* v. *Marriott* (10) as decided by BACON, V.-C. In my opinion, therefore, KAY, J., in *Gleadhow* v. *Leetham* (11) was expressing a correct conclusion where he divided the cases into two parts, one in which there is nothing but the expression "clear annuity" or "clear of all deductions," and the other where the expression "deductions" is so connected with the word "taxes" as to indicate that the author of the instrument intended to include income tax amongst the things from which the annuitant in question was to be free. Here is just one of the cases falling within the second of the two classes to which I have referred, and I am of opinion that I am entitled to construe those words as I have already said I would have construed them if I had heard nothing of the long string of cases which have been cited. There is nothing on the authorities which prevents me from coming to that conclusion, but on the contrary, the authorities on the second class of cases, viz., those in which the word "taxes" is actually used in connection with the expression "deductions," are strong enough to enable me to come to the conclusion to which I have arrived.

So far I have dealt only with the construction of the actual terms in which the power is given to charge the jointure in question, but it is said there are other expressions, there are other portions of the Shrewsbury Estate Act, 1843, which prevent one coming to the conclusion at which I have arrived, and reliance is placed on s. 9 and s. 10. I do not propose to read those sections. They have been read several times in the course of the argument. All I wish to say about them is that all difficulty in the construction or application of those sections disappears if one interprets the expression relating to the jointure used therein in the way in which the expressions are used, or as I think they ought to be interpreted, in s. 7. If in s. 7 one accepts the expression a jointure of "£3,000 clear of all deductions for taxes" as meaning "£3,000 net and free from income tax," and

interpret the £6,000 in s. 10 in the same way, as meaning £6,000 net without any deduction for income tax, the three sections fall into line and can be interpreted without difficulty.

There are only two other points, one is, it is said, that the provision of s. 103 of the Income Tax Act, 1842, renders void the provision that this jointure shall be free from income tax. The answer to that is that s. 103 is the result of a contract and agreement, and the tax to which we are giving effect is under a statute, and it is therefore not covered by the words in s. 103. As to the words in s. 187 I agree with SIR ERNEST POLLOCK, M.R., that it probably does not refer to such an annuity at all. If it does, then the statutes which are referred to there are statutes which were already in operation at the time of the passing of the Act of 1842, and not statutes which were afterwards passed. To come to any other conclusion would be to hold that one session of Parliament had attempted to enact that statutes passed in subsequent sessions of Parliament had an effect which, but for that provision, they would not have. That, it seems to me, would be an absurd conclusion. It cannot relate to statutes already in force. For these reasons, with respect to the learned judge, I think the decision was wrong, and the appeal should be allowed and the declaration made as asked by the appellant.

SARGANT, L.J.—We have here to find the true meaning of a particular expression used in s. 7 of this Act. In so doing we have, of course, to attribute the strict and primary meaning to the words employed in the section unless from the context, coupled with the surrounding circumstances, it appears that the words have been used in a modified or different sense. Here the phrase in question is "clear of all deductions for taxes or otherwise." It is now well settled that income tax is not a deduction in the strict or proper sense. Under the machinery of Sched. A of the Act, the owner is assessed on the whole value of the land, and is recouped for any deductions in respect of annuities by being at liberty to retain, I use a neutral word for the moment, out of the annuities the tax at the appropriate rate. The result is not that he pays less than the full annuity, but that he pays the bulk to the annuitant, and is deemed to pay the amount of the tax, also being, in fact, liable to pay to the Crown all tax moneys that he deducts which he has to pay on the assessment of the true value of the land. Hence a direction in a will or deed to pay an annual sum without any deduction is primâ facie satisfied by the payment to the annuitant, minus the tax, and I think, in this case, that counsel for the respondents was quite right in saying that when the owner of the lands had paid to the annuitant, taking the figure he mentioned, £2,250, and had paid income tax on the whole of the lands, he had paid to her the £750 also, which he had retained out of the £3,000, and had paid her £3,000 without deductions. But though income tax is not a deduction in the result, and therefore not a deduction in the strict sense, still the process or method under Sched. A is a process by way of deduction. The word "deduction" is used throughout the relevant parts of the Act, and, therefore, the word "deduction" can very naturally, though with slight inaccuracy, be applied to the payment of the tax. A very usual form of words in legal documents is to pay an annual sum of this kind or a quarterly rent without any deduction except for income tax and such a phrase, though not strictly accurate, is perfectly intelligible and arouses, to my mind, at any rate, no sense of contradiction or violent inconsistency.

To deal more closely with the phrase in question. Had it been "clear of all deduction for income tax or otherwise," without question the annuity would be relieved from its liability to undergo the process of deduction, though this may have only been a method and though income tax was not strictly a deduction. What then is the effect of the larger and vaguer phrase "taxes"? There was no other tax at the time, but land tax and income tax, and not only would land tax alone be insufficient to satisfy the plural word "taxes," but land tax itself was collected, as a question of method, by deduction; and if taxes mean all taxes present and future, then the case seems to fall within the principle of the

Pole-Carew Case (13), a case which is stronger than the present one in that the statutory provision there was long prior to the Income Tax Act, 1842. Here I think the dates are very strongly in favour of the appellant. The general Act was only a year old and it imposed a tax collectable by way of deduction although not in fact, and, in my judgment, the words used in the Act of 1843 are clearly intended to point to the recent public legislation.

It is said that the Act of 1843 cannot be construed in this way, because it would be going back on the general legislation of 1842. This argument does not convince me. There is nothing in the Act of 1842 to prevent the division of a total income between several beneficiaries in such a way that the person receiving a fixed income may have the benefit of receiving it as so absolutely fixed and invariable as to have his income tax provided for out of the total income. The remarks of KINDERSLEY, V.-C., in *Lord Lovat* v. *Duchess of Leeds* (*No. 1*) (1) at the conclusion of his judgment seem to me entirely appropriate. Then comes the particular argument as to s. 9 and s. 10. That argument really depends on two suggestions. The first suggestion is that the limits of total charging the jointure spoken of are not jointures of the same special character as the jointures mentioned in s. 7 and the suggestion that the creation of the jointure in cl. 7 is the creation of two charges, the first of £3,000 itself, and the second the amount charged necessary to defray the income tax. In my judgment neither suggestion is sound. What is authorised by s. 7 is the creation of a specially favourable annuity, viz., one that is exempt from the liability to have income tax deducted by the tenant for life when he comes to pay the charge, and on all ordinary principles of construction the superadded s. 9 and s. 10 are dealing with annuities of the same character as those created under s. 7, viz., annuities with this special exemption. This view is supported by the omission of the words now in question in a case of annuities which had been created in satisfaction of obligations created in the settled estates prior to the passing of the Income Tax Act, 1842, and which had, therefore, become subject to the taxing provisions of that Act. Finally, I agree that s. 187 does not apply, for the reasons which have already been stated.

Appeal allowed.

Solicitors: *Nicholson, Freeland & Shepherd*; *Williams & James.*

[*Reported by* J. L. DENISON, ESQ., *Barrister-at-Law.*]

PRICE *v.* RHONDDA URBAN DISTRICT COUNCIL

[CHANCERY DIVISION (Eve, J.), July 13, 1923]

[Reported [1923] W.N. 228; 130 L.T. 156; 58 L.Jo. 199; 87 J.P. 567]

Costs—Representative action—Action dismissed with costs—Jurisdiction to order costs to be paid by persons represented.

In a representative action which is dismissed with costs the court has no jurisdiction to order the persons represented to pay costs.

Scott v. *Pascall* (1) (1847), 2 Ph. 390, followed.

Notes. As to representative actions, see 26 HALSBURY'S LAWS (2nd Edn.) 17, 18; and for cases see DIGEST, Practice, 415 et seq.

Case referred to:

(1) *Scott* v. *Pascall* (1847), 2 Ph. 390; Digest Practice 422, *1181.*

Also referred to in argument:

Adair v. *New River Co.* (1805), 11 Ves. 429.

National Bolivian Navigation Co. v. *Wilson* (1880), 5 App. Cas. 176, 43 L.T. 60, H.L.; 43 Digest 657, *904.*

Duke of Bedford v. *Ellis*, [1901] A.C. 1; 70 L.J.Ch. 102; 83 L.T. 686; 17 T.L.R. 139, H.L.; Digest Practice 416, *1133.*

Re Jones (1870), 6 Ch. App. 497, sub nom. *Fielden* v. *Northern Railway of Buenos Ayres Co., Ltd., Re Jones*, 40 L.J.Ch. 113; 23 L.T. 655; 19 W.R. 361, L.C.; 42 Digest 352, *4010.*

Motion.

In this case an action had been brought by the plaintiff, suing on behalf of herself and all other married women teachers in the employment of the defendant council, for a declaration that a resolution of the defendants purporting to terminate their engagements was ultra vires, and an injunction to restrain them from acting thereon. The action failed, and was dismissed with costs, and by the order liberty was reserved to the defendants to apply to make the order as to costs effective against the persons whom the plaintiff represented. A motion was now made for that purpose.

Upjohn, K.C., and *Bethune* for the motion.

Gover, K.C., and *John Stone* for the respondents.

EVE, J.—This action was originally instituted as an action by the plaintiff against the defendants claiming a declaration, an injunction and damages. As from Nov. 6, 1922, it became, and was continued as, an action by a single plaintiff on behalf of herself and a certain number of persons constituting a class similarly interested to the plaintiff and who were actively supporting the litigation which the plaintiff had instituted. It is impossible to read the documents which came into existence shortly before the commencement of the action and at the time when the amendment was made without seeing that this class of persons was actively supporting the case which the plaintiff was putting forward. It is important to notice that the case, as counsel for the motion says, is peculiar in that it is not a case of a plaintiff purporting to sue on behalf of a large class without being able to affirm that all the members of the class were supporting her attitude. Here the plaintiff can so affirm; the actual names of her supporters were disclosed, and they are the persons who would benefit by the plaintiff's success. Per contra, it is argued that, if the plaintiff fails and her action turns out to be misconceived, those who would have benefited by her success ought to contribute to the costs to which the defendants have been put in resisting her claims. I think I can say this much in response to counsel's invitation, that if ever there was a case in which a representative action has been instituted and maintained

in which those in whose interest it was brought ought to be ordered to pay costs, this is that case. A

But the question is really one of jurisdiction. It is to be observed, in view of the large number of persons whose rights were to be dependent on the result of the litigation, that alternative suggestions were made by the defendants to the action, either to add all such persons as parties or to convert the action into a representative one. As the first alternative would have involved adding fifty-eight plaintiffs, it was obviously the more convenient course to make the action a representative one. The advisers of the plaintiff accordingly accepted the second alternative. What was the effect of that? To prevent these persons against whom the defendants were now moving becoming parties to the action. It is quite true that, in a sense and a very important sense, they are before the court in that each of them is bound by the judgment and could not now institute fresh proceedings for the same relief. In that sense they are before the court, but they are not parties to the action. They are persons who have been described at times as quasi parties. The real and only point is whether there is jurisdiction to order costs to be paid by a person not a party. I regret it, but, in my opinion, it is well settled that there is no such jurisdiction. Notwithstanding the criticism of counsel for the motion to the contrary, I think *Scott* v. *Pascall* (1) proceeds entirely on the ground that originally the persons there sought to be made liable were not named on the record. That this is so appears from the argument addressed to the court on behalf of the appellant (2 Ph. at p. 392). "There is an analogy for this in the practice of courts of law in actions of ejectment and others, where the plaintiffs on the record are mere nominal parties: for in such cases, if the defendant obtains a verdict, process for costs issues against the real parties; and it is reasonable that a similar practice should exist in this court; for, strictly, all the guardians ought to have been actually named on the record as plaintiffs, in which case all would clearly have been liable for the costs; and it would be singular if the rule, which allows some to represent the whole body, being introduced for their convenience, should deprive the defendant of a security which he would otherwise have had for payment of his costs." That is the same argument as has been addressed to me. It was discussed and rejected in 1847, and I do not think it can succeed to-day. I have no jurisdiction to make the order asked, and I dismiss the motion with costs. B C D E F

Solicitors: *Smith, Rundell & Co.*, for *Morgan, Bruce & Nicholas*, Pontypridd; *Helder, Roberts & Co.*, for *W. R. Davies & Co.*, Pontypridd. G

[*Reported by* A. W. Chaster, Esq., *Barrister-at-Law.*]

A

Re FALKINER. MEAD *v.* SMITH

[CHANCERY DIVISION (Tomlin, J.), October 16, 1923]

[Reported [1924] 1 Ch. 88; 93 L.J.Ch. 76; 130 L.T. 405; 68 Sol. Jo. 101]

B

Will—Bequest—Legatees to apply in accordance with wishes of testatrix expressed in memorandum—Memorandum "not to create any trust or legal obligation"—Agreement by legatees with knowledge of contents of will to carry out wishes expressed.

C By her will, dated April 22, 1922, the testatrix devised and bequeathed her real and personal estate to her two trustees on trust to sell, call in and convert into money the same, and out of the proceeds to pay her funeral and testamentary expenses and debts and to invest the residue as therein mentioned. By cl. 5 of the will, she bequeathed to the two trustees by name "absolutely as joint tenants one-half of the residuary trust moneys with the request that they will dispose of the same in accordance with any paper or memorandum D signed by me and deposited with this my will or left among my papers at my death." By cl. 6 the trustees were to stand possessed of the remaining half of the residuary trust moneys in trust to pay the income thereof to S. during his life, and, by cl. 7, the testatrix bequeathed, subject to cl. 6, this remaining half of the residuary trust moneys to the two trustees by name with the request E that they would dispose of the same as under cl. 5. By cl. 8 any such memorandum or paper referred to was not to be deemed to form part of her will or to have any testamentary character, and "the above expression of my wishes as to the disposal of the said sums shall not create any trust or legal obligation even if the same shall be communicated to my trustees in my lifetime." The two trustees were partners in a firm of solicitors which prepared F the will and had prepared an earlier will in August, 1921. Prior to August, 1921, the testatrix sent to one of the partners of the firm a list of persons whom she desired to benefit, but, despite his advice that the will of August, 1921, should contain the names of these beneficiaries, she refused to insert them. In October, 1921, she sent him revised lists of persons and institutions whom she wished to benefit and requested him to destroy the earlier list. G Subsequently, she wrote letters to him asking him to make alterations in the lists, all of which he acknowledged. The testatrix died in June, 1922, and on the question whether the shares of the residuary estate left to the trustees were held by them for their own benefit, or whether, either by virtue of the will or by virtue of something outside the will, they were held by them as trustees, and, if so, for whose benefit,

H **Held:** the trustees took the property bequeathed to them for their own benefit, since there was no agreement between them and the testatrix which imposed a legal obligation, but only an agreement to give effect to the testatrix's wishes, which they knew, in accordance with the scheme of the will, including the provision that there was to be no trust or legal obligation.

Re Spencer's Will (1) (1887), 57 L.T. 519, distinguished.

I **Notes.** Distinguished: *Re Williams, Williams* v. *Parochial Church Council of the Parish of All Souls, Hastings*, [1932] All E.R.Rep. 724. Applied: *Re Stirling, Union Bank of Scotland, Ltd.* v. *Stirling*, [1954] 2 All E.R. 113.

As to evidence of secret trusts, see 24 HALSBURY'S LAWS (2nd Edn.) 183–185; and for cases see 43 DIGEST 596 et seq.

Case referred to:

(1) *Re Spencer's Will* (1887), 57 L.T. 519; 3 T.L.R. 822, C.A.; 43 Digest 597, 457.

Also referred to in argument:

Re Pitt Rivers, Scott v. *Pitt Rivers*, [1902] 1 Ch. 403; 71 L.J.Ch. 225; 86 L.T. 6; 66 J.P. 275; 50 W.R. 342; 18 T.L.R. 272; 46 Sol. Jo. 246, C.A.; 8 Digest (Repl.) 386, *791*.

McCormick v. *Grogan* (1869), L.R. 4 H.L. 82; 17 W.R. 961, H.L.; 43 Digest 600, *480*.

Re Gardom, Le Page v. *A.-G.*, [1914] 1 Ch. 662; 83 L.J.Ch. 681; 109 L.T. 845, C.A.; affirmed sub nom. *Le Page* v. *Gardom* (1915), 84 L.J.Ch. 749; 113 L.T. 475; 59 Sol. Jo. 599, H.L.; 43 Digest 596, *451*.

Ellcock v. *Mapp* (1851), 3 H.L.Cas. 492, H.L.; 24 Digest (Repl.) 937, *9499*.

Re Boyes, Boyes v. *Carritt* (1884), 26 Ch.D. 531; 53 L.J.Ch. 654; 50 L.T. 581; 32 W.R. 630; 43 Digest 601, *487*.

Adjourned Summons.

By her will dated April 22, 1922, Marie Ffrench Falkiner, after appointing Henry John Mead and Henry Gifford Mead to be her executors and trustees, devised and bequeathed all her real and personal estate to her trustees on trust to sell, call in, and convert into money the same, and with and out of the moneys produced by such sale, calling in and conversion, to pay her funeral and testamentary expenses and debts, and to invest the residue of the said moneys, or so much thereof as should not be immediately required to satisfy the trusts hereinafter declared as therein mentioned. Then followed cl. 5 to cl. 8 of her will which were as follows:

"5. I bequeath unto the said Henry John Mead and Henry Gifford Mead absolutely as joint tenants one-half of the residuary trust moneys with the request that they will dispose of the same in accordance with any memorandum or paper signed by me and deposited with this my will or left among my papers at my death. 6. My trustees shall stand possessed of the remaining half of the residuary trust moneys and the investments for the time being representing the same In trust to pay the income thereof to Humphrey Donnell O'Sullivan of Burton-on-Trent Physician during his life. 7. Subject to cl. 6 hereof I bequeath unto the said Henry John Mead and Henry Gifford Mead absolutely as joint tenants the remaining half of the residuary trust moneys with the request that they will dispose of the same in accordance with any memorandum or paper signed by me and deposited with this my will or left among my papers at my death. 8. Any such memorandum or paper referred to in cl. 5 and cl. 7 hereof shall not be deemed to form part of my will or to have any testamentary character and the above expression of my wishes as to the disposal of the said sums shall not create any trust or legal obligation even if the same shall be communicated to my trustees in my lifetime."

The testatrix had previously made a will dated Aug. 9, 1921, which differed from her second will in only two respects. First, in the earlier will, Dr. O'Sullivan was also appointed an executor and trustee; and secondly, the earlier will contained no provision such as there was in the later will (cl. 11) appointing the Westminster Bank a custodian trustee. Both wills were prepared by Messrs. Mead & Sons, a firm of solicitors consisting of Henry John Mead and Henry Gifford Mead, his son. It appeared from an affidavit of Henry Gifford Mead, that, shortly before Aug. 9, 1921, the testatrix instructed him to prepare her will of that date. Before preparing the will, he strongly urged the testatrix to state in her will the names of the various beneficiaries whom she desired to benefit as set out in a list sent by her to him dated May 24, 1921, but she refused to accept this advice, and stated that, unless the will was drawn in the form she wished, she would employ other solicitors. In these circumstances he prepared the will, but on condition that the testatrix executed it in the presence of an independent solicitor, who should go through it with her and satisfy himself that it carried out her wishes. This was in fact done. Subsequently the testatrix wrote a letter to him dated Oct. 18, 1921, enclosing revised lists dated Oct. 12, 1921,

dealing with the distribution of her estate at her death, and she instructed him to destroy the earlier list. The first of the new lists contained the names of a number of persons and institutions with sums of money set opposite the names amounting to £7,670, and was headed "Gifts and legacies at my death." Another list consisted entirely of gifts of pictures and other chattels. The remaining list was headed "Second list for Messrs. Mead & Sons, after death of any other executor," and it also contained the names of a number of persons and institutions with sums set opposite the names of all except the last amounting to £2,360. Against the last name appeared the word "residue." H. G. Mead replied to the testatrix's letter by a letter dated Oct. 19, 1921, in which he said: "I have your letter of the 18th inst., with the enclosures, and quite understand your instructions." On Jan. 23, 1922, the testatrix wrote to H. G. Mead a letter containing the following passage: "I also want to say that should I die in the flat, I should like Hearne, my maid, to have my clothes and trunks to dispose of, and to stay on in the flat on board wages for a month or so to go through things. Please note that I want Miss Agnes M. Smyth to be put in the list for £25." On Jan. 25, 1922, H. G. Mead replied: "I have noted your wishes and will ensure that they are carried out." In April, 1922, the testatrix instructed H. G. Mead to prepare a new will for her, and on April 21, 1922, the testatrix had an interview with H. G. Mead, and he made the following note of what took place: "Mrs. Ffrench Falkiner has to-day instructed me that she wishes the furniture, linen, plate and pictures sold, and the proceeds treated as part of general estate, her books only going to M. C. Maycock, except four pictures specifically mentioned. Mrs. Falkiner has arranged with Albert Smith that he shall look after his blind brother Harry, his wife and children, out of the money he is to receive. We are to consider the purchase of a business for Albert Smith, so that if he thinks fit he can take his brother Ernest as junior partner. Mrs. Falkiner wishes to revoke the appointment of Dr. O'Sullivan as executor and trustee, as having regard to his increasing responsibility and second family, she does not want him to be troubled with her affairs. . . ." The testatrix signed her will on the following day. On May 3, 1922, the testatrix wrote a letter to H. G. Mead requesting him to put the name of Miss M. A. Atkinson "on my first list for distribution, after my death for the sum of £20." The testatrix died on June 4, 1922.

In April, 1923, H. J. Mead and H. G. Mead took out this summons to have it determined whether, according to the true construction of the testatrix's will, and in the events which had happened, the moiety of the residuary estate of the testatrix bequeathed by cl. 5 of her will, with the income thereof as from her death, ought to be held by them: (a) for their own benefit free from any trust, or (b) subject to a trust for the application thereof for the benefit of the persons named in the lists dated Oct. 12, 1921, as modified by subsequent letters of the testatrix, and in the proportions in the list and letters mentioned, or (c) subject to a trust in favour of the next-of-kin of the testatrix at the time of her death.

Lyttelton Chubb for the plaintiffs.
W. J. Hart for one of the beneficiaries mentioned in the revised lists.
Sanger for another beneficiary.
Shebbeare for the next-of-kin of the testatrix.

TOMLIN, J.—In this case, the question is whether the shares of the residuary estate left to Henry John Mead and Henry Gifford Mead are held by them for their own benefit, or whether, either by virtue of the will or by virtue of something outside the will, they are held by them as trustees, and, if so, for whose benefit. [HIS LORDSHIP stated the facts and continued:] The Messrs. Mead have stated by their counsel at the Bar that they intend to give effect to the wishes of the testatrix as expressed by the documents of Oct. 12, 1921, but it makes some difference whether they are under a trust to do so or are left with a free discretion.

The first question is whether they are absolute owners of what is expressed to be given them by the will. If not, then the further questions will arise whether

they are trustees for the persons and institutions set out in the lists of Oct. 12, 1921, or whether they are trustees of a fund of which the beneficial interest is undisposed of, so that the persons beneficially entitled are the testatrix's next-of-kin. I think the question whether, if there is not a trust created outside the will in favour of the persons named in the lists, the Messrs. Mead are trustees for the next-of-kin must depend on the construction of the will itself; because, if there was no bargain outside the will imposing a fiduciary relationship, then that relationship can only exist by virtue of the terms of the will itself. Looking at the will, I do not think that any fiduciary relationship is created. By cl. 5 of the will, the testatrix bequeathed to them absolutely as joint tenants a moiety of the residuary trust moneys, with the request that they would dispose of the same in accordance with any memorandum or paper signed by her and deposited with her will or among her papers; and the position is similar with regard to the remaining moiety, subject to a life interest given to Dr. O'Sullivan. Then, by cl. 8, the testatrix provides:

> "Any such memorandum or paper referred to in cl. 5 and cl. 7 hereof shall not be deemed to form part of my will or to have any testamentary character and the above expression of my wishes as to the disposal of the said sums shall not create any trust or legal obligation even if the same shall be communicated to my trustees in my lifetime."

I think, on the true construction of the will, the Messrs. Mead take these interests absolutely, and that, assuming there are no trusts created outside the will, they cannot be said to be trustees for the next-of-kin.

The remaining question is whether they are trustees by reason of some bargain outside the will. I do not think the principle is in doubt that, if a gift made absolutely by will is induced by a representation that the donee will apply the same in some special manner indicated by the testator, the court will impose a trust on the donee binding on his conscience and will give effect to that trust. But the question must always be what the donee has in fact agreed to do; and it must be borne in mind in this case that, whatever H. G. Mead agreed on behalf of his father and himself to do, he did it with full knowledge of all the relevant documents. He knew that the testatrix objected to her will taking a form which showed the persons intended to be benefited. He knew also that she had expressed her intention in the will that no trust or legal obligation should be imposed; and the question is whether the true inference to be drawn is that, in agreeing to carry out her wishes, he was giving an absolute assent so as to create a trust or a qualified assent subject to the terms and conditions contained in her will, including the condition that he and his father would remain absolute owners of the property bequeathed to them, though under a moral obligation to carry out her wishes.

It has been suggested to me that *Re Spencer's Will* (1) precludes me from coming to any conclusion other than that there was an absolute agreement to give effect to the testatrix's wishes so as to create a trust. I do not think the case has that effect. That case only decided what evidence was admissible on a question of this sort. It is quite true that the will contained language suggesting that the testator did not intend to create a trust. It contained this phrase, "relying but not by way of trust upon their applying the said sum in or towards the object or objects privately communicated to them." But what the effect of those words was did not fall for decision. Further, there is nothing in that case to show that the persons who undertook to carry out the wishes of the testator ever knew of the form or contents of the will at all or were in a position differing from that of a man to whom a testator says: "I have left my money to you, and I will not revoke my will if you will undertake to apply the money as I wish." It is quite plain that the clause in the will could not diminish the obligation of a donee who had undertaken to carry out the testator's wishes, unless the terms of the will were known to him and were intended to be part of the arrangement.

On the other hand, if it were intended to be part of the bargain which the parties made, it would become operative not by virtue of its being a term in the will, but by virtue of its being a term of the bargain.

The question, therefore, is whether I am to draw the inference that the bargain entered into was a bargain simpliciter to give effect to the testatrix's wishes, or a bargain to do so in accordance with the scheme of her will, including the clause declaring that there was to be no trust or legal obligation. I have come to the conclusion that I ought to hold that there was never any agreement between the donees and the testatrix which was absolute in such a sense as to impose a legal obligation. Therefore, I answer the summons by saying that the donees take the fund for their own benefit.

Solicitors: *Mead & Sons.*

[*Reported by* L. Morgan May, Esq., *Barrister-at-Law.*]

PRATCHETT *v.* DREW

[Chancery Division (Tomlin, J.), December 7, 1923]

[Reported [1924] 1 Ch. 280; 93 L.J.Ch. 137; 130 L.T. 660; 40 T.L.R. 167; 68 Sol. Jo. 276]

Mortgage—Foreclosure—Appointment of interim receiver—Order for delivery up of possession by mortgagor to interim receiver—Primâ facie right of mortgagee.

Where, on an interlocutory application for the appointment of an interim receiver in an action by a mortgagee for foreclosure or sale, the mortgagor is in possession of the premises, the mortgagee, although the court has a discretion to make the order in some other form, e.g., by giving the mortgagor an opportunity to attorn tenant, is primâ facie entitled to an order for delivery up of possession by the mortgagor to the receiver.

Hawkes v. *Holland* (1) [1881] W.N. 128, applied.

Edgell v. *Wilson* (2), [1893] W.N. 145.

Taylor v. *Soper* (3) (1890), 62 L.T. 828, distinguished.

Notes. As to the appointment of a receiver by the court in mortgage proceedings, see 27 Halsbury's Laws (3rd Edn.) 266–269; and for cases see 35 Digest 520 et seq.

Cases referred to:

(1) *Hawkes* v. *Holland*, [1881] W. N. 128, C.A.; 35 Digest 526, *2578.*

(2) *Edgell* v. *Wilson*, [1893] W.N. 145; 37 Sol. Jo. 715; 35 Digest 527, *2582.*

(3) *Taylor* v. *Soper* (1890), 62 L.T. 828; 35 Digest 526, *2580.*

(4) *Ind, Coope & Co.* v. *Mee*, [1895] W.N. 8; 39 Digest 70, *811.*

Also referred to in argument:

Griffith v. *Griffith* (1751), 2 Ves. Sen. 400; 28 E.R. 256, L.C.; 39 Digest 90, *1070.*

Davis v. *Duke of Marlborough* (1819), 2 Swan. 108; 2 Wils. Ch. 130; 36 E.R. 555, L.C.; 35 Digest 523, *2521.*

Reid v. *Middleton* (1823), Turn. & R. 455; 37 E.R. 1176, L.C.; 35 Digest 526. *2568.*

Baylies v. *Baylies* (1844), 1 Coll. 537; 63 E.R. 533; 39 Digest 21, *216.*

Everett v. *Belding* (1852), 22 L.J.Ch. 75; 20 L.T.O.S. 136; 1 W.R. 44; 39 Digest 71, *823.*

Randfield v. *Randfield* (1859), 7 W.R. 651; 35 Digest 526, *2577.*

Truman & Co. v. *Redgrave* (1881), 18 Ch.D. 547; 50 L.J.Ch. 830; 45 L.T. 605; 30 W.R. 421; 35 Digest 531, *2617.* A

Yorkshire Banking Co. v. *Mullan* (1887), 35 Ch.D. 125; 56 L.J.Ch. 562; 56 L.T. 399; 35 Digest 526, *2572.*

Re Burchnall, Walker v. *Lacey*, [1893] W.N. 171; 38 Sol. Jo. 59; 35 Digest 527, *2583.*

Motion. B

By a deed dated Aug. 1, 1922, the defendant, W. A. Drew, mortgaged the freehold property at Kirkdale, Westbury Road, New Malden, Surrey, to the plaintiffs, the trustees of the Loyal Flower of Hendon Lodge of Oddfellows, to secure £900 with interest. The principal money was made payable in fifty equal quarterly instalments of £18 each, but there was a proviso that the whole sum remaining owing at any time should become payable if any of the instalments or C the interest were more than thirty days in arrear. There was also a provision that the trustees should be entitled to enter into possession if, inter alia, the mortgagor was adjudicated a bankrupt. On July 3, 1923, the mortgagor was adjudicated a bankrupt, and £864 of the principal money, with interest from Mar. 25, 1923, was due and owing. The mortgagor paid no rent and did not give up possession on being requested to do so by the plaintiffs' solicitor. The trustees D took out a summons against the mortgagor and his trustee in bankruptcy for foreclosure or sale of the mortgaged premises, and this motion was for an interlocutory order for the appointment of an interim receiver of the rents and profits of the premises, and for an order that the mortgagor should within four days after service of the order give up possession of the premises to the receiver.

E

Henry Johnston for the plaintiffs.

Alan Ellis (*Sheldon* with him) for the trustee in bankruptcy.

TOMLIN, J.—This is a motion by a legal mortgagee for the appointment of a receiver of the mortgaged property, the motion being made against the mortgagor, who has been adjudicated a bankrupt, and his trustee in bankruptcy. The mortgaged property consists of a residence in the possession of the mortgagor, and the F form of order asked for is that a receiver be appointed and that the mortgagor be ordered to deliver up possession to him. The application is supported by the trustee in bankruptcy so far as he is able to.

There seems to be a question of considerable doubt whether, on an interlocutory application for the appointment of a receiver by a mortgagee, it is proper, where the mortgagor is in possession, to order him to deliver up possession, or whether G an order of that kind can only be made on judgment in the action being obtained. I have had a large number of cases cited to me which are thought to bear on the question, and there seems certainly to be some diversity of opinion amongst them. I have, however, come to the conclusion that, on an interlocutory application for the appointment of a receiver in an action brought by a mortgagee, whether legal or equitable, an order for the delivery of possession by the mortgagor to the H receiver is an order which the court has jurisdiction at this stage to make, and that, primâ facie, it is a proper form of order. I have had the advantage of seeing a note of the facts in *Hawkes* v. *Holland** (1) made for my assistance by counsel

* On Oct. 11, 1878, the defendant purchased from the plaintiff the equity of redemption in the hereditaments hereinafter mentioned, subject to a first mortgage for £13,000 and other incumbrances. On the same day the defendant executed in favour of the plaintiff a mortgage I for £5,000 of the property which was therein described as a messuage or farmhouse with the barn, stables and other buildings, four cottages and several pieces or parcels of grass and arable land containing 387a. 2r. 17p. situate in Spalding and Deeping St. Nicholas subject to the prior incumbrances. The mortgage contained a covenant that if default be made in payment of principal or interest the plaintiff might enter and hold and enjoy without disturbance. Interest fell in arrear and the plaintiff required the defendant to give up possession but he refused to do so. On July 7, 1881, HALL, V.-C., appointed a receiver. In an affidavit of the plaintiff, read in the Court of Appeal filed July 28, 1881, it is stated: "It was submitted to the registrar that the order should contain the common directions that the defendant deliver up possession of the premises to the receiver." The registrar refused, and a motion

A for the plaintiffs from the papers at the Record Office, and I am satisfied that this point was expressly raised and determined by the Court of Appeal in that case, and that it did, in fact, hold that this was a proper form of order, at any rate in the sense that it is, primâ facie, a proper form of order.

That view is supported by the decisions in two cases which are shortly noted in the WEEKLY NOTES. The first is *Edgell* v. *Wilson* (2), where there was a motion B by the plaintiff, who appears to have been the first mortgagee, for the appointment of a receiver of the mortgaged property, and NORTH, J., on the authority of *Hawkes* v. *Holland* (1), which he said was exactly in point and was a decision of the Court of Appeal, ordered the mortgagor to deliver up possession to the receiver. The only comment that can be made on that case is that, according to the report, it was there agreed that the motion should be treated as the trial C of the action; but if, in fact, this had already been agreed to when the case was dealt with by NORTH, J., I fail to see how the point raised in *Hawkes* v. *Holland* (1) could have been put in issue. I have no doubt that NORTH, J., determined the case as on motion, and that, after it had been determined, the parties were content to treat the motion as the trial of the action. The second case is *Ind, Coope & Co.* v. *Mee* (4), which in some respects is a different case, as the motion D was brought by the owners of business for the interlocutory appointment of a receiver and manager and an order to deliver up possession to the receiver when appointed. NORTH, J., appointed the receiver and made an order for the defendant, who was the manager of the business, to give possession to the receiver. He said there must have been special circumstances in *Taylor* v. *Soper* (3), where the view was expressed that an order for possession could not be given except on E final judgment. It appears from the headnote that this case was an action by brewers for the foreclosure of a mortgage of a public-house, and that a receiver and manager had been appointed on an interlocutory application.

> "The mortgagee continued in occupation of a part of the premises, and was alleged to have acted in a manner which interfered with the proper conduct of the business by the receiver. The plaintiff now moved for an order F directing the mortgagor to give up possession to the receiver and restraining him from remaining in occupation of any part of the premises."

It was held that the mortgagee was not entitled to such an order before judgment, and NORTH, J., said in the course of his judgment (62 L.T. at p. 828):

> "What I am asked to do is to make an order before trial of the action that G the plaintiff should be put into possession of the property of which he seeks to recover possession by means of the action. It is true that the motion is to give the possession to the receiver, but the effect is that the defendant, who is in possession, is to be turned out before trial from the property, possession of which is the object of the action. I cannot make such an order."

It will be observed that the learned judge who refused that order was the same H judge who subsequently determined *Ind, Coope & Co.* v. *Mee* (4), and he distinguished his previous decision on the ground that there must have been some special circumstance. Reading the report, I cannot help thinking that there was, in *Taylor* v. *Soper* (3), some special claim to a right of possession, which was an issue to be tried in the action, and that, in asking that possession should be given to the receiver, the plaintiff was attempting to get the possession which he was

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to vary minutes was refused. The defendant appealed against the appointment of a receiver; the plaintiff gave notice that he should apply to vary the form of order and move for an injunction. On Aug. 3, 1881, the following order was made in the Court of Appeal: On motion by way of appeal by defendant from order of July 7, 1881, and on motion for injunction at the same time made by plaintiff and on application of plaintiff that the receiver should be at liberty to enter on the hereditaments and premises mentioned in the order of July 7, 1881, and on reading orders and affidavits order [defendant's appeal dismissed, &c.] and order defendant on or before Aug. 15, 1881, to deliver to receiver when appointed pursuant to order of July 7, 1881, possession of the said hereditaments and premises. Restrain defendant from removing crops in the meantime whether standing or already cut and now being thereon.

claiming in the action by virtue of some right other than that of being mortgagee. In any case, these two decisions bear out the view that it was in fact determined by the Court of Appeal in *Hawkes* v. *Holland* (1) in the sense in which I have indicated.

I do not, however, wish it to be understood that I have no discretion in the matter. The order for possession is, primâ facie, a proper order, but there is always a discretion in the court to make the order in some other form as, for example, by giving the mortgagor an opportunity to attorn tenant, if that order be thought more appropriate. In the present case, the mortgagor has been adjudicated a bankrupt and, primâ facie, there is nothing to be gained from the point of view of the plaintiff in giving him an opportunity to attorn tenant to the receiver. On the other hand, I think such an opportunity ought to be given to him. He may be able to make an offer with such guarantees for the payment of rent as may justify the receiver in accepting it. I will make an order for delivery up of possession to the receiver on or before Friday, Jan. 18 next; but I wish it to be understood—and this information must be conveyed to the defendant—that it is the intention of the court that, if in the meantime he is able to make an offer to attorn tenant at a suitable rent with proper guarantees for its payment, the receiver shall bring that offer before the court in order that it may determine whether the offer should be accepted rather than that the mortgagor should be turned out of his house.

Solicitors: *Sweetland, Greenhill & Stimson*; *Tarry, Sherlock & King.*

[*Reported by* L. Morgan May, Esq., *Barrister-at-Law.*]

Re KING. KERR *v.* BRADLEY

[Chancery Division (Romer, J.), February 1, 1923]

[Reported [1923] 1 Ch. 243; 92 L.J.Ch. 292; 128 L.T. 790; 67 Sol. Jo. 313]

Charity—Religion—Gift for stained glass window in church in memory of testatrix and certain of her relatives—Immateriality of testatrix's motive.

Charity—Cy-près doctrine—Surplus after satisfying prescribed purpose.

A bequest to provide for the erection of a stained glass window in a parish church to the memory of the testatrix and certain of her relatives is a good charitable gift. In considering whether such a bequest is charitable, it is immaterial that the testatrix' motive was not to beautify the church, but to perpetuate her memory and that of her relatives. Any surplus left over after completing the bequest and paying the cost of obtaining a faculty and the costs of proceedings to determine the character of the bequest is to be applied cy-près.

Notes. Followed: *Re Robertson, Colin v. Chamberlin*, [1930] 2 Ch. 71; *Re Raine, Walton* v. *A.-G.*, [1956] 1 All E.R. 355.

As to charitable purposes and the cy-près doctrine, see 4 Halsbury's Laws (3rd Edn.) 213 et seq., 317 et seq.; and for cases see 8 Digest (Repl.) 312 et seq., 459 et seq.

Case referred to:

(1) *Hoare* v. *Osborne* (1866), L.R. 1 Eq. 585; 35 L.J.Ch. 345; 14 L.T. 9; 30 J.P. 309; 12 Jur.N.S. 243; 14 W.R. 383; 8 Digest (Repl.) 354, *338*.

Also referred to in argument:

Mellick v. *Asylum President, etc.* (1821), Jac. 180; 37 E.R. 818; 8 Digest (Repl.) 354, *332.*

Trimmer v. *Danby* (1856), 25 L.J.Ch. 424; 20 J.P. 709; 2 Jur.N.S. 367; 4 W.R. 430; 8 Digest (Repl.) 354, *333.*

Re Wilson, Twentyman v. *Simpson*, [1913] 1 Ch. 314; 82 L.J.Ch. 161; 108 L.T. 321; 57 Sol. Jo. 245; 8 Digest (Repl.) 422, *1132.*

A.-G. v. *Drapers' Co.* (1840), 2 Beav. 508; 48 E.R. 1279; 8 Digest (Repl.) 445, *1363.*

A.-G. v. *Earl of Winchelsea* (1791), 3 Broc.C.C. 373; 28 E.R. 591; 8 Digest (Repl.) 445, *1360.*

Originating Summons.

By her will, dated June 6, 1919, the testatrix devised and bequeathed all her real and personal estate to the plaintiffs, whom she appointed to be her executors and trustees, on trust to sell the same and out of the proceeds of such sale to pay her funeral and testamentary expenses and debts and the duties payable on her death, and declared that the residue remaining after such payments had been made should be held by her trustees to be applied by them in providing a stained glass window and in placing the same in the church of Irchester to the memory of her late father, her late mother, and her late sister and herself. The testatrix having died on May 11, 1920, the trustees of her will paid all the funeral and testamentary expenses and debts, and all duties payable at her death, and there then remained in their hands a sum of £1,094 19s. 4d. The best stained glass window of the required kind was estimated to cost between £750 and £800. In these circumstances, the trustees of the will issued this summons to have it determined whether the gift of the stained glass window was a good charitable trust or whether such gift failed, and also if it was good as being a charitable trust whether the trustees had a power to apply any balance which would remain after paying for the stained glass window cy-près in providing another stained glass window or how otherwise such balance ought to be dealt with.

F. D. Morton for the trustees.

P. M. Walters for a co-heir-at-law.

V. Barran (*H. T. Methold* with him) for the next-of-kin.

Dighton Pollock for the Attorney-General.

ROMER, J.—I have to determine, in the first place, whether a gift of the testatrix's residue for the purpose of providing a stained glass window in memory of herself and certain members of her family is a good charitable bequest. I have no doubt that it is. It is clear that a bequest to provide a parish church with stained glass windows is a good charitable gift. It is said in this case that the gift is bad because the motive is not to beautify the church or to benefit the parishioners, but to perpetuate the memory of the testatrix and her relatives. It was, however, pointed out in *Hoare* v. *Osborne* (1) that the motive is immaterial in considering whether a bequest is charitable. In certain cases, gifts for the purpose of erecting tombstones have been held not to be charitable gifts, but, in my opinion, the distinction between those cases and this is that a gift for erecting a tombstone is not so obviously a gift for the benefit of a church as a gift for the provision of a stained glass window. No decision has been cited to me covering the case of a stained glass window, and I hold that the gift is a charitable gift.

That being so, the further question arises as to how any surplus is to be disposed of after the costs of obtaining a faculty and the costs of these proceedings have been provided for. On behalf of the next-of-kin it is said that the surplus is undisposed of. On behalf of the Attorney-General it is contended that any surplus must be applied cy-près. In cases where the charity ceases to exist before the death of the testator, the cy-près doctrine applies where a general charitable intention is found. I am unable to see any difference between such a case and the

present case where a sum is left over after a particular intention has been fulfilled. In TYSSEN'S CHARITABLE BEQUESTS (2nd Edn.) p. 202, I find the following statement:

"Where a gift is made for a particular charitable purpose which is sufficiently provided for without the gift, the gift will be applied cy-près."

That and other authorities, in my view, establish the contention of the Attorney-General, and I, therefore, hold that the contention on behalf of the next-of-kin fails.

Solicitors: *Collyer-Bristow & Co.*, for *Ingram, Berridge, Flude & Frearson*, Leicester; *C. E. Pullon*, for *F. J. Bell*, Surbiton; *Treasury Solicitor.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

Re MORANT. Ex parte the TRUSTEES

[CHANCERY DIVISION (P. O. Lawrence, J.), October 15, November 5, 1923]

[Reported [1924] 1 Ch. 79; 93 L.J.Ch. 104; 130 L.T. 398; [1923] B. & C.R. 145]

Bankruptcy—Fraudulent preference—Payment by bankrupt to agent of creditor—Receipt by agent in belief that payment valid—Liability of agent—Payment to agent not payment to "person in trust for creditor"—Liability of such trustee—Bankruptcy Act, 1914 (*4 & 5 Geo. 5, c. 59*), *s. 44* (1).

Where an agent, in the ordinary course of his employment, receives payment of a debt for the use of his principal, and in good faith pays the money over to, or otherwise deals to his detriment with, his principal in the belief that the payment is good and valid, the money cannot be recovered from the agent by the trustee in the subsequent bankruptcy of the debtor, even if in fact the debtor's payment was a fraudulent preference. A payment made to an agent on behalf of his principal in the ordinary case is not a payment "in favour of [a] person in trust for [a] creditor" within s. 44 (1) of the Bankruptcy Act, 1914.

Per **Curiam:** Whether a trustee for a creditor is personally liable to the trustee in a subsequent bankruptcy of a debtor for money received under a fraudulent and void payment by the debtor depends on the facts of each case. In determining his liability the court would take into consideration, inter alia, whether the trustee for the creditor had acted in good faith, and whether he still held the money or had paid it over to the creditor before having notice that the debtor's payment was fraudulent and void.

Notes. As to avoidance of fraudulent preference, see 2 HALSBURY'S LAWS (3rd Edn.) 553 et seq.; and for case see 5 DIGEST (Repl.) 972 et seq. For the Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Case referred to in argument:

Re Gunsbourg, [1920] 2 K.B. 426; sub nom. *Re Gunsbourg, Ex parte Trustee*, 89 L.J.K.B. 725; [1920] B. & C.R. 50; sub nom. *Re Gunsbourg, Ex parte Cook*, 123 L.T. 353; 36 T.L.R. 485; 64 Sol. Jo. 498, C.A.; 5 Digest (Repl.) 692, *6079*.

Motion by the trustees in bankruptcy of C. E. Morant to recover a sum of £1,500 from the respondents, Cave and Benoist, paid to them by the bankrupt, on Jan. 14, 1921, on the ground that such payment constituted a fraudulent preference within the meaning of s. 44 (1) of the Bankruptcy Act, 1914.

A The bankrupt was a silk merchant trading in London, and in the course of his business he had been in the habit of buying goods from an Italian firm named Gavazzi which carried on business in Milan through the respondents, who had for many years acted as agents in London for Gavazzi. At Gavazzi's request payment for goods supplied by them to the bankrupt were made to the respondents as such agents. The last delivery of goods from Gavazzi to the bankrupt took B place on Jan. 20, 1920. On Jan. 24, 1920, a private company was incorporated under the name of William Cave & Son, Ltd., and the respondents were appointed managers of that company by the articles of association. That company took over from Gavazzi the benefit and obligations of all their contracts existing on Dec. 17, 1919, for the sale and delivery of goods in the British Isles. Thereupon Gavazzi, on or about Feb. 17, 1920, sent a letter to the bankrupt, stating that the C benefit and obligations of his contracts with them had been transferred by them to William Cave & Son, Ltd., who had undertaken to deliver the balance of these contracts, that all payments in respect thereof should in future be made to William Cave & Son, Ltd., and that payment for all goods invoiced prior to the date of the letter under the contracts should as theretofore be made to the respondents. In pursuance of the arrangement so come to between Gavazzi and William D Cave & Son, Ltd., the respondents, in or about March, 1920, sent to the bankrupt in the name of Gavazzi statements for all goods delivered to him by Gavazzi prior to Dec. 17, 1919, with a notice endorsed thereon that cheques in payment of such invoices should be made payable to the respondents. The respondents at the same time sent statements for the goods delivered by Gavazzi to the bankrupt subsequently to Dec. 17, 1919, in the name of William Cave & Son, Ltd. E On Dec. 17, 1919, the bankrupt was indebted to Gavazzi in a considerable sum of money for goods delivered on and prior to that date. Between Dec. 17, 1919, and Jan. 20, 1920, he became further indebted to Gavazzi in a substantial amount for goods delivered during that period. The latter indebtedness was transferred to William Cave & Son, Ltd., under the arrangement above mentioned. In the latter part of 1919 and in 1920 the bankrupt was behindhand in his payments, and F eventually, in June, 1920, the following bills were drawn up and accepted by him, namely, in respect of his indebtedness to Gavazzi for goods delivered prior to Dec. 17, 1919, two bills, one of which was for £1,935 9s. at two months, and the other was for £2,047 14s. 4d. at four months, both being drawn by the respondents as agents for Gavazzi, although it did not so appear in the bills, and in respect of his indebtedness to William Cave & Son, Ltd., for goods delivered subsequently G to Dec. 17, 1919, one bill for £2,614 0s. 10d. at six months drawn by the respondents as managers for and on behalf of William Cave & Son, Ltd. The amounts of these bills included substantial sums of interest which the respondents debited to the bankrupt in the hope of expediting his payments, on their own responsibility and without informing either of their principals that they had done so. The two months' bill for £1,935 9s. was met at maturity in August, 1920. As regards the H four months' bill for £2,047 14s. 4d., on Oct. 6, 1920, the bankrupt made a payment of £1,000 on account, and, in settlement of the balance, accepted a fresh bill on Oct. 7, 1920, for £1,054 7s. 6d. at one month drawn upon him by the respondents as agents for Gavazzi. On Nov. 6, 1920, the bankrupt paid a sum of £250 on account of the bill for £1,054 7s. 6d., but the balance was not met when it became due. On Dec. 4, 1920, the bankrupt paid a further sum of £250 in I respect thereof, leaving a balance of £554 7s. 6d. due on that bill. The bill for £2,614 0s. 10d. fell due on Dec. 10, 1920, and was not met. Accordingly, on Jan. 14, 1921, there was due from the bankrupt in respect of goods supplied by Gavazzi and interest a total sum of £3,168 8s. 4d., namely, £554 7s. 6d., balance of the bill for £1,054 7s. 6d. due to Gavazzi, and £2,614 0s. 10d., the whole of the bill due to William Cave & Son, Ltd. On Jan. 14, 1921, the bankrupt paid to the respondents the sum of £1,500 in full settlement of the amounts due to Gavazzi and William Cave & Son, Ltd. The respondents accepted this sum in good faith and in ignorance of the impending bankruptcy of the bankrupt, although they

knew that the bankrupt was in difficulties. The balance of £1,668 8s. 4d. which the respondents agreed to write off approximately equalled the amount of interest which they had charged as before mentioned. The respondents, on receiving the cheque for the £1,500, paid it into their own banking account, and on the same day drew a cheque for £945 12s. 6d. in favour of William Cave & Son, Ltd., and paid such cheque into that company's account. They also credited their account with Gavazzi with £554 7s. 6d., the balance of the £1,500, and advised Gavazzi of this credit, which advice was duly acknowledged by Gavazzi. After that date the respondents dealt to their detriment with Gavazzi in the belief that the payment of the £1,500 was a good and valid payment. On Feb. 11, 1921, the bankrupt executed a deed of assignment for the benefit of his creditors, and on Feb. 19, 1921, the petition upon which he was eventually adjudicated bankrupt was presented, the act of bankruptcy relied upon being the execution of the deed of assignment. The first claim for the payment of the £1,500 by the trustees against the respondents was made on Feb. 22, 1923, and the present motion was launched on July 30, 1923, after the respondents had in good faith dealt with the money in such a way as to make it inequitable to compel them to refund it.

Comyns Carr for the trustees in bankruptcy.
C. Tindale Davis for the respondents.

P. O. LAWRENCE, J.—The object of this motion is to recover from the respondents a sum of £1,500 paid to them by the bankrupt on Jan. 14, 1921, on the ground that such payment was a fraudulent preference. The respondents deny liability, first, on the ground that the £1,500 was paid to them merely as agents for the use of two of the bankrupt's creditors, in whose favour they have dealt with the money in good faith before any claim by the trustees in bankruptcy, and, secondly, on the ground that the applicants have failed to prove that the payment was in fact a fraudulent preference. The question of the liability of the respondents is one which goes to the root of this motion, as the trustees have elected to proceed against them as sole respondents after I had expressed to counsel my willingness to entertain an application for an adjournment of the motion for the purpose of giving the trustees an opportunity of considering the advisability or practicability of adding or substituting the two creditors or either of them as respondents.

Counsel have not been able to refer me to any case which deals with the liability of an agent who, on behalf of his principal, has received payment of a debt, which payment turns out to have been a fraudulent preference, nor has my own research resulted in the discovery of any such case. Although s. 44 of the Bankruptcy Act, 1914, does not expressly provide for the recovery of a payment constituting a fraudulent preference, the enactment that such a payment is to be deemed fraudulent and void as against the trustee in bankruptcy necessarily implies that the trustee is entitled to recover the amount paid. In the majority of cases, no doubt, payment of a debt is made directly to the creditor, and if such payment is a fraudulent preference it is recoverable from him. There must, however, be many cases where a debt is paid to an agent for the creditor, and it strikes me as somewhat strange that no reported case is to be found where such a payment has been attacked as a fradulent preference and has been sought to be recovered from the agent. On principle I do not see any reason why the personal liability of an agent in such a case should be any greater than in a case where money is paid to an agent for the use of his principal in circumstances which entitle the person paying it to recover it back. No doubt, the trustee in bankruptcy, in claiming repayment of money under s. 44 is asserting a higher right than the bankrupt would have had if he had remained solvent, but that fact, in my opinion, does not involve the proposition that the trustee can recover the money from an agent where such agent would not have been liable had the person paying it been entitled to recover it back. In my opinion, the legislature, by enacting that a payment in favour of a creditor is to be deemed fraudulent and void as against the

trustee in bankruptcy, did not intend to place, and has not placed agents under any greater liability than the liability which they would be under in cases where they had received money which had been obtained by duress or fraud. If that be the true principle, it seems to me to follow that where an agent on behalf of a creditor receives from a debtor payment of a debt in such circumstances as to constitute a fraudulent preference, and the agent knows that the debtor is insolvent and is making the payment with a view to preferring the creditor, the money can be recovered from the agent on the ground that the agent was party or privy to the fraudulent preference, but where an agent, in the ordinary course of his employment, receives payment of a debt for the use of his principal, and in good faith pays the money over to, or otherwise deals to his detriment with, his principal, in the belief that the payment is a good and valid payment, then the money cannot be recovered from the agent, although it turns out that in fact the payment was a fraudulent preference. In such a case the money must be recovered from the principal.

Counsel for the trustees in bankruptcy, however, relies on the express enactment in s. 44 (1), that a payment in favour of any person in trust for any creditor is to be deemed fraudulent and void as against the trustee in bankruptcy, his contention being that the respondents were trustees for their principals, and that, as the payment to them in that character is to be deemed fraudulent and void, the money can be recovered from them. In my opinion, there are two answers to this contention. In the first place, I do not think that the payment was made to the respondents in trust for the two creditors within the meaning of s. 44. I will deal with the exact position occupied by the respondents hereafter, but for the present purpose it is enough for me to say that on the evidence I have come to the conclusion that the respondents were merely the agents of the creditors, and that the payment was made by the bankrupt to them solely in that capacity. It is true that a confidential agent may often be in the same position and under the same duties and liabilities as if he were a trustee for his principal, but I do not think that the legislature intended the expression "any person in trust for any creditor" to apply to the ordinary case of the payment to an agent for the use of his principal. The payment of a debt to an authorised agent for the use of the creditor operates in law as a payment to the creditor, and such a payment is, in my judgment, covered by the words in s. 44 (1) "every payment made . . . in favour of any creditor." What I think is more likely to have been in the contemplation of the legislature when adding the expression "any person in trust for any creditor" is that a payment might be made to a trustee (either created ad hoc or existing under some instrument) in such circumstances as would support the contention that no payment had been made to the creditor himself. In my opinion, it was in order to bring such a payment within the scope of the section that the expression in question was inserted. In the next place, it does not, in my opinion, necessarily follow that because a payment to a trustee for a creditor is to be deemed fraudulent and void, the trustee to whom the payment was made is personally liable to pay the money to the trustee in bankruptcy. I think that the liability of the trustee would depend upon the facts of each case, and in determining upon his liability the court would take into consideration (inter alia) whether he had acted in good faith and whether he still held the money or had paid it over to his cestui que trust before having received notice that the payment was fraudulent and void.

On both these grounds, therefore, I am of opinion that the words relied upon by counsel for the trustees in bankruptcy do not have the wide effect contended for by him. I come to the conclusion that the respondents are not liable even if it should turn out that the payment of the £1,500 was a fraudulent preference. In the result, I hold that the respondents are entitled to succeed on their first ground of defence, and their second ground of defence does not call for decision. That being so, it would not be right that I should express any opinion upon the

question whether the trustees have discharged the burden cast upon them of proving that the payment of the £1,500 was, in fact, a fraudulent preference. The motion will be dismissed with costs.

Solicitors: *G. L. Lepper*; *E. F. Turner & Sons.*

[*Reported by* G. P. Langworthy, Esq., *Barrister-at-Law.*]

Re SMITH. ROYAL EXCHANGE ASSURANCE CO. *v.* LEE

[Chancery Division (Sargant, J.), March 16, 1923]

[Reported 130 L.T. 185; 67 Sol. Jo. 457]

Annuity—Lump sum paid to annuitant in lieu of annuity—Amount—Direction to trustees to purchase annuity "from government or any public company or from themselves"—Government annuity more expensive than other kinds specified—Right of annuitant to amount of cost of government annuity.

By his will a testator directed his trustees, an assurance company, to purchase "from government or any public company or from themselves" an annuity of £200 to be paid to C.B.L. for her life. C.B.L. elected that a sum equivalent to the purchase price of the annuity should be paid to her in place of the annuity. The cost of a government annuity was higher than that of the other kinds of annuity mentioned.

Held: the lump sum payable to the annuitant would depend on the purchase price of the annuity; the trustees clearly had a discretion as to which kind of annuity they would buy, and the annuitant could not insist on their buying a government annuity; therefore, she was not entitled to the larger sum which would be required to purchase a government annuity.

Notes. As to directions to purchase an annuity, see 28 Halsbury's Laws (2nd Edn.) 190; and for cases see 39 Digest 127–128.

Cases referred to:

(1) *Ford* v. *Batley* (1853), 17 Beav. 303; 23 L.J.Ch. 225; 51 E.R. 1051; 39 Digest 127, *202*.

(2) *Re Castle*, *Nesbitt* v. *Baugh*, [1916] W.N. 195; 39 Digest 127, *205*.

Originating Summons taken out by trustees to determine the method of the ascertainment of an annuity under a will.

By his will, dated Feb. 16, 1921, the testator, D. W. Smith, after appointing the plaintiff corporation to be the executors and trustees thereof and making sundry specific and pecuniary bequests, directed his trustees to purchase "from government or any public company or from themselves" an annuity of £200 for the life of his cousin, C. B. Lee, and to pay the same to her when purchased, and in the meantime in lieu thereof to pay a like annuity out of the income of his residuary estate. He further directed that the annuity should be paid free of all death duties. C. B. Lee elected that, instead of the annuity being purchased, the trustees should pay to her the equivalent of the purchase money, and demanded that the sum required to purchase a government annuity should be paid over to her although it would be larger than that required for the purchase of an annuity by the other methods mentioned in the will.

Rabagliachi for the trustees.

S. Davey for the annuitant.

SARGANT, J., stated the facts, read the material portions of the testators' will, and continued: The annuitant has expressed the desire to have a lump sum paid

to her in respect of her annuity, and to that it is admitted that she is entitled. The only question is how the amount to be paid ought to be calculated. It is said on her behalf that if she had not elected to receive a lump sum, she would have been entitled to a government annuity notwithstanding the direction given to the trustees, and, accordingly, that she is entitled to receive such a sum as will buy her a government annuity, and not merely such a sum as might be required to purchase for her an annuity in a public company. *Ford* v. *Batley* (1) is cited in support of the contention.

In my judgment, the matter so far as the actual purchase of the annuity is concerned is unarguable on the terms of the will. Here there is a direction given to the trustees to purchase an annuity "from government or from any public company or from themselves." It is impossible to hold that the annuitant would be entitled to insist on the trustees abandoning their discretion and purchasing a government annuity. The lump sum to which the annuitant is entitled must depend on the purchase price of the annuity. The circumstances in *Ford* v. *Batley* (1) were different. There was in that case a direction to executors to purchase an annuity from government or any public company, and, according to the head note, it was held that the annuitant was entitled to have a government annuity purchased, and, therefore, at his option to take the price required for the purpose. But when the case is looked into, it appears that the executors had not exercised their discretion, but had handed over the residue to the residuary legatees without making any investment in respect of the annuity. Therefore, the estate being in the hands of the residuary legatees, the court had to direct them to effect the required investment. In these circumstances the court would direct the purchase of the best possible annuity. The discretion vested in the executors was gone, and, therefore, the best possible annuity had to be purchased. I do not think that that case is an authority here.

The only other case cited is *Re Castle* (2). There the testator had directed his executors to purchase a life annuity, and no discretion was given to them as to the annuity they were to purchase. In these circumstances EVE, J., said that it was desirable there should be a standardised rule in these matters. He thought that where an executor was simply directed to purchase an annuity or an annuitant elected to take a capital sum in lieu of the annuity a government annuity should be purchased, or the capital value should be calculated by reference to the government tables, and not to the price at which the annuity could be purchased from an insurance company. I entirely agree with that in a case where no discretion or option is given to the trustees. The annuitant is then entitled to the best annuity, but that has no bearing on a case where the testator by his will has given his trustees a discretion. It is clearly given to them to enable them to relieve the estate from a burden which becomes unnecessary if they consider that a safe annuity other than a government annuity can be purchased. The trustees being desirous of exercising their discretion, I cannot force on the residuary legatees the payment of the sum required to purchase a government annuity.

Solicitors: *Bell, Broderick & Gray*, for *J. H. Hodge*, Bromley; *Brown & Woolnough.*

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law.*]

A

Re BEST. PARKER *v.* BEST

[CHANCERY DIVISION (Tomlin, J.), October 18, 1923]

[Reported [1924] 1 Ch. 42; 93 L.J.Ch. 63; 130 L.T. 311; 68 Sol. Jo. 102]

B

Administration of Estates—Mortgage—Mortgage of life assurance policies—Assignment of policies not made subject to mortgage—Amount owing on mortgage deducted from payment to assignee on death of assured—Right of assignee to be recouped deduction from estate of assured.

A testator mortgaged two policies to an insurance company to secure a loan. Subsequently he assigned them to his wife without mentioning the mortgage, and during his life he kept down the interest on the mortgage debt. C

Held: the testator's widow had an equity to be recouped out of the testator's estate the amount of the mortgage debt and interest which had been deducted by the insurance company from the policy-moneys paid over to her.

Re Darby's Estate, Rendall v. *Darby* (1), [1907] 2 Ch. 465, applied.

D

Notes. Considered: *Re Mainwaring, Mainwaring* v. *Verden*, [1936] 3 All E.R. 540.

As to the right of exoneration of an assignee from the mortgagor of part of the mortgaged property, see 27 HALSBURY'S LAWS (3rd Edn.) 401; and for cases see 35 DIGEST 596–603.

E

Case referred to in argument:

(1) *Re Darby's Estate, Rendall* v. *Darby*, [1907] 2 Ch. 465; 76 L.J.Ch. 689; 97 L.T. 900; 35 Digest 600, *3399*.

Also referred to in argument:

Ker v. *Ker* (1869), 4 I.R.Eq. 15.

F

Adjourned Summons taken out by executors to determine (inter alia) whether the testator's widow was entitled to be recouped by them out of the estate of the testator the sum of £126 12s., deducted by an assurance company from the amount payable under two policies of assurance which had been assigned to her.

On Oct. 23, 1903, the testator was entitled to two policies of assurance on his life for £500 each in an insurance society, free from incumbrances, and by a deed of that date he assigned them to trustees of the society by way of mortgage to G secure a loan of £125 and interest thereon. He covenanted for repayment of the sum. On Oct. 31, 1921, the testator by deed of that date in consideration of his natural care and affection for his wife, assigned the two policies and all moneys assured by or to become payable under or by virtue thereof to her absolutely, subject to the payment of all further premiums thereon. The mortgage was not mentioned, and during his lifetime the testator kept down the interest on the H mortgage debt. After his death in 1922 the insurance society paid his widow the amount of the policies less the mortgage debt of £125 and £1 12s. interest thereon.

Cyril J. Parton for the executors.
Wilfrid M. Hunt for the widow.
Winterbotham for the residuary legatees.

I

TOMLIN, J. (after stating the facts).—The question is whether the testator's widow is entitled to call on his executors to reimburse to her the sum of £126 12s. retained by the insurance company in payment of their debt. On the one hand, it is said by the widow that she has an equity against the estate to be recouped that amount. On the other hand, it is said on behalf of the residuary estate that the principle applicable is that the log lies where it falls, and the widow, therefore, is not entitled to be reimbursed.

When a creditor who has alternative remedies against two different persons (as,

for example, if a debt is charged on properties not all in the same hands, or if, as is the case here, the debt is the personal obligation of a debtor and is charged on property in the hands of some other person), equity intervenes to see that the burden of payment falls on the right shoulders. The question, therefore, arises in this case on whom the burden ought to fall. Primâ facie equality or the imposition of proportionate burdens on different properties charged with a debt is equity; but there may be circumstances which disturb the primâ facie distribution of the burden, and throw it wholly on one person.

My attention has been called to *Re Darby's Estate* (1), decided by WARRINGTON, J. In that case the mortgage debt was secured on several properties in different hands, but one of the persons against whom the creditor had a remedy was under a personal obligation to pay the debt. It was held that the principle of casting proportionate parts of the debt on the different properties was disturbed, and it was held to be equitable that he who was under a personal obligation to pay the debt should bear it. If that be a true expression of the principle governing that case, and if, also, the same doctrine ought to be applied, as I think it should, whenever a debtor has alternative remedies against different persons, then applying it to the facts of this case, I must hold that the testator's estate is bound to recoup the widow as the assignee of the policies of insurance the money seized on by the insurance company to pay its debt.

Solicitors: *C. J. Parker & Sloan*; *J. D. Langton & Passmore.*

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law.*]

Re CROOK'S SETTLEMENT. Re GLASIER'S SETTLEMENT. CROOK *v.* PRESTON

[CHANCERY DIVISION (Lawrence, J.), April 19, 20, 1923]

[Reported [1923] 2 Ch. 339; 92 L.J.Ch. 495; 129 L.T. 284]

Settlement—Marriage settlement—After-acquired property—Transfer to trustees of settlement—Property to which wife entitled in reversion at date of settlement—Property falling into possession during coverture.

By a marriage settlement made in 1896 it was agreed by cl. 22 that if the wife, or her husband in her right, should at any time during the intended coverture "become . . . entitled . . . to . . . any estate or interest whatsoever in possession, reversion, remainder or expectancy," the same should forthwith be transferred to the trustees of the settlement. At the date of the marriage and settlement the wife was entitled in reversion to certain property which she did not bring into settlement, and during the coverture this reversion fell into possession.

Held: although the wife did not bring into the settlement the property to which she was then entitled in reversion she became entitled to an interest in possession in that property during the coverture, and, therefore, the property was caught by cl. 22 and must be transferred to the trustees of the settlement.

Notes. Section 2 of the Married Women's Property Act, 1882, has now been repealed, and a married woman has been placed in the same position as regards the acquisition, disposition and holding of property as a feme sole: see Law Reform (Married Women and Tortfeasors) Act, 1935, s. 1 (a): 11 HALSBURY'S STATUTES (2nd Edn.) 811.

Considered: *Re Maltby Marriage Settlement, Aylen* v. *Gaud*, [1953] 2 All E.R. 220.

As to covenants to settle after-acquired property, see 29 HALSBURY'S LAWS (2nd Edn.) 571 et seq.; and for cases see 40 DIGEST (Repl.) 542 et seq. For the Married Women's Property Act, 1882, see 11 HALSBURY'S STATUTES (2nd Edn.) 799.

Cases referred to:

(1) *Re Clinton's Trust, Holloway's Fund, The Same, Weare's Fund* (1871), L.R. 13 Eq. 295; 41 L.J.Ch. 191; 26 L.T. 159; 20 W.R. 326; 40 Digest (Repl.) 560, *666*.

(2) *Archer* v. *Kelly* (1860), 1 Drew. & Sm. 300; 29 L.J.Ch. 911; 2 L.T. 796; 6 Jur.N.S. 814; 8 W.R. 684; 62 E.R. 394; 40 Digest (Repl.) 541, *503*.

(3) *Re Williams' Settlement, Williams* v. *Williams*, [1911] 1 Ch. 441; 80 L.J.Ch. 249; 104 L.T. 310; 55 Sol. Jo. 236; 40 Digest (Repl.) 546, *548*.

(4) *Re Bland's Settlement, Bland* v. *Perkin*, [1905] 1 Ch. 4; 74 L.J.Ch. 28; 91 L.T. 681; 40 Digest (Repl.) 543, *520*.

(5) *Re Capel's Trusts, Arbuthnot* v. *Galloway*, [1914] W.N. 378; 40 Digest (Repl.) 543, *521*.

(6) *Stevens* v. *Trevor-Garrick* [1893] 2 Ch. 307; 62 L.J.Ch. 660; 69 L.T. 11; 41 W.R. 412; 3 R. 468; 27 Digest (Repl.) 97, *715*.

(7) *Buckland* v. *Buckland*, [1900] 2 Ch. 534; 69 L.J.Ch. 648; 82 L.T. 759; 48 W.R. 637; 16 T.L.R. 487; 44 Sol. Jo. 593; 27 Digest (Repl.) 97, *716*.

Also referred to in argument:

Re Whitaker, Christian v. *Whitaker* (1887), 34 Ch.D. 227; 56 L.J.Ch. 251; 56 L.T. 34; 35 W.R. 217; 3 T.L.R. 284, C.A.; 27 Digest (Repl.) 96, *711*.

Hancock v. *Hancock* (1888), 38 Ch.D. 78; 57 L.J.Ch. 396; 58 L.T. 906; 36 W.R. 417; 4 T.L.R. 373, C.A.; 27 Digest (Repl.) 96, *712*.

Re Yardley's Settlement, Milward v. *Yardley* (1908), 124 L.T.Jo. 315; 40 Digest (Repl.) 546, *547*.

Re Ware, Cumberlege v. *Cumberlege-Ware* (1890), 45 Ch.D. 269; 59 L.J.Ch. 717; 63 L.T. 52; 38 W.R. 767; 6 T.L.R. 388; 40 Digest (Repl.) 554, *614*.

Originating Summons.

By an indenture of settlement dated Sept. 20, 1872, made on the marriage of Walter Harris Crook and Mark Ann Crook, a policy on the life of W. H. Crook and certain furniture were settled upon trust for M. A. Crook for the joint lives of herself and W. H. Crook, and after the death of such one of them as should first die in trust for the survivor during his or her life, and after the death of such survivor in trust to sell the same, and to hold the proceeds of such sale for the issue of the marriage as M. A. Crook and W. H. Crook should jointly appoint or as the survivor should appoint, and in default of any such appointment for all the children of the marriage in equal shares. M. A. Crook died on May 2, 1918, and W. H. Crook on Nov. 1, 1922. There were two children only issue of their marriage, the defendant, Ethel Mary Glasier, and another daughter, Hilda, who died an infant without ever having been married. No joint appointment was made and no appointment was made by W. H. Crook as the survivor, and accordingly the trust property devolved upon Ethel Mary Glasier under the trusts in default of appointment. By a deed dated May 29, 1918, the plaintiff, John Edward Willis Crook, and Ethel Mary Glasier were appointed to be new trustees of the settlement of Sept. 20, 1872. A sum of £1,059 9s. was received in respect of the life policy settled and the estimated value of the furniture was £2,000, and no further property was ever brought into the settlement. By a settlement dated July 17, 1896, made upon the marriage of the defendants William Glasier and Ethel Mary Glasier, formerly Ethel Mary Crook, it was recited that it had been further agreed that such provision should be made for the settlement of "the future acquired property of the said Ethel Mary Crook" as therein contained, and by cl. 22 it was agreed and declared that if Ethel Mary Crook at any time during the intended coverture or the said William Glasier in her right

A "shall become by devise, bequest, gift, settlement, descent, representation, transmission, or by any other means except purchase for valuable consideration, seised, possessed or entitled of or to any real or personal property or any estate or interest whatsoever in possession, reversion, remainder or expectancy,"

B with certain exceptions therein mentioned, then the same should be assured and transferred to the trustees of the settlement upon trusts therein appearing, which, shortly stated, were trusts for sale and conversion, and to stand possessed of the proceeds thereof and of the investments representing the same upon trust to pay the income arising therefrom to Ethel Mary Glasier during her life without power of anticipation, and after her death to pay such income to William Glasier during his life but subject as in the settlement mentioned, and after the death of the C survivor of them in trust for the issue of their marriage as therein appearing. There was issue of the marriage between Ethel Mary Glasier and William Glasier one child only, namely, the defendant Enid Mary Glasier. The defendants, Walter John Preston, Harry Lutwyche Dinwiddy and Apsley Brooke Winch, were the present trustees of the settlement dated July 17, 1896. This summons was issued by the plaintiff, John Edward Willis Crook, as one of the trustees of the D settlement of Sept. 20, 1872, to determine whether the whole of the property settled on the marriage of Mr. and Mrs. Crook was now subject to the settlement of July 17, 1896, as being property which in the events which had happened was included in the after-acquired property of the wife or her husband in her right by cl. 22 of the settlement of July 17, 1896. The present trustees of that settlement claimed that the whole of the property or proceeds of sale of the property E subject to the trusts of the settlement of Sept. 20, 1872, ought now to be transferred or paid to them as such trustees.

C. V. Rawlence for the plaintiff, a trustee of the settlement of Sept. 20, 1872.

C. E. E. Jenkins, K.C., and *H. B. Vaisey* for the defendants, trustees of the settlement of July 17, 1896.

Gavin T. Simonds for the husband, William Glasier.

F *Ashworth James* for Enid Mary Glasier, the child of the marriage.

Ward Coldridge, K.C., and *J. E. Harman* for the wife, Ethel Mary Glasier.

Cecil Turner for the executors of W. H. Crook.

P. O. LAWRENCE, J.—The question which I have to decide is purely one as to the effect which in the circumstances ought to be given to cl. 22 of the marriage G settlement of July 17, 1896. In my opinion, it is clear that a covenant for the settlement of after-acquired property can be so framed as to include property to which the wife may become entitled in possession during the coverture, although at the date of the marriage she is entitled to a reversionary interest in the property, and such reversionary interest is not comprised in the settlement—indeed, counsel did not contend to the contrary. Whether the property now in question is caught H by the covenant to settle after-acquired property contained in the settlement of July 17, 1896, depends, therefore, in the first instance, on the true construction of that covenant.

Construing this covenant to the best of my ability, I hold it to include every estate or interest in any real or personal estate, whether such estate or interest happens to be an estate or interest in possession or an estate or interest in reversion, I or an estate or interest in remainder, or an estate or interest in expectancy of or to which the wife or the husband in her right may become seised, possessed, or entitled during the coverture.

In the present case the wife during the coverture became entitled for the first time to an interest in possession in the personal property settled by her parents' marriage settlement, and that interest falls within the express words of the covenant. The fact that the wife was entitled to a reversionary interest in that property at the date of her marriage, which reversionary interest was not expressly dealt with by the settlement does not operate to exclude the interest of the wife

when it became an interest in possession from the covenant, regard being had to the express words contained in that covenant. I find nothing in the settlement to exempt from the operation of the covenant property to which the wife becomes entitled in possession during the coverture merely because at the date of the settlement she had a reversionary interest in the property. So long as the interest of the wife remained in reversion it was outside the settlement altogether and could no doubt have been disposed of by her, but as she did not dispose of it, and as it happened to fall into possession during the coverture it is, in my opinion, bound by the covenant.

I do not agree with the argument that if the property in question is caught by the covenant it follows that the reversionary interest was incapable of being disposed of during the coverture. In my opinion any assignment of the wife's interest whilst it remained reversionary would have conferred a good title on the assignee. After such an assignment the wife would not have become entitled to an interest in possession in the property, because such interest would vest not in her but in her assignee. In none of the cases which have been cited by counsel is the wording of the covenant the same as in the present case. Moreover, those cases are not very helpful in furnishing a general guide to the construction of covenants of this kind, as they appear to me to be somewhat conflicting and not easy to reconcile. *Re Clinton's Trust* (1), *Archer* v. *Kelly* (2) and *Re Williams' Settlement* (3) seem to me to favour the opinion which I have formed. On the other hand, *Re Bland's Settlement* (4) and *Re Capel's Trusts* (5) seem to me to tend rather the other way.

In these circumstances I consider that I am bound to express my own view on the construction of this covenant, and I have therefore done so. Assuming, however, that I have taken an erroneous view of the construction of the covenant there is another way of arriving at the same result. Apart from the wife's covenant I am of opinion that the interest in question became bound by the husband's covenant by virtue of s. 19 of the Married Women's Property Act, 1882. Had it not been for s. 2 of that Act, the interest of the wife on falling into possession during coverture would have gone to the husband. Now, s. 19 enacts (inter alia) that nothing contained in the Act is to interfere with or affect any settlement to be made before marriage respecting the property of a married woman. In *Stevens* v. *Trevor-Garrick* (6) CHITTY, J., held that a settlement made after the passing of the Act by a husband of property belonging to his wife bound that property, although the wife (being an infant and afterwards having disaffirmed) had not made a binding assignment of that property, and although, apart from s. 19 of the Married Women's Property Act, 1882, that property would have been the separate property of the wife. The decision in that case, which was followed by BUCKLEY, J., in *Buckland* v. *Buckland* (7), in my opinion governs the present case. Here the husband has covenanted that any property to which he should during the coverture become entitled in right of his wife should be settled, and, but for s. 2 of the Act, the interest in question when it fell into possession would have belonged to the husband in right of his wife, and would have been caught by his covenant. Applying the principle enunciated by the above-mentioned cases, the husband's agreement to settle his wife's after-acquired property operates by virtue of s. 19, so as to bring the interest within the scope of the covenant. Accordingly there will be a declaration that the property comprised in the settlement of Sept. 20, 1872, is subject to the covenant for the settlement of the wife's after-acquired property contained in the settlement of July 7, 1896.

Solicitors: *Tomlin & Dinwiddy*, for *Ayrton & Alderson Smith*, Liverpool; *Preston & Foster*; *Fladgate & Co.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

A

JOHNSON v. STEPHENS AND CARTER, LTD., AND ANOTHER

[Court of Appeal (Atkin and Younger, L.JJ.), July 17, 1923]

[Reported [1923] 2 K.B. 857; 92 L.J.K.B. 1048; 130 L.T. 106; 68 Sol. Jo. 59]

B *Practice—Parties—Defendant—Contract—Action by joint contractor—Refusal of co-contractor to join as plaintiff—Joinder as defendant—Condition precedent—Indemnity against costs—Exception to general rule.*

As a general rule if a joint contractor refuses to join in an action on the contract he can be joined as a defendant on tender of an indemnity against costs. But such a tender is not a condition precedent to his being joined C where it is alleged that he has procured the breach of contract sued for or has otherwise acted in fraud or in wrong of his co-contractor.

Per Younger, L.J.: The true view is that a joint contractor is not entitled to sue the person with whom he has contracted, making his joint contractor a defendant, unless he has in the first instance exhausted all reasonable means of obtaining the assent of his co-contractor to be joint plaintiff with him in the D action. I agree that in nearly every case one of the reasonable means which ought to be taken by one of two joint contractors who desires that his co-contractor should join with him as plaintiff is to offer him an indemnity against the costs if he so permits his name to be used.

Notes. As to parties to actions by joint contractors, see 30 Halsbury's Laws (3rd Edn.) 313; and for cases see Digest, Practice 426. E

Cases referred to:

(1) *Whitehead* v. *Hughes* (1834), 2 Cr. & M. 318; 2 Dowl. 258; 4 Tyr. 92; 149 E.R. 782; 4 Digest (Repl.) 256, *2316*.

(2) *Cullen* v. *Knowles* [1898] 2 Q.B. 380; 67 L.J.Q.B. 821; Digest Practice 425, *1212*.

F (3) *Ellis* v. *Kerr*, [1910] 1 Ch. 529, 537; 79 L.J.Ch. 291; 102 L.T. 417; Digest Practice 399, *1010*.

Also referred to in argument:

Davenport v. *James* (1847), 7 Hare, 249; 12 Jur. 827; 68 E.R. 102; 35 Digest 550, *2788*.

Luke v. *South Kensington Hotel Co.* (1879), 11 Ch.D. 121; 48 L.J.Ch. 361; 40 G L.T. 638; 27 W.R. 514, C.A.; 35 Digest 550, *2790*.

Appeal by the plaintiff from an order of Swift, J., at chambers.

The plaintiff in his statement of claim alleged that he was in partnership with the second defendant, one Golding, carrying on the business of painters and cleaners of glazed building surfaces; that in March, 1915, the first defendants Stephens and Carter, Ltd., entered into an agreement with the firm of Johnson H and Golding by which they undertook that on their receiving any orders for work of the description done by the firm they would give the firm notice with the necessary particulars to enable the firm to tender for the execution of the work; and that they would do their best to obtain a contract with the ultimate principals, and upon obtaining it would employ the firm to execute the work. The plaintiff further said that in September, 1922, the defendants repudiated the agreement, I and that in breach of the agreement they employed other persons than the firm, including the defendant Golding personally, to execute work of the above-mentioned description without giving the firm an opportunity of tendering for the execution of it, whereby the plaintiff was deprived of the profit which he would have made. He further said that he requested the defendant Golding to join as plaintiff in the action, and upon his refusing to do so he made him a defendant as being a necessary party, and contended that the defendant company conspired with Golding that he should commit a breach of the partnership agreement and that together they should commit breaches of the agreement of March,

1915. The defendant Golding applied at chambers to have his name struck out of the action on the ground that the plaintiff had not offered him any indemnity against costs if he would consent to be joined as plaintiff, and he contended that there was no valid cause of action against the defendants. SWIFT, J., ordered Golding's name to be struck out on the ground that the offer of such an indemnity was a condition precedent to the right of one of two co-contractors to join the other as defendant against his will in an action for a breach of the contract. The plaintiff appealed.

Croom-Johnson for the plaintiff.
Barrington-Ward, *K.C.*, and *P. B. Morle* for the defendant Golding.

ATKIN, L.J.—This is an appeal from the learned judge in chambers who struck out the defendant Golding as a defendant in the action. The claim is brought by the plaintiff, Johnson, against the company, Stephens and Carter, Ltd., and the defendant Golding. It is endorsed on the writ as a claim for damages for breach of contract; it does not disclose on the face of it that the debt was a partnership debt, but in the statement of claim the plaintiff sets out his claim at length, and there he makes it clear that the alleged contract was made with a partnership firm, of which he was one of the members, and the defendant Golding was the other. Then he alleges an agreement made in 1915 in which he says that the company agreed with his firm that if the company got work of the character done by the firm, they would give notice to the firm enabling them to tender, and then the company were to try to obtain a contract, and, if they got a contract, they would sub-let the contract to the plantiff's firm. The plaintiff says that that agreement was repudiated by the defendant company in September, 1922, when, in breach of the agreement, the defendants had work done by firms and persons other than the plaintiff's firm, including the defendant Golding. The plaintiff alleges that he requested Golding to join in the action, but Golding had omitted to do so, and therefore, he was now joined as a defendant as a necessary party. That is an ordinary claim for a breach of a contract made with two co-contractors, and an allegation that one of the co-contractors was unwilling to sue, and therefore was made a defendant in the action. The plaintiff also alleges a series of contentions the general substance of which is that the company conspired and agreed with Golding to commit a breach of the agreement and of the partnership agreement, and procured Golding to commit a breach of the partnership agreement, and he claims damages in respect of that. That again I think would be a claim made in tort by the plaintiff's firm against the individual partner, the second defendant. The defendant Golding applied, before the statement of claim had been delivered, that he should be struck out of the action, upon the ground that this was in fact a claim by the firm in respect of a partnership debt, and that he ought not to have been joined as a defendant, because, although an application had been made to him to join in the action as a plaintiff, he had not been offered an indemnity against the costs, and the learned judge has taken that view.

As a general rule if two co-contractors have to sue, one alone cannot sue if his co-contractor refuses to join except upon offering a reasonable indemnity against costs to the refusing co-contractor, and if, after being offered such an indemnity the other co-contractor refuses to sue, then he can be joined as defendant. I think that is an advance upon what the strict rule was at common law, though I think that one partner, at any rate, had some right to use the partnership name against the will of his partner on a proper indemnity being given as to costs. It is unnecessary to decide that matter here, but I would refer to *Whitehead* v. *Hughes* (1), where the plaintiff was in partnership with one Greenwood, who had become bankrupt, that is, in respect of his separate estate, and the other plaintiffs were his assignees. Whitehead had commenced an action for a firm debt in the name of himself and the assignees of Greenwood and the defendant had paid the money to the assignees. The action was brought against the will of the assignees, but they had not applied for an indemnity against the costs, and it was held that the

solvent partner was entitled to use the name of the assignees against their will. BAYLEY, B., said (2 Cr. & M. at p. 319):

> "One of several partners has a clear right to use the names of the other partners. If they object to their names being used, they may apply for an indemnity against the costs to which they might be subjected by the use of their names."

I do not propose to consider whether that case is law now, or whether one partner can in those circumstances use the names of his co-partners against their will, but it was decided in *Cullen* v. *Knowles* (2) that this was a proper proceeding to take. There, one of two owners of a patent alleged he had a cause of action to recover £1,600. One of the co-owners had applied to the other to join with him as co-plaintiff in suing to recover the money and offered an indemnity against all costs. The other co-owner, Birks, had refused his consent, and, accordingly, had been made a defendant, and BIGHAM, J., decided that was a proper proceeding to take, and that there could be no objection to the adding of Birks as a defendant in those circumstances. It is true that he did not decide that the offer of an indemnity against costs was an essential condition to the right to add the other co-owner as defendant, but it had been done in pursuance of the practice which had existed, as appears from *Whitehead* v. *Hughes* (1), which was decided in 1834, for a very great number of years before this, and I have no doubt that it has always been the practice, that, if one of two co-contractors desires to sue in his own name, before he can constitute the action properly, he must offer his other co-contractor an indemnity against costs, and in ordinary circumstances then and only then is he entitled to constitute the action by suing in his own name and making his co-contractor a defendant. That was not done in the present case, and in those circumstances, under normal conditions, the defendant would have been entitled to have said that the action was not properly constituted and that he objected to being made a defendant in any action which could not properly be brought as framed.

That rule, however, is not without an exception. If the co-contractor refuses to join in an action for breach of contract because that co-contractor has procured the breach or has acted in some way in fraud or in wrong of his co-contractor, that circumstance would entitle the remaining co-contractor to bring an action without performing what ordinarily is a necessary condition of offering an indemnity against costs. That is a very special set of circumstances, but still it is one that occasionally arises, and, if it does arise, I think that the plaintiff would be entitled to frame his action in the way this has been framed. That is in substance the allegation in this statement of claim. It may or may not be unfounded, but it does contain a substantive cause of action based upon that very wrongdoing, and, therefore, it has to be determined as it stands. In those circumstances I think that it would be wrong at this stage, in view of the issue of fact which has to be tried, to decide that the plaintiff has no right to join the defendant Golding without offering an indemnity. If he establishes his allegation of fact, I think the true conclusion is that the action is properly constituted, but if he fails, then I think that the action will be wrongly constituted. In these circumstances, the proper order, I think, is to allow the appeal, and discharge the order which at the present moment strikes the defendant Golding out of the action. If the issue of conspiracy is allowed to remain as an issue in the action, and if it is determined in favour of the plaintiff, then I think the action will be properly constituted as to the claim made in the previous paragraphs of the statement of claim. If, on the other hand, that allegation is not made out, then I think the action will be wrongly constituted, and the allowing of this appeal is without prejudice to the right of the defendant to take that point.

YOUNGER, L.J.—I am of the same opinion. Now that the plaintiff has condescended upon his statement of claim, it would be difficult to describe in a very short form of words what his action is, but it is, I think, easy to say what it

is not. It is not a simple action brought by one of two joint contractors against a company with whom he has contracted and his co-contractor as defendants. There are raised by the statement of claim issues which may be serious; issues as between the one co-contractor and the other co-contractor which, if they are well founded, would result in some form of judgment being obtainable by the plaintiff against that defendant. Accordingly, so long as the statement of claim stands, and no application has been made to strike it out as frivolous or vexatious or an abuse of the process of the court or otherwise, it seems impossible that this court can say that at his own instance the defendant, the joint contractor, should be dismissed from the proceedings. But one item of claim undoubtedly in this composite action is a claim made by one co-contractor against the company with whom he and his joint contractor have contracted, and the joint contractor is also a defendant, and the question does arise as to the circumstances in which one of two joint contractors is entitled to maintain such an action in such a form.

The privilege which one joint contractor is in certain circumstances given to frame an action in that way is a privilege and not in all circumstances a right, and the court has to see what the terms are upon which that privilege is enjoyed. I should like to express these terms more generally than with reference to such a matter as offering a joint contractor an indemnity if he will permit his name to be used as co-plaintiff before that joint contractor may be properly sued as defendant, and to say that, in my opinion, the true view is that a joint contractor is not entitled to sue the person with whom he has contracted, making his joint contractor a defendant, unless he has in the first instance exhausted all reasonable means of obtaining the assent of his co-contractor to be joint plaintiff with him in the action, and that until then he is not, either in a question as between himself and his co-contractor, or a question as between himself and that contractor as co-defendant, entitled to constitute his action in the way in which this action is constituted. I agree that in nearly every case one of the reasonable means which ought to be taken by one of two joint contractors who desires that his co-contractor should join with him as plaintiff is to offer him an indemnity against the costs if he so permits his name to be used. If there is no adequate reason why that offer should not be made, I can quite understand that the absence of such an offer would be a reason for saying that the action constituted by making the co-contractor a co-defendant was not properly constituted, but I shrink from saying that that particular circumstance should be carried further than constituting what may be called a condition before the action can be framed in the way in which, for this purpose, this action is.

I am fortified in that view by a statement of WARRINGTON, J., in *Ellis* v. *Kerr* (3) ([1910] 1 Ch. at p. 540), because *Cullen* v. *Knowles* (2) was cited, and WARRINGTON, J., sitting as a judge of first instance, explains what he understands to be the principle upon which one of two joint contractors may maintain an action against the person with whom they have both contracted, joining the other as co-defendant. He says:

> "It is perfectly true that authorities have been cited in support of the well-known practice and doctrine of the Court of Chancery, that if a covenant is entered into with two persons jointly by a third person, and one of those joint covenantees refuses to sue at law, the court will allow one of them to sue the covenantor, making his co-covenantee a party to the action. But that seems to me to depend upon a perfectly well-known principle of equity, and to arise, as do so many equitable principles, out of the doctrine of trusts. I think it arises from this notion, that if a covenant to pay a sum of money is made with two jointly, each of them is trustee for the two and for the other, and if one as such trustee refuses to join in the action, which in all honesty he is bound to bring for the benefit of his co-covenantee, then his co-covenantee is entitled to make him a party to the action in order that he may be bound, and to recover the moneys secured by the covenant."

A There is nothing there about offering an indemnity to the co-covenantee against the costs before his co-contractor is entitled to join him as defendant. It is based rather upon the duty of the co-contractor in all honesty to concur in taking steps necessary to recover the debt, and that seems to suggest the ground on which my Lord has decided this case as being the sound ground. Here we have an allegation made against the defendant Golding, that he has colluded with the B persons with whom he and the plaintiff had contracted, with the result that the benefit of that contract is lost both to the plaintiff and himself, and it would seem plain, according to all principle, that if an action on the joint contract can ever be maintained in such form at all, it can be maintained in such circumstances as these.

C Solicitors: *Leonard, Bingham & Sharp*; *Boyce & Evans.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

D

Re CHESTERMAN'S TRUSTS. MOTT *v.* BROWNING AND OTHERS

E [COURT OF APPEAL (Lord Sterndale, M.R., Warrington and Younger, L.JJ.), May 29, 30, 31, July 31, 1923]

[Reported [1923] 2 Ch. 466; 93 L.J.Ch. 263; 130 L.T. 109]

Money—Foreign currency—Rate of exchange—Debt—Foreign beneficiary charging beneficial interest abroad—Master's certificate as to persons entitled to fund—Date at which foreign currency should be converted into F *sterling.*

On the death of a tenant for life, on Jan. 19, 1920, a trust fund became divisible between three German beneficiaries, A., B., and C. The interest of B. had been mortgaged in 1912 to a Dutch company and the interest of C. had been mortgaged in 1906 to a Dutch bank. In an administration action G inquiries as to the beneficiaries and chargees were ordered and the master by his certificate dated Nov. 24, 1922, found that specified sums in reichmarks for principal and interest were due under the mortgages. At the date when the mortgages were effected the amounts due thereunder were, by German law relating to legal tender, to be repayable in gold marks, but in August, 1914, a German statute was passed releasing debtors from their liability to repay H in gold marks moneys due from them and authorising such repayments to be made in German treasury notes. The question arose at what rate the reichsmarks should be converted into sterling for the purpose of ascertaining the amount to be paid out of the trust fund, which had been paid into court.

Held: the mortgages could not be construed as requiring payment in gold by reason only of the existence prior to August, 1914, of the German law I relating to legal tender; they were capable of being redeemed by a payment in reichsmarks at any time; (YOUNGER, L.J., dissenting) it followed that the amount to be paid out of the fund must be ascertained as at the date of the master's certificate.

Notes. Applied: *Anderson* v. *Equitable Assurance Society of United States*, [1926] All E.R.Rep. 93; *Pyrmont, Ltd.* v. *Schott*, [1938] 4 All E.R. 713; *Re United Railways of the Havana and Regla Warehouses, Ltd.*, [1959] 1 All E.R. 214. Referred to: *Ellis' Trustee* v. *Dixon-Johnson*, [1924] 2 Ch. 451; *Buerger* v. *New York Life Assurance Co.*, [1927] All E.R.Rep. 342; *Broken Hill Proprietary*

Co. v. *Latham*, [1933] Ch. 373; *Ottoman Bank of Nicosia* v. *Chakarian*, [1937] 4 All E.R. 570; *Madeleine Vionnet et Cie* v. *Wills*, [1939] 4 All E.R. 136; *Marrache* v. *Ashton*, [1943] 1 All E.R. 276; *Bonython* v. *Commonwealth of Australia*, [1951] A.C. 201; *Re United Railways of Havana and Regla Warehouses, Ltd.*, [1957] 3 All E.R. 641.

As to judgment for sum of money payable in foreign currency, see 11 HALSBURY'S LAWS (3rd Edn.) 306 et seq.; and for cases see 35 DIGEST 169 et seq.

Cases referred to:

(1) *British Bank for Foreign Trade, Ltd.* v. *Russian Commercial and Industrial Bank* (1921), 38 T.L.R. 65; 35 Digest 170, *17*.

(2) *Di Ferdinado* v. *Simon, Smits & Co., Ltd.*, [1920] 3 K.B. 409; 89 L.J.K.B. 1039; 124 L.T. 117; 36 T.L.R. 797; 25 Com. Cas. 37, C.A.; 35 Digest 175, *52*.

(3) *Celia* (*Owners*) v. *Volturno* (*Owners*), [1921] 2 A.C. 544; 90 L.J.P. 385; 126 L.T. 1; 37 T.L.R. 969; 15 Asp.M.L.C. 374, H.L.; 35 Digest 174, *39*.

(4) *Re British American Continental Bank, Ltd., Goldzieher and Penso's Claim*, [1922] 2 Ch. 575; 91 L.J.Ch. 760; 38 T.L.R. 785; 66 Sol. Jo. 647; C.A.; 35 Digest 175, *53*.

(5) *Re British American Continental Bank, Ltd., Crédit Général Liégeois' Claim*, [1922] 2 Ch. 589; 91 L.J.Ch. 765; 127 L.T. 284; 38 T.L.R. 464; 66 Sol. Jo. 388; 35 Digest 174, *46*.

(6) *Manners* v. *Pearson & Son*, [1898] 1 Ch. 581; 67 L.J.Ch. 304; 78 L.T. 432; 46 W.R. 498; 14 T.L.R. 312; 42 Sol. Jo. 413, C.A.; 35 Digest 176, *57*.

(7) *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade, Ltd.*, [1921] 2 A.C. 438; 90 L.J.K.B. 1089; 126 L.T. 35; 37 T.L.R. 919; 65 Sol. Jo. 733, H.L.; 35 Digest 170, *16*.

(8) *Re British American Continental Bank, Ltd., Lisser and Rosenkranz's Claim*, ante, p. 52; [1923] 1 Ch. 276; 92 L.J.Ch. 241; 128 L.T. 727; 35 Digest 175, *54*.

(9) *Société des Hôtels de Touquet-Paris-Plage* v. *Cummings*, [1922] 1 K.B. 451; 91 L.J.K.B. 288; 126 L.T. 513; 38 T.L.R. 221; 66 Sol. Jo. 269, C.A.; 35 Digest 173, *36*.

(10) *Uellendahl* v. *Pankhurst, Wright & Co.*, [1923] W.N. 224; 67 Sol. Jo. 791; sub nom. *Uliendahl* v. *Pankhurst, Wright & Co.*, 3 T.L.R. 628; 35 Digest 173, *38*.

(11) *Cohn* v. *Boulken* (1920), 36 T.L.R. 767; 64 Sol. Jo. 636; 35 Digest 174, *45*.

Also referred to in argument:

Cash v. *Kennion* (1805), 11 Ves. 314; 32 E.R. 1109, L.C.; 35 Digest 173, *35*.

Cockerell v. *Barber* (1810), 16 Ves. 461; 33 E.R. 1059, L.C.; 35 Digest 172, *33*.

Farrer v. *Lacy, Hartland & Co.* (1885), 31 Ch.D. 42; 55 L.J.Ch. 149; 53 L.T. 515; 34 W.R. 22; 2 T.L.R. 11, C.A.; 35 Digest 488, *2200*.

Appeal by two defendants from an order of RUSSELL, J., dated Jan. 12, 1923, and reported [1923] 2 Ch. at p. 470, made on further consideration.

The following statement of the facts was extracted from the judgment of RUSSELL, J.

Under a trust deed dated Mar. 23, 1887, in certain events various persons became entitled to the trust fund. On July 7, 1921, the surviving trustee of that trust deed issued an originating summons. To that he made various persons parties, including three persons who had become entitled to share in the trust fund on the death of certain persons and their assignees or mortgagees. The defendants to that summons included one Max Busch and a Dutch company described in the summons as the Algemeene Maatschappij, and a bank described as the Nederlandsche Bank. It was asked by the summons whether, according to the true construction of the indenture and in the events which had happened, the defendants Fanny Sarah Walewska Wilhelmina Magdalene Ernestine Schimmelpfennig, Edwin Max Hermann Ernst Marschall von Bieberstein and Egon

Wilhelm Marschall von Bieberstein were entitled to any and what interest or interests in the trust fund constituted under the indenture. On that summons coming before him, on Jan. 20, 1922, RUSSELL, J., declared that according to the true construction of the indenture and in the events which had happened, among other things, on the death of Maria Marschall von Bieberstein, which event occurred on Jan. 19, 1920, the defendants, Fanny Sarah Walewska Wilhelmina Magdalene Ernestine Schimmelpfennig, Edwin Max Hermann Ernst Marschall von Bieberstein, Egon Wilhelm Marschall von Bieberstein and their representative assignees and incumbrancers, if any, became entitled to the trust fund in possession in certain proportions "subject to the charge created by the Treaty of Peace Order 1919." Then it was ordered that the following inquiries be made:

> "An inquiry whether any and which of the defendants Fanny Sarah Walewska Wilhelmina Magdalene Ernestine Schimmelpfennig, Edwin Max Hermann Ernst Marschall von Bieberstein, and Egon Wilhelm Marschall von Bieberstein have in any way and how assigned mortgaged charged or incumbered their respective shares in the trust fund and if so what were the dates and priorities of such assignments mortgages charges or incumbrances respectively and what is the nationality of the persons or companies in whose favour such assignments mortgages charges or incumbrances were respectively made and in whom the said shares in the trust fund or any such assignments mortgages charges or incumbrances are now respectively vested and what is due and to whom in respect of such respective assignments mortgages charges or incumbrances."

It was ordered that on payment of the costs the plaintiff, that is the trustee, was to be at liberty to lodge in court the balance of the trust fund in his hands and further consideration of the action was adjourned. Accordingly, the trustee has paid into court the trust fund to which these three persons and their assignees or incumbrancers were, subject to the Peace Treaty Order, entitled. The master made his certificate, dated Nov. 24, 1922, by which he found as follows: First, that the defendant, Fanny Sarah Walewska Wilhelmina Magdalene Ernestine Schimmelpfennig had not in any way assigned, mortgaged, charged, or incumbered her share; and next that Edwin Max Hermann Ernst Marschall von Bieberstein assigned absolutely all his share in the said trust fund in 1910 to Max Busch, who was one of the defendants to the summons before RUSSELL, J. Accordingly Edwin dropped out and Max Busch took his place as the person entitled to the share. The certificate then proceeded:

> "By an indenture dated Nov. 23, 1911, the said Max Busch assigned by way of mortgage the said share to the Algemeene Maatschappij to secure the repayment of the sum of 31,000 German reichsmark three calendar months after the date of the death of Maria Marschall von Bieberstein (which event happened on Jan. 19, 1920) with interest thereon at the rate of seven per cent. per annum (reducible to six per cent. on payment within fourteen days next after such half-yearly date of payment) from Jan. 1, 1912."

Then the certificate found that the Algemeene Maatschappij was a Dutch company incorporated according to the laws of Holland, and that

> "Subject to the said mortgage the share of the said defendant in the trust fund is vested in the defendant Max Busch."

Then the certificate found that

> "there is due to the said Algemeene Maatschappij under and by virtue of the said mortgage the sum of 31,000 German reichsmark in respect of principal together with interest thereon at the rate of seven per cent. per annum calculated from July 1, 1912, down to the date of payment."

The total amount in reichsmarks could thus be easily ascertained. Then the certificate dealt with the third share, the share of Egon von Bieberstein, and it found that

> "Egon von Bieberstein by an indenture dated Feb. 12, 1906, assigned by way

of mortgage his share in the said trust fund to the defendants the Nederlandsche Bank to secure the repayment of the sum of 33,000 German reichsmarks on May 1, 1906, together with compound interest thereon at the rate of six-and-a-half per cent. per annum from the said Feb. 12, 1906, payable half-yearly [reducible to six per cent. on payment within a certain time]. The Nederlandsche Bank is a corporation with limited liability incorporated according to the laws of the Kingdom of Holland and has its registered office at 33 Prinsessegracht The Hague Holland. Subject to the said mortgage the share of the defendant Egon Wilhelm Marschall von Bieberstein in the said trust fund is vested in the said defendant. There is due to the said Nederlandsche Bank under and by virtue of the said mortgage the sum of 33,000 German reichsmarks in respect of principal together with compound interest thereon at the rate of six-and-a-half per cent. per annum from the said Feb. 12, 1906, down to the date of payment."

So again, according to the certificate, the amount in reichsmarks due on that mortgage to the Nederlandsche Bank is a sum easily capable of ascertainment by a simple arithmetical calculation. The matter came on for further consideration, and, in particular, the court was asked to apportion the mortgage security between the mortgagors and the mortgagees. RUSSELL, J., held that the mortgagees were entitled to be paid the amount in sterling equivalent to the amount due in reichsmarks converted at the rate of exchange prevailing at the date of the master's certificate. This gave the mortgagees £1 15s. 1d. and £3 2s. 3d. respectively. The mortgagees appealed.

G. B. Hurst, K.C., and *H. C. Bischoff* for the Dutch Company and the Dutch Bank, the mortgagees.

Underhay for the plaintiff trustee.

Devonshire for the three beneficiaries.

Gavin T. Simonds for the Attorney-General.

R. Peel for Max Busch.

Cur. adv. vult.

July 31. The following judgments were read.

LORD STERNDALE, M.R.—This is an appeal from RUSSELL, J., raising a question as to the amount to which certain mortgagees of reversionary interests in a fund are entitled on the distribution of the fund. The facts are clearly stated in the judgment of the learned judge. They are as follows: [The Master of the Rolls read the statement of the facts from the judgment of RUSSELL, J., above set out and continued:] The learned judge has held that the amount which the mortgagees are entitled to be paid out of the fund is the amount in marks due on the mortgage for principal and interest converted into sterling at the rate of exchange prevailing at the date of the certificate. This gives the mortgagees an absurdly small sum: in the one case £1 15s. 1d., and in the other £3 2s. 3d.

The mortgagees appeal, and the first point taken on their behalf is that by the terms of the mortgages themselves they are entitled to be paid in what they call gold marks; in other words, that the mortgages are given to secure not so many reichsmarks, but so many gold reichsmarks. In my opinion this contention is not correct. A reichsmark is what is called a unit of account, i.e., a coin which had a definite value throughout the German reich and was substituted for the different coinages existing at the formation of the German Empire in the different States included in it. Strictly speaking, there is no such thing as a gold mark. There are gold coins of a certain number of marks, but a gold mark does not exist. The mortgagees' contention amounts to this: that in these mortgages reichsmarks are to be read not as units of account but coins of one-tenth the value of the gold coin. I do not think that this is correct. By the law of Dec. 4, 1871, the following provisions are made as to a gold coinage: Imperial gold coin are coins at the rate of 139½ coins to one pound of fine gold; the tenth part of such gold coin is called a mark, and is divided into 100 pfennige. I think that a mortgage to

A secure a given number of reichsmarks is a mortgage to secure the repayment of whatever may be legal tender at the time of repayment in the country where the reichsmark circulates. Up to August, 1914, for a debt of this kind the German law required a tender to an amount above 20 marks to be in gold in order to be legal tender, and the mortgagees argue that because at the time of the loan a payment of 31,000 or 33,000 marks could only be made in gold the document must B be construed as a loan of marks payable in gold. I think that there is a fallacy in this. If the mortgagees call in aid the German municipal law for the purpose of ascertaining what is a legal tender it must be the German municipal law for the time being, i.e., at the time of payment, and the state of that law at the time of the loan is immaterial. If the German law is to have any relevancy it must be the German law as it is from time to time, and the mortgagees cannot take C that law as it exists at one time and claim that their rights must be regulated by its then state however it may be changed in the future. In other words, if their rights are to be defined by German law it must be that law as it exists from time to time. I do not think that the ordinance of September, 1914, has any bearing on this case, because, in my opinion, this was not an agreement in accordance with which a payment in gold had to be made.

D The mortgagees, however, raise another point, that is, that assuming that this was not a mortgage of gold marks and that the mortgagees were at liberty to pay in Treasury notes or paper marks, still, if for any purpose the amount of paper marks payable has to be converted into sterling, it must be so converted as at the date when payment had to be made according to the mortgage deed, which they allege to be considerably earlier than the date of the certificate. This contention E is founded on the principle according to which the date of conversion of a sum awarded for damages for breach of contract has been held to be the date of the breach. This principle the mortgagees contend applies to the case of non-payment of a debt, the difference in exchange being given as damages for not paying on the due date. I have some doubt whether this principle applies at all to a case in which by the terms of the contract the payee agrees that he shall be compen- F sated for the non-payment by interest, but I will assume that if the mortgagees had in this case brought an action on the covenant in the mortgage to recover the money the principle would have applied. But no such action was brought. What took place was that, it becoming necessary to ascertain what sum was due on the mortgage, an inquiry for that purpose was directed and took place. That sum is ascertained, as it must be, in marks, and on payment of that sum in marks the G mortgagor would be entitled to redeem the security. If after the ascertainment of the amount the mortgagor tendered the amount in marks I cannot see how the mortgagee could have refused it. This is perhaps plainer in the mortgage which makes the money payable to an agent of the mortgagee in Berlin, but I do not rely on that circumstance. In this case the mortgagor does not pay the money himself, but it is paid out of a sum which is standing to the credit of an account H in a court in this country. I cannot see how that circumstance can entitle the mortgagee to be paid more than he would be paid if there were no fund, nor can I see how the amount payable on the mortgage can depend on the position of the fund or the situation of the country in whose court it stands. I think the decision of Russell, J., was right, and the appeal should be dismissed with costs.

I **WARRINGTON, L.J.**—An English trust fund is represented by a fund in court. Two of the persons entitled, subject to a life interest, to shares in that fund being Germans, borrowed from Dutch banks certain sums in Imperial German marks, and executed mortgages of their respective shares to secure the repayment of those sums respectively with interest thereon. The tenant for life having died, the fund became distributable, and it became necessary to ascertain what proportion thereof was payable to the mortgagees of the two shares, and accordingly an inquiry was directed as to the incumbrances thereon, and "What is due and to whom in respect of such incumbrances." In answer to this inquiry the master

has found that in each case there is due to the mortgagee a certain sum of German reichsmarks with interest at the rates and from the days in the certificate mentioned. The certificate, which was dated Nov. 24, 1920, and was filed the same day, having become binding, the matter came on for further consideration, and the question necessarily arose on what principle and at what date were the sums in sterling representing the sums of marks mentioned in the certificate to be ascertained. The judge has made an order directing payment to each mortgagee of such sum in sterling as at the date of the certificate represented the value of the German reichsmarks found due under and by virtue of the mortgage with the interest thereon. Under this order the mortgagees would receive in satisfaction of their respective mortgages very small sums of English money, and they appeal therefrom, insisting either that the amount payable to them should be the equivalent of German reichsmarks payable in gold, or if they fail in this, then that the rate of exchange should be that ruling on the days when the respective sums became payable by virtue of the personal obligations contained in the mortgages respectively. Having thus stated in general terms the nature of the question and how it arises I must now go a little more into detail.

The fund was settled by a trust deed executed in 1887, under which a lady, who died on Jan. 19, 1920, was entitled to the income for her life. It has been determined in the action that, subject to her life interest, the fund was divisible into shares of which Edwin Max Hermann Ernst Marschall von Bieberstein and Egon Wilhelm Marschall von Bieberstein respectively became entitled to 97/282. In 1910 Edwin assigned his share to one Max Busch, and by an indenture dated Nov. 23, 1911, Busch assigned such share to a Dutch bank to secure the repayment of a sum of 31,000 German reichsmarks advanced to Busch by the bank. The deed was in the ordinary form adopted in such cases. It contained a covenant by the mortgagor for payment of the 31,000 German reichsmarks at the expiration of three calendar months from the death of the tenant for life—that is to say, on April 19, 1920, with interest thereon from Jan. 1, 1912, at 7 per cent. per annum (reducible to 6 per cent. on punctual payment) by equal half-yearly payments on Jan. 1 and July 1 in each year. The share was assigned to the mortgagees subject to a proviso for redemption on payment of 31,000 German reichsmarks with interest in accordance with the covenant, and any other sums by the deed made payable and not then paid. The deed contained a provision that the security should be deemed to be an English instrument and be enforceable according to the law of England for the time being in force with respect to securities. By a deed dated Feb. 12, 1906, Egon assigned his share to another Dutch bank by way of mortgage to secure the repayment of 33,000 German reichsmarks with compound interest as therein expressed. The deed contained a covenant to pay 33,000 German reichsmarks on May 1, 1906, with interest at 6½ per cent. per annum from the date of the deed, and, if the money was not so paid, then to pay to the mortgagees interest at the same rate by half-yearly payments on May 1 and Nov. 1 in every year. The deed contained an assignment of the share and of a policy of assurance on the life of the mortgagor subject to a proviso for redemption in common form on payment of 33,000 German reichsmarks with interest thereon. The deed contained provisions for the conversion of unpaid interest into principal and the accumulation thereof by way of compound interest with half-yearly rests and a covenant in the following terms:

> "The borrower will when the said share and premises fall into possession pay to the mortgagee the said accumulated fund as well as the original principal sums hereby secured together with interest thereon respectively at the rate aforesaid until payment and such fund and sum and the interest thereon shall constitute a charge on the premises hereby assigned, and the premises hereby assigned shall not be redeemed except on payment of all principal moneys hereby secured and all interest and accumulations made as aforesaid of interest on such principal money and accumulations."

A It was thereby agreed that the deed should take effect and be construed in all respects in accordance with the law of England. No interest was ever paid under either of the deeds. As to the mortgage of Edwin's share the principal money became due on April 19, 1920, and each payment of interest became due on the half-yearly day fixed for payment. On the true construction of the mortgage of Egon's share I think that the only covenant for payment either of principal or B interest which in the events which happened became operative was that set out above, and accordingly the original principal and the accumulated interest became due on Jan. 19, 1920, and was payable with further accumulations of interest until the date of payment. This point becomes important only if this court should be of opinion that the principle and date of conversion adopted by RUSSELL, J., is not correct.

C The mortgagees object to the order appealed from on two grounds. First, they say that on the construction of each of the deeds the sum of German reichmarks thereby secured was payable in gold only, and, accordingly, that the sum in sterling to which each of them is entitled is the sum equivalent to the number of gold marks payable under the deed. Secondly, if their first contention fails, they contend that their claim, being in law a claim for damages for breach of contract, the D proper date for making the conversion is that of the breach—that is to say, the several dates on which the principal and each payment of interest respectively became due.

As to the first contention neither of the deeds provides in express terms in what form the payment shall be made; the debtor in each case simply undertakes to pay so many German reichsmarks. According to the evidence the reichsmark is E simply the unit of account in the Imperial German currency established in 1873 to take the place of the various State currencies previously existing. It seems to me, therefore, that an obligation to pay so many German reichsmarks is simply one to pay so many units of German currency. The form in which such a payment is to be made must, in my opinion, be regulated by German municipal law, and what would or would not be a legal tender must depend on the law on that subject F in force at the time of the tender. The result of the evidence on this subject is that from Oct. 1, 1907, down to Aug. 4, 1914, gold coins were the only currency recognised as legal tender in Germany in the case of any payment exceeding twenty marks. The exact terms of the law of June 1, 1909, a copy and translation of which have been furnished to us as being the statute referred to by Dr. Ernest Schuster (and which I gather is of the nature of a Consolidation Act) are:

G

> "No one is obliged to take in payment silver coins to an amount of more than twenty marks, nickel and copper coins to an amount of more than one mark."

Prior to Aug. 4, 1914, in private dealings, there was no obligation to accept either Imperial Treasury notes or banknotes in payment: see the law of April 30, 1874, H as to Treasury notes and that of Mar. 14, 1875, as to banknotes. Since Aug. 4, 1914, Imperial Treasury notes have been legal tender.

The mortgagees in this state of facts contend that at the date of the respective contracts they would have been entitled to insist on payment in gold and therefore they are now entitled to insist on payment in that form. But if I am right in thinking, as I do, that the obligation is merely to pay in German currency, the I nature of that currency must necessarily be regulated by German law, which thus becomes for this purpose a part of the "proper law of the contract"—to use the term adopted by PROFESSOR DICEY (DICEY AND KEITH'S CONFLICT OF LAWS (3rd Edn.) p. 615). In fact the contention with which I am now dealing can only be supported by treating as part of the law of the contract the provisions of German law as to legal tender. This law is necessarily subject to alteration from time to time according to the economic needs of the country and the will of the German legislature, and has in fact been altered in the manner above mentioned. The mortgagees cannot, in my opinion, rely on German law for one purpose only and

refuse to submit to its liability to alteration by the competent authority. In my opinion, therefore, the contracts in question are not contracts the obligations under which can only be discharged by payment in gold. This view of the nature of the contracts is substantially the same as that expressed by RUSSELL, J., in *British Bank for Foreign Trade* v. *Russian Commercial and Industrial Bank* (1), and I think that that case as well as the present was in that respect rightly decided. In the view I take of the true construction of the contract the ordinance of Sept. 28, 1914, referred to by Dr. Schuster, does not affect the present question. It may be that if according to its true construction a contract were one for payment in gold, as, for example, if it had been so expressed, that ordinance would have had no operation to prevent an English contract of that nature from being binding on the debtor, but that is not the case with which we have to deal.

As to the second point, that is to say, that conversion ought to be made as at the date when the several moneys became due, I will assume that if the subject of the discussion were the amount in sterling for which personal judgment against the debtor ought to be pronounced the date fixed for payment according to the contract would be the correct date. In the ordinary case of damages for breach of contract it is settled that conversion must be made as at the date of the breach: *Di Ferdinando* v. *Simon, Smits & Co., Ltd.* (2), *Celia* (*Owners*) v. *Volturno* (*Owners*) (3) and *Goldzieher and Penso's Claim* (4). The same principle has been applied when the breach is non-payment of a debt at the time it became due: *Crédit Général Liègeois' Claim* (5); and see also the judgment of VAUGHAN WILLIAMS, L.J., in *Manners* v. *Pearson & Son* (6). There may be a difficulty in treating non-payment of a debt as giving rise to a claim for damages where, as in the present case, non-payment on the due date is under the contract compensated for by payment of interest, but I will assume that the general principle above referred to would apply. But we have not to consider in the present case for what amount personal judgment would be recovered. The question before us is how much of the fund representing the mortgaged property is to be paid to the mortgagee in order to entitle the mortgagor to redeem. Supposing as soon as the amount due had been ascertained by the certificate the mortgagor had paid or tendered that sum in marks he would have been entitled to require a release of the mortgaged property. The price of those marks if he had bought them in the market would have been determined by the rate of exchange on the day of the date of the certificate, and I think that date has been rightly selected by the learned judge as the date for conversion, being that on which the amount due was finally ascertained. The case is not unlike that of a stock mortgage under which the mortgagor had to replace a sum of stock and the mortgagee took the chance of a rise or fall in price. The view I have expressed seems to me to be in accordance with the views of the Court of Appeal and of the House of Lords in *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade, Ltd.* (7). I think that it is reasonably clear that so soon as the loan was declared to be a rouble loan the Court of Appeal and the House of Lords regarded the security as redeemable in roubles. See particularly the passage from the speech of LORD DUNEDIN ([1921] 2 A.C. at p. 448), and one from the speech of LORD SUMNER (ibid. at p. 451). See also the judgment of RUSSELL, J., in *British Bank for Foreign Trade, Ltd.* v. *Russian Commercial and Industrial Bank* (1), being the redemption action brought by the mortgagors in consequence of the decision that the loan in question was a rouble loan. On the whole I agree with the decision of RUSSELL, J., and am of opinion that the appeal should be dismissed.

YOUNGER, L.J.—I will appropriate the benefit, if I may, of the very full statement of the facts and circumstances of this case just made by my Lord and the Lord Justice and will proceed at once to indicate the view I take of the two questions which now arise for our decision. The considerations attending the first of these, i.e., the question whether on the true construction of these two mortgage deeds the loans which were made in gold are also repayable in gold, may, I think,

A be thus stated. The mortgages are each of them mortgages of a reversionary interest in personalty settled by an English trust deed and vested in an English trustee. Each mortgage contains a provision not identical in terms, but similar in effect. I quote the clause from the Busch mortgage, that the security shall be deemed to be an English instrument and be construed and be enforceable according to the law of England for the time being in force with regard to securities. The B advance in each case is expressed to be an advance of German reichsmarks. The repayment is to be made in German reichsmarks. A reichsmark at the date of each deed was a unit of German currency. It was, however, also the tenth part of a German Imperial gold coin, coined at the rate of 139½ coins from one pound of fine gold: see the law of Dec. 4, 1871. At the dates of these deeds 31,000 reichsmarks in one case and 33,000 in the other were and meant the same thing, C whether the reichsmark was regarded as a unit of German currency or as the tenth part of the German Imperial gold coin referred to. The first question, as I see it, accordingly is, whether in these mortgages, construed as they are to be by the law of England, the obligation is to repay the loan in gold coins, or is, in the language of the learned judge, merely to repay "in whatever may be the legal tender or legal currency at the time of repayment in the foreign country whose D money is the subject-matter of the loan." The mortgagees contend for the first alternative, and I would observe at the outset that it is in no way necessary for them, as I understand their position, to invoke German municipal law at any stage of their case for the purpose of determining their rights. What each mortgagee says, as I understand the argument, is that on its true construction the covenant in its mortgage deed is a covenant to pay in gold coins. There is nothing in English E law to make such a covenant unenforceable. There is no difficulty, even to-day, in translating that obligation into English currency. Neither mortgagee, as I understand its position, disputes that even so construed the obligation on the part of the borrower to repay in gold could not now be enforced in Germany. But that, they both say, is only because of the German ordinance of Sept. 28, 1914, which enacts that agreements made before July 31, 1914, according to which a payment F in gold has to be made, are until further order not binding, and such an ordinance has no operation in England on a covenant governed by English law and set up in an English court. The position of the mortgagees accordingly is that in the case of each mortgage there is a covenant to make payment in gold from which the mortgagor by English law, and in an English court, has never been released and by which, according to the law of the contract, he remains bound.

G My own view is that, at least up to a point, this statement of the position of the mortgagees is sound. It does not expose them, as I understand it, to the damaging criticism that to maintain it they are driven to resort to some provisions of German law in order to create a liability in their mortgagor and are compelled to ignore others which would release him from it. To maintain their position they need H resort to Germany and its statute laws for one purpose only, and that is to ascertain what it was with reference to which as a mere matter of construction of the deeds the parties to them were contracting about. Now if it be correct so to state the problem, then it becomes one the solution of which is, to my mind, by no means easy or clear. On the one hand I can myself have very little doubt that neither the borrowers nor the mortgagees ever contemplated that repayment would or could I be validly made under the deeds otherwise than in gold. This, I think, may even be assumed. But that assumption does not solve the difficulty. Why did the parties make it? Again, I should say, the answer is plain. They made it because neither of them ever supposed that for the duration of the loan there would be any divergence between a reichsmark as a unit of currency and a reichsmark as the tenth part of an Imperial gold coin. I cannot doubt that if any such divergence—even any slight divergence—between the two had been foreseen the obligation to repay each loan in the gold in which it was made would have been express. But this is not enough for the mortgagees, if the language used is not apt to make that

obligation clear. Is, then, that language sufficient for the purpose? On the whole, A
although not without hesitation, I have come to the conclusion that it is not.

In the case of the Busch mortgage it is provided that all moneys payable under the security are to be paid to a nominee of the mortgagee. The first nominee is given in the deed, and he has an address at Berlin. In the case of this mortgage, therefore, the fact that repayment in Germany and not in Holland was contemplated actually appears on the face of the deed—a circumstance which to my B
mind indicates that any repayment proper and sufficient by German law at the time when in Germany it was made was in the direct contemplation of the parties. Egon von Bieberstein's mortgage does not provide any similar direct indication of intention, but the effect of the deed must, I think, in this respect be, in common with the other, the same. The mortgagors in each instance were German. In each case, although borrowing from Dutch lenders, they had received their advance C
in marks—that is, in the coinage of their own country. The natural inference from the fact that the obligation to repay is expressed in the same coinage, although the security for its performance is an English trust fund, must I think be, in the absence of compelling words to the contrary, that in that obligation the marks are referred to as currency of the country of their issue and nothing else. I confess that I reach this conclusion with hesitation and some regret. If the contingency D
which has arisen had even been remotely apprehended, it would, I cannot doubt, have been provided for and the borrowers would have been required, and would have been willing, to repay the equivalent of the sum they had received. In one case the borrower received the equivalent in English currency of over £1,600, in the other as much as £1,550. Large sums by way of interest are unpaid on both securities, yet as a result of the learned judge's declaration all liability under the E
mortgage with arrears of interest from its date will be satisfied by in one case a payment of £3 2s. 3d. and in the other by a payment of £1 15s. 1d. The result is almost farcical. This must, however, be borne by the lenders, however unfortunate it is, unless some slight alteration is secured for them by the adoption as correct of their alternative ground of appeal.

That alternative raises the second question before us—viz., the date as at which F
the sums in marks payable to the banks under their securities are to be translated into sterling so as to fix the sums receivable by them out of the shares in the English trust fund on which their loans are respectively secured. In the present case this question subdivides itself into two: First, what would be the date of such translation if in these proceedings each bank was pursuing its remedies as mortgagee and the court was in its judgment expressing in English currency the sum G
due to it? Secondly, is the date of translation altered by the nature of the present proceedings? The first of these questions raises considerations of much interest on some of which judicial opinion apparently still fluctuates, although up to a point the law has been clearly settled by the House of Lords. Whether the claim of a plaintiff be damages for a tort, which have been ascertained in a foreign currency, or damages for a breach of contract similarly ascertained, or be a claim H
in respect of an obligation to make a payment in or to hand over foreign currency at a fixed date, the necessary, if not the only, reason for an English court in its formal judgment translating the amount of foreign currency into English money is to comply with the requirements of English law that an English judgment for money must be expressed in terms of English currency in order to make the judgment one on which execution can issue. In that state of things one might well I
share the view, if one were at liberty judicially to entertain it, that when any sum ascertained in foreign currency has, under the court's order, to be paid in English sterling, the payment should always be for that sum in sterling which would at the date of the order enable the plaintiff to purchase the foreign currency of the ascertained amount. Thus would there be secured to him the nearest equivalent for that which the court would give him if it could—that which presumably a court of the country of the coinage would have done for him had he sued in such a court —namely, a payment expressed in the terms of the foreign currency he has proved

to be recoverable. For, where a defendant's obligations, whether in respect of tort, breach of contract, or debt, are, all through, expressible in terms of British currency, our courts have no regard, in assessing the amount recoverable by a plaintiff, to any variation in the purchasing power of the sovereign between, for example, the date of the breach of contract and the date of the judgment in respect of it. One might accordingly have thought that in relation to a commodity of such limited utility as foreign currency the courts here might for translation purposes have been equally oblivious to any fluctuation in its internal exchangeable value and might have concluded in all these cases its sole purpose to be to give to a plaintiff the nearest possible equivalent in English sterling for that amount of foreign currency to which at that moment it held him entitled, and not to give him a sum in English currency which in these days of violent fluctuations in external values of foreign currency would probably be very much more, might be less, but could only by accident be an equivalent of that amount.

This appears to be the American view. But it is not the law of this country. It has now been definitely decided that certainly in cases both of damages for breach of contract and of damages for tort, the translation must be effected as at the date of the breach or of the wrong, the principle being most clearly stated, I think, by LORD SUMNER in the *Volturno Case* (3), where, speaking of the cost of repairs to a ship damaged in collision and paid in foreign currencies, he says:

> "In each case these currencies would have been converted into sterling, as at the date when liability for the several outlays accrued, because when the damage is proved by the actual cost of repairing it, conversion of that cost forthwith into the currency with which the High Court deals is simply the process of completing the proof."

LORD WRENBURY in the same case expresses the same view under another figure. The foreign currency to which by way of damages the plaintiff is entitled is a commodity which ought to have been handed to him at the date when the damage was done. The case is the same accordingly as if the plaintiff by the defendant's tort had lost a cow at the same time. In each case the plaintiff recovers by the judgment the value of the currency or of the cow as at that date. These two judgments seem to me very clearly to show that the translation of currency into sterling as at the date of the breach or of the tort is in no way referable to the fact that the claim in each case is in damages and that this translation is by way of further damage. If the exchange were to fall before the date of the judgment there would be a loss for the plaintiff in fixing the earlier date for the translation. But does this same principle apply where the claim, as here, is for payment of a number of marks which by the debtor's covenant ought to have been paid, but were not, at dates long past? And first of all is an obligation to make payments in foreign currency under a contract which is to be construed and governed by English law, as is the case here, an obligation which results in a debt strictly so-called at all? Is it technically more than an obligation to deliver particular quantities of a prescribed commodity at prescribed dates, and is failure to deliver in an English court more than a breach of contract to deliver, as was the case in *Re British American Continental Bank, Lisser and Rosenkrantz's Claim* (8). If this be the true view of these deeds here, and it seems to derive support from the speeches of the noble Lords above referred to, it is clear that the value of the marks not delivered at each prescribed date must be ascertained by translation into English currency at that date. It is clear also from the case last cited that the obligant—I use a neutral term—could not in such as case satisfy his obligation by tendering the prescribed number of marks at a date when their value had depreciated.

I feel very much impressed with this view of the position, but it was not canvassed in argument, and accordingly I refrain from expressing any concluded opinion on it, the more especially as it seems to me that the same conclusion may be reached in another way. In my judgment, on the principle of the authorities as they now stand, the same consequence follows even if the obligations of the

borrowers under these mortgages are the obligations of debtors, and the sums payable by them in marks are, in an English court and under these English deeds, debts. Even on that hypothesis the marks due and not paid must, I think, in each case be translated into English currency at the respective dates when they ought to have been paid and were not. This principle is, I think, involved in the judgments of all the members of the court in *Manners* v. *Pearson & Son* (6), as explained in the *Volturno Case* (3), and it is expressly so laid down in the dissenting judgment of VAUGHAN WILLIAMS, L.J., in a judgment which, after the *Volturno Case* (3), must, in all courts, be regarded as one of the highest authority. It was adopted by AVORY, J., in the *Société des Hotels Le Touquet-Paris-Plage* v. *Cummings* (9), and on the hypothesis on which he proceeded the correctness of his view was, I think, accepted in the Court of Appeal, by at least BANKES and SCRUTTON, L.JJ., and it was also adopted by ROWLATT, J., in *Uellendahl* v. *Pankhurst, Wright & Co.* (10), not following a decision of ACTON, J., in *Cohn* v. *Boulken* (11), to the opposite effect. And for myself I cannot see why on the principle on which such cases as the *Volturno Case* (3) proceeded there should be any real difference for this purpose of fixing the date of translation between a failure to make payment of marks when due under a contract of loan and a failure to hand them over by way of compensation for a wrong. It is said, however, that a distinction may arise from the fact that in the case of a debt in foreign currency it is always open to the debtor to tender to his creditor in payment and satisfaction the precise amount unpaid, and the decision of this court in *Société des Hotels Le Touquet-Paris-Plage* v. *Cummings* (9) it cited in support of that view. I would, however, observe first with reference to that case that the contract there under which the francs became payable was in every sense a French contract, and the payment made in France was by French law a complete satisfaction. French law takes no more account of fluctuations in the franc in relation to French claims than do the English courts of fluctuations in sterling. The mind of the court was not in that case directed to English contracts, with which we are here concerned. *Lisser and Rosenkrantz's Claim* (8) is nearer the present case even on this view of it. Moreover, in this case no payment of tender whatever of marks has been made to the banks, and the court has proceeded to an order, and as was indicated by the Court of Appeal in the *Le Touquet-Paris-Plage Case* (9), any such tender as was there made would, even in respect of that French contract, have been nugatory after an English judgment for the debt. For these reasons my own view is that even if such a privilege does to any extent belong to the mortgagors under these deeds its existence is not enough to displace the application to them of the principles, I think, with reference to the translation of foreign currency into sterling which obtain in actions for breach of contract or in tort.

In my judgment, therefore, if the banks were in these proceedings pursuing their remedies as mortgagees their right under these deeds would be to have the sum in marks found to be due to them respectively translated into currency as at the dates when the marks constituting in each case the aggregate sum became due and were unpaid. What then are these dates? Each mortgage is a mortgage of a reversionary interest. No interest has in the case of either been paid since the loan was made, nor was any payment of principal demanded. Moreover, it is, in my judgment, plain on the Egon mortgage, and it may be implied on the Busch mortgage, that no payment certainly of principal, and, I am prepared to hold, no payment of interest, was to be expected until the fund fell in by the death of the tenant for life, which event took place on Jan. 19, 1920. In my opinion, therefore, there would not, in these cases in proceedings to enforce these securities be any translation of marks into sterling until that date; in each case the sum in marks due for principal and interest as at that date would be calculated and translated into sterling as at the exchange of that day and each subsequent instalment of interest down to the date of payment would in like manner be converted into sterling at the rate of exchange ruling at the date when such payment became due. And this brings me to the last point. It is said that no such translation

A is allowable in these proceedings because they are in no true sense proceedings by mortgagees to enforce their securities. RUSSELL, J., said ([1923] 2 Ch. at p. 474):

> "All that the court is doing here is dividing the property in the correct proportions between the mortgagors and the mortgagees. This is in no sense an action against the mortgagors, on their covenant, and still less is it a claim for damages for breach of contract. The true position is that the court, in dividing the funds, ascertains what sums would be payable by the mortgagors if they came to the court seeking to redeem, and those sums are payable out of the mortgaged property to the mortgagees, and the balance to the mortgagors."

I should, speaking for myself, be sorry to feel compelled to subscribe to that position. It seems to me to sanction in this case what VAUGHAN WILLIAMS, L.J., in *Manners* v. *Pearson & Son* (6) uttered his warning against:

> "Making the plaintiff's remedy for the recovery of what is due to him differ according to the form of procedure and according as he brings his action in the Queen's Bench Division or in the Chancery Division."

It is true this is not a foreclosure action. Neither, however, is it a redemption action. Neither the mortgagors nor the mortgagees are actors in it. Both are defendants to a summons by the trustee in which inquiries have been directed such as would more usually have been made on a petition by the banks for payment out of the money due to them. It seems to me that the amount actually in sterling found to be due to the mortgagees must be the same whether it is ascertained on an inquiry directed in a redemption action or in a foreclosure action—on an inquiry directed on such a petition or on one asked for by the trustee of the fund with mortgagors and mortgagees before the court as respondents, each making their claims. If the sum in sterling found due by them would be ascertained on the principles which I have set out as being in my judgment correct, then, in my opinion, it must follow that that sum neither more nor less must be found on the inquiries directed in these proceedings.

In my view, therefore, these appeals should be allowed, and the order made by the learned judge on further consideration varied by altering the payment schedule so as to give effect to the translations into currency above indicated and by ordering payment in accordance with the schedule as altered.

Appeal dismissed.

Solicitors: *Cruesemann & Rouse*; *Golding, Hargrove & Golding*; *De La Chapelle & Co.*; *Treasury Solicitor*; *Mott & Parkes.*

[*Reported by* J. L. DENISON, ESQ., *Barrister-at-Law.*]

A

GIUSTI PATENTS AND ENGINEERING WORKS, LTD. *v.* MAGGS AND OTHERS

[Chancery Division (Astbury, J.), March 23, 27, 1923]

[Reported [1923] 1 Ch. 515; 92 L.J.Ch. 345; 129 L.T. 438; 40 R.P.C. 199]

B

Certiorari—Removal of county court action into High Court—Lack of jurisdiction in county court—Right of plaintiffs to writ—Need for defendants to appear in High Court.

A company commenced an action in a county court against certain persons for infringement of a patent and damages, to which the defendants pleaded that the patent was invalid, so that the county court judge had no jurisdiction. The plaintiffs thereupon applied ex parte for a writ of certiorari to remove the action into the Chancery Division. The defendants declined to appear in the action in the Chancery Division, and the plaintiffs filed a statement of claim, and moved for judgment in default of appearance. The judge made the order without having the whole of the material facts before him. The defendants moved to set aside the judgment.

C

D

Held: a plaintiff who had chosen his own tribunal was not entitled to a writ of certiorari to remove the action into a higher court because the inferior tribunal had no jurisdiction, and so the certiorari was improperly obtained; there was no rule compelling the defendants to appear in the action; and the judgment must, therefore, be set aside.

E

Sowton v. *Cutler* (1) (1675), 2 Rep. Ch. 108, applied.

Edwards v. *Bowen* (2) (1826), 2 Sim. & St. 514, distinguished.

Notes. Section 90 of the Supreme Court of Judicature Act, 1873, and the County Courts Act, 1888, have been repealed; provision for removal of county court actions into the High Court by certiorari is now made by s. 115, s. 117, and s. 119 of the County Courts Act, 1959, s. 107 of which forbids any other such removal by certiorari. Writs of certiorari were abolished, and replaced by orders, by the Administration of Justice (Miscellaneous Provisions) Act, 1938. The procedure on certiorari is now governed by R.S.C., Ord. 59, rr. 1–10, and in the Chancery Division application for leave is now made to a Master (R.S.C., Ord. 55, r. 15). Power to transfer county court actions to the High Court corresponding to that formerly contained in s. 90 is now contained in the County Courts Act, 1959, s. 65 (1). Despite these changes this case, however, is probably still authority for the proposition that the remedy of certiorari for lack of jurisdiction is only available to the defendant.

F

G

As to applications for certiorari by plaintiff suing in wrong court, see 11 Halsbury's Laws (3rd Edn.) 128; as to county court jurisdiction in counterclaims, see 9 ibid. 143; and for the County Courts Act, 1959, see 39 Halsbury's Statutes (2nd Edn.) 102 et seq.

H

Cases referred to:

(1) *Sowton* v. *Cutler and Clerke* (1675), 2 Rep. Ch. 108; 21 E.R. 630; Digest Supp.

(2) *Edwards* v. *Bowen* (1826), 2 Sim. & St. 514; subsequent proceedings, 2 Russ. 153; 38 E.R. 294; 16 Digest 424, *2840*.

I

Also referred to in argument:

General Estates Co. v. *Beaver*, [1912] 2 K.B. 398; 81 L.J.K.B. 761; 106 L.T. 793, D.C.; 13 Digest (Repl.) 412, *388*.

R. v. *Halifax County Court Judge*, [1891] 2 Q.B. 263; 65 L.T. 104; 39 W.R. 545; 7 T.L.R. 576; sub nom. *R.* v. *Yorkshire County Court Judge*, 60 L.J.Q.B. 550, C.A.; 13 Digest (Repl.) 395, *232*.

Harrison v. *Bull and Bull*, [1912] 1 K.B. 612; 81 L.J.K.B. 656; 106 L.T. 396; 28 T.L.R. 223; 56 Sol. Jo. 292, C.A.; 16 Digest 450, *3190*.

Davies v. *Williams* (1879), 13 Ch.D. 550; 49 L.J.Ch. 352; 42 L.T. 469; 28 W.R. 223; 16 Digest 450, *3192*.

Motion to set aside judgment in default of appearance.

In July, 1922, Giusti Patents and Engineering Works, Ltd., who were the assignees of letters patent for an invention of a tin opener, commenced proceedings in the county court at Lowestoft against C. W. Maggs, R. J. Pryce & Co., and Thompson & Sons for infringement of the patent and damages. All the defendants pleaded the invalidity of the patent and upon such plea the county court judge had no jurisdiction to try the action. The plaintiffs then applied for an order transferring the plaint to the Chancery Division of the High Court of Justice, but before that application was heard they applied ex parte in the Chancery Division for a writ of certiorari to issue to remove the plaint from the county court to the Chancery Division. On Sept. 21, 1922, the Master made an order that certiorari should issue and that when removed the plaint should be assigned to ASTBURY, J. The writ was issued on Oct. 2. On Nov. 16 the plaintiffs' solicitors gave notice to the defendants of the issue of the writ, and also gave them notice to cause an appearance to be entered for them within eight days. Correspondence took place between the solicitors for the plaintiffs and the respective defendants, in which the defendants contended that it was irregular for a writ of certiorari to be issued on the application of a plaintiff, and that there was no provision in the rules for the defendants to enter an appearance to such a writ, and the defendants refused to enter an appearance. On Jan. 24, 1923, the plaintiffs filed a statement of claim, and on Feb. 9 they moved for judgment in default of appearance for the relief asked for in the statement of claim. Upon that motion ASTBURY, J., made an order granting an injunction to restrain the defendants, and each of them, and the servants and agents of each of them, from infringing the said letters patent, and for an inquiry as to damages, and for delivery up of all infringing articles in their possession, and for costs against the defendants. The motion was made ex parte, and his Lordship was not acquainted of all the material facts. Each of the defendants now moved to set aside the judgment on the following grounds: (a) That the order for the issue of the writ of certiorari was improperly obtained by the plaintiffs without notice to the defendants; (b) that the plaintiffs were not entitled to the order; (c) that the judgment of Feb. 9 was given ex parte and under a misapprehension and without knowledge of the true position; (d) that the proceedings in the action in the Chancery Division had been wholly irregular.

Luxmoore, K.C., and *W. R. Sheldon* for the defendants, Thompson & Sons.
Gavin Simonds for the other defendants.
Courtney Terrell for the plaintiffs.

ASTBURY, J., stated the facts and continued: The first question is whether the plaintiffs, having chosen a tribunal which would have no jurisdiction if the most common defence in a patent action—namely, the invalidity of the patent—were put in, were entitled to remove that action by certiorari when that defence was put in.

For many years provision has been made for the removal of civil cases from inferior courts without having recourse to the cumbrous and old-fashioned proceeding by certiorari. Section 90 of the Judicature Act, 1873, empowers the High Court to transfer proceedings from an inferior court in cases where the defence involves matter beyond that inferior court's jurisdiction. In the Chancery Division the application for a transfer under this section is made by originating summons, and both sides are heard. Section 126 of the County Courts Act, 1888, empowers the High Court to order the removal "by writ of certiorari or otherwise" of any action commenced in the inferior court, if the High Court shall deem it desirable that the action shall be tried in the High Court. That section does not, however, suggest that certiorari is the proper remedy where it was not so before the 1888 Act. Where the defendant obtains a writ of certiorari before judgment, he is bound to enter an appearance in the Central Office as soon as possible after the

return of the writ. Otherwise the plaintiff may apply by a procedendo to send the case back to the inferior court: see ANNUAL PRACTICE, 1923, p. 2249. But these provisions obviously do not contemplate such a writ being obtained by the plaintiff. Section 114 of the County Courts Act, 1888, provides that where an action is commenced over which the county court has no jurisdiction, the judge shall, unless the parties consent to the jurisdiction, order it to be struck out. This is not conclusive, but it throws a strong light on what is intended to happen to a plaintiff who chooses the wrong court.

On the question whether the plaintiff can obtain a writ of certiorari, there is only one direct authority, *Sowton* v. *Cutler* (1), where the plaintiff in an inferior court, being unable to proceed because his witnesses were out of the inferior court's jurisdiction, prayed a certiorari to remove the proceedings into Chancery. The defendant (inter alia) objected by demurrer that it was not practicable "for the plaintiff to remove his own bill by certiorari." LORD NOTTINGHAM held that the demurrer was good. That is a direct decision, and, indeed, the only decision, dealing with this point. It decides that, where a plaintiff voluntarily sues in a court that has no jurisdiction, he cannot cure his mistake and remove the proceedings by certiorari. By that I am clearly bound.

The plaintiffs rightly referred to *Edwards* v. *Bowen* (2). In that case the plaintiff in replevin commenced his action in the only possible court—namely, the Sheriff's Court, whence it was removed to a Court of Great Sessions. The freehold title being in question, the plaintiff applied for a certiorari. LEACH, V.-C., said:

> "In the text-writers there is no qualification stated as to the right of the plaintiff to the writ of certiorari in all cases; and the subject is not to be deprived of a beneficial writ in the particular case, merely because he is not prepared with a precedent precisely in point. If, however, it be necessary for the plaintiff here to lay a special ground for the writ, it is a sufficient ground that, in all other cases, the plaintiff has an election to proceed either in the superior or inferior court, but, in replevin, the action must commence in the Sheriff's Court."

That was a decision that in a replevin action the plaintiff, being bound to commence his action in the inferior court, might obtain certiorari. But LEACH, V.-C., was inaccurate in saying that there was no qualification in the text-books as to the plaintiff's right in all cases. The case went on appeal to LORD ELDON, and it was agreed that it should be treated as a motion originally made before him, there being some doubt as to the vice-chancellor's jurisdiction in the matter. LORD ELDON ordered the writ to issue in that particular case, but the right of a plaintiff in all cases to certiorari was not discussed, nor was *Sowton* v. *Cutler* (1) referred to.

The text-books both before and after LEACH, V.-C.'s decision have treated the matter as quite clear. In MITFORD'S PLEADINGS IN CHANCERY (1847, 5th Edn., p. 50), LORD REDESDALE states that

> "when an equitable right is sued for in an inferior court of equity, and by means of the limited jurisdiction of the court the defendant cannot have complete justice, or the cause is without the jurisdiction of the inferior court, the defendant may file a bill in Chancery, praying a special writ, called a writ of certiorari, to remove the case into the Court of Chancery."

For this he cites *Sowton* v. *Cutler* (1). In BACON'S ABRIDGMENT (1832, 7th Edn., vol. 2, p. 12) it is stated that

> "The writ of certiorari is used for the purpose of removing not only legal, but likewise equitable proceedings; for when an equitable right is sued for in an inferior court of equity, and by reason of the limited jurisdiction of the court, the defendant cannot have complete justice, or the cause is without the jurisdiction of the inferior court; the defendant may file a bill in Chancery praying this writ to remove the cause into the Court of Chancery."

A side-note states that "the plaintiff below, it seems, is not at liberty to make this application." This side-note is based on HARRISON'S CHANCERY PRACTICE, OR THE ACCOMPLISHED PRACTISER IN THE HIGH COURT OF CHANCERY (1741, 1st Edn., p. 103; 1808, 2nd Edn., p. 50), where it is stated that "not the plaintiff, but only the defendant in an inferior court of equity, may remove the proceedings hither by certiorari."

B I do not see any way of escaping from LORD NOTTINGHAM'S decision, and the text-books' statements, which I have read, and many others which take the same view. I must, therefore, hold that the order for the certiorari was wrongly made, and the whole subsequent proceedings bad ab initio.

The matter, however, does not end there. About four months after the writ of certiorari was issued the plaintiffs moved for judgment in default of appearance. C I am unable to find any rule compelling defendants to enter an appearance to an action removed by certiorari on a plaintiff's application. This is not at all surprising, because a plaintiff who has chosen his forum cannot properly obtain a certiorari. The plaintiffs contend that the High Court Rules apply as soon as a certiorari is de facto granted. But the ANNUAL PRACTICE (1923, p. 2249) states that

D "Where certiorari is issued before judgment defendant should enter an appearance in Central Office as soon as possible after the return of the writ into court, otherwise plaintiff may [not move for judgment in default of appearance, but] apply for a procedendo to send the case back to inferior court. Plaintiff may apply for procedendo immediately after return of the certiorari, and unless defendant appears within four days after receiving notice of such application, procedendo will be granted."

E It is clear that the authors do not assume that the plaintiff has an alternative remedy by judgment in default of appearance.

On these grounds, I am of opinion that the judgment in default of appearance, which was granted under a misapprehension as to the true position, must be set aside with costs. There will be the same order on both motions.

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